TEXAS REGISTER

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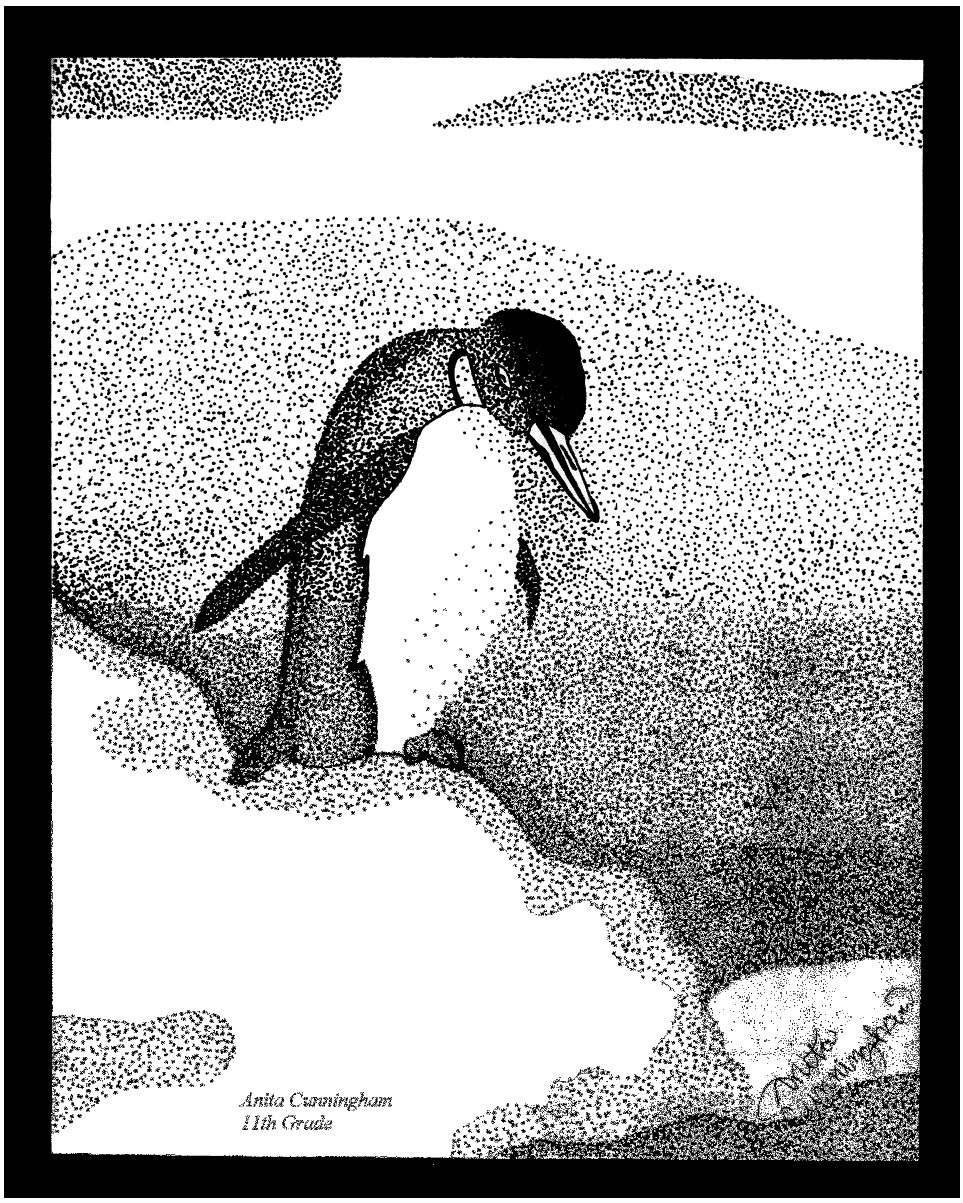

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but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

State Preservation Board

Public Utility Commission of Texas

South Texas Development Council

Texas Department of Transportation

The University of Texas System

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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

THE GOVERNOR

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

Appointments

Appointments for November 5, 2007

Appointed to the Texas Commission on the Arts for a term to expire August 31, 2013, Alphonse Dotson of Voca (Mr. Dotson is being reappointed).

Appointed to the Texas Commission on the Arts for a term to expire August 31, 2013, Susan Howard-Chrane of Boerne (Ms. Howard-Chrane is being reappointed).

Appointed to the Texas Commission on the Arts for a term to expire August 31, 2013, Molly Hipp Hubbard of Houston (replacing Victoria Lightman of Houston whose term expired).

Appointed to the Texas Commission on the Arts for a term to expire August 31, 2013, Lee William McNutt of Dallas (replacing Loren McKibbens of Dallas whose term expired).

Appointed to the Texas Commission on the Arts for a term to expire August 31, 2013, Jeanne Parker of Austin (replacing W.C. Abernathy of Archer City whose term expired).

Appointed to the Texas Commission on the Arts for a term to expire August 31, 2013, Paul McCash, Jr. of Texarkana (replacing Mildred White of Tyler whose term expired).

Appointed to the Teacher Retirement System of Texas Board of Trustees for a term to expire August 31, 2011, R. David Kelly of Plano (replacing Terence Ellis of New Ulm whose term expired).

Appointed to the Red River Compact Commission for a term to expire February 1, 2011, William A. Abney of Marshall (Mr. Abney is being reappointed).

Rick Perry, Governor

TRD-200705427

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Appointments

Appointments for November 8, 2007

Appointed to the State Community Development Review Committee for a term to expire February 1, 2009, Dorothy Morgan of Brenham (replacing Bernard Neumann of Chilton whose term expired).

Appointments for November 12, 2007

Appointed as Judge of the 448th Judicial District Court, El Paso County, pursuant to SB 1951, 80th Legislature, Regular Session, effective September 1, 2007, for a term until the next General Election and until his successor shall be duly elected and qualified, Christopher Antcliff of El Paso.

Appointed to the University of North Texas Board of Regents for a term to expire May 22, 2013, Gwyn Shea of Irving (replacing Burle Pettit of Lubbock whose term expired).

Appointed to the University of North Texas Board of Regents for a term to expire May 22, 2013, Don Buchholz of Dallas (replacing Bobby Ray of Plano whose term expired).

Appointed to the University of North Texas Board of Regents for a term to expire May 22, 2013, Jack Wall of Dallas (replacing Marjorie Craft of DeSoto whose term expired).

Appointed to the Texas Workforce Investment Council for a term to expire September 1, 2013, Karen Bonner of Corpus Christi (replacing John Wroten of Fairview whose term expired).

Appointed to the Texas Workforce Investment Council for a term to expire September 1, 2013, Paul Mayer of Garland (replacing Harold Jenkins of Irving whose term expired).

Appointed to the Texas Workforce Investment Council for a term to expire September 1, 2013, Wes Jurey of Arlington (replacing Ann Hodge of Katy whose term expired).

Appointed to the Texas Workforce Investment Council for a term to expire September 1, 2013, Danny Prosperie of Bridge City (replacing James Brown of Burleson whose term expired).

Appointed to the Texas Racing Commission for a term to expire February 1, 2011, Robert Schmidt of Fort Worth (replacing Dyke Rogers of Dalhart whose term expired).

Appointed to the Texas Racing Commission for a term to expire February 1, 2013, Gloria Hicks of Corpus Christi (replacing David Cabrales of Dallas whose term expired).

Appointed to the Texas Higher Education Coordinating Board for a term to expire August 31, 2009, Robert V. Wingo of El Paso (replacing Paul Foster of El Paso who resigned).

Appointed to the Texas Higher Education Coordinating Board for a term to expire August 31, 2013, Brenda Pejovich of Dallas.

Appointed to the Texas Poet Laureate, State Musician and State Artists Committee for a term to expire October 1, 2009, Liza Billups Lewis of San Antonio (replacing Suzanne P. Azoulay of Dallas whose term expired).

Appointed to the Texas Industrialized Building Code Council for a term to expire February 1, 2008, Randall R. Childers of Hewitt (replacing Arthur Sosa of Corpus Christi who no longer qualifies).

Appointed to the Texas Commission of Licensing and Regulation for a term to expire February 1, 2013, Deborah Yurco of Austin (replacing Bill Pittman of San Antonio whose term expired).

Rick Perry, Governor

TRD-200705562

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THE ATTORNEY GENERAL

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

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

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

Request for Opinions

RQ-0643-GA

Requestor:

The Honorable Rex Emerson

Kerr County Attorney

County Courthouse, Suite BA-103

700 Main Street

Kerrville, Texas 78028

Re: Status of the Kerr County Airport Authority (RQ-0643-GA)

Briefs requested by December 10, 2007

RQ-0644-GA

Requestor:

Mr. Lee F. Jackson, Chancellor

University of North Texas System

Post Office Box 311220

Denton, Texas 76203-1220

Re: Whether Denton Municipal Electric is required to discount charges for electric service to the University of North Texas (RQ-0644-GA)

Briefs requested by December 13, 2007

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

TRD-200705560
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: November 13, 2007

♦ ♦ ♦

Opinion

Opinion No. GA-0579

The Honorable Rodney Ellis

Chair, Committee on Government Organization

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether the Texas Lottery Commission violates the Americans with Disabilities Act if it fails to provide "meaningful access" to state services (RQ-0586-GA)

S U M M A R Y

A court would probably find that the Texas Lottery Commission violates the Americans with Disabilities Act if it fails to provide Texas residents with "meaningful access" to state services.

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

TRD-200705568
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: November 14, 2007

♦ ♦ ♦

EMERGENCY RULES

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

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 19. AGENTS' LICENSING

SUBCHAPTER B. MEDICARE ADVANTAGE PLANS, MEDICARE ADVANTAGE PRESCRIPTION DRUG PLANS, AND MEDICARE PART D. PLANS

28 TAC §§19.101 - 19.104

The Commissioner of Insurance (Commissioner) adopts on an emergency basis, to take immediate effect, new Subchapter B, §§19.101 - 19.104, establishing qualifying license types for persons marketing Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Prescription Drug Plans (Medicare plans) under federal marketing guidelines specified in "Medicare Marketing Guidelines for: Medicare Advantage Plans (MAs), Medicare Advantage Prescription Drug Plans (MAs-PDs), Prescription Drug Plans (PDPs) and 1876 Cost Plans," second revision, July 25, 2006, published by the Centers for Medicare and Medicaid Services (CMS guidelines). As required by the Government Code, §2001.034(a) - (b), the Commissioner has found for the following reasons that there is imminent peril to the health and welfare of certain Medicare beneficiaries of this state, including Texas' senior citizens, who are confronting significant healthcare decisions and thereby has determined that it is necessary to adopt this emergency rule. The Texas Department of Insurance (Department) has received increasing numbers of reports that Medicare beneficiaries of this state are being fraudulently and dishonestly deceived by licensed insurance agents into enrolling in Medicare plans that are unsuitable for those Medicare beneficiaries due to either other insurance or existing medical treatment concerns. These changes often place Medicare beneficiaries at severe medical risk when they are no longer able to obtain continuing medical care from their existing physicians and care facilities and financial risk when the costs of the replacement plans exceed those of their existing insurance and other suitable available coverage. Even if care is available, the fact that it is only available from an unfamiliar and/or limited source may result in Medicare beneficiaries, to their detriment, not seeking or receiving the care to which they are justly entitled and possible irreversible physical decline or death.

Many of these complaints allege that this activity is being done in particular by temporary agents. Pursuant to §§4001.152 - 4001.154 of the Insurance Code, temporary agents are appointed upon only eight days' notice to the Department by insurers, health maintenance organizations, or other insurance agents to solicit insurance without prior training or passing a qualifying examination demonstrating knowledge of the products they will be selling. In this Order, the term "temporary license" is used to refer to a license issued under §§4001.152-4001.154 of the Insurance Code; and the term "permanent license" is used to refer to a license issued to a person satisfying the qualifications required for Texas resident insurance agents licensed under the Insurance Code, §4001.105 and §4001.106 and nonresident insurance agents licensed under §§4056.052-4056.054. Pursuant to §4001.155 of the Insurance Code, the temporary license is valid for 90 days after issuance. Pursuant to §4001.156 of the Insurance Code, a temporary license may not be issued to or renewed by the same individual more than once in a consecutive six-month period. Therefore, the individuals who obtain temporary licenses are able to market the Medicare plans for 90 days and are able to renew the temporary license to extend the period that they are able to act as a temporary agent without meeting all of the requisites for individual insurance agents who are licensed pursuant to §§4001.105, 4056.052, and 4056.053 of the Insurance Code.

Further, the next annual enrollment period for Medicare plans is limited to November 15, 2007, through December 31, 2007, unless extended to March 15, 2008. This brief period presents an opportunity for persons that would not otherwise be able to qualify for a permanent agent license to obtain access to a significant portion of this market with a temporary license. This short period in which millions of senior citizens and other Medicare beneficiaries will be seeking to purchase essential coverage will allow an untrained, unqualified, or unscrupulous insurance agent who lacks knowledge and experience to take advantage of tens or hundreds of persons who themselves are under substantial time pressure to make complex and important healthcare choices. This situation is unlike normal marketing environments in which insurance agents must locate and solicit potential consumers and consumers have more time to consider and make informed decisions on such important health coverage matters. Therefore, the short enrollment period and the large numbers of Texas Medicare beneficiaries who will be seeking health coverage during this short period are major factors in the Commissioner's decision to adopt an emergency rule to respond to the recent increasing reports of fraud and abuse. The Department's ability to otherwise act before November 15 when the enrollment cycle begins is limited, and an emergency rule is the most efficient and comprehensive action available.

This emergency rule is necessary to respond in a timely and comprehensive manner to address the problems demonstrated by the recent increasing reports of fraud and abuse resulting from untrained, unqualified, and unscrupulous insurance agents actively marketing Medicare plans to unsuspecting consumers enrolling in Medicare plans. This rule will enhance the Department's ability to regulate insurance agents engaging in these activities and work in conjunction with the Department's enforce-

ment authority to prevent the harm that certain agents may try to inflict upon Texas' senior citizens and other Medicare beneficiaries. Additionally, the emergency rule is necessary to prevent future actions of untrained, unqualified and unscrupulous persons to prey on vulnerable citizens. The emergency rule limits the license types of those authorized to market Medicare plans; prohibits insurers, health maintenance organizations, and agents from appointing and using temporary agents in the marketing; and imposes certain reporting requirements, all of which are necessary preventative measures to protect Texas' senior citizens and other Medicare beneficiaries. These preventative measures will provide an additional means to address the problem.

This emergency rule limits the marketing of Medicare plans to insurance agents holding permanent licenses. The rule also prohibits insurers, health maintenance organizations, or insurance agents from appointing temporary agents to market Medicare plans offered pursuant to federal law, regulations, and CMS marketing guidelines, allowing their appointed temporary agents to market Medicare plans pursuant to federal law, regulations, and CMS marketing guidelines, or from assisting in the enrollment of individuals in Medicare plans that have been marketed by temporary agents or unlicensed individuals other than those individuals specifically authorized to market Medicare plans under the CMS Guidelines.

With respect to permanent agents, the emergency rule requires organizations marketing these plans to give notice to the Department of licensed insurance agents they employ or contract with and notice of the termination for cause of a Department-licensed marketing representative's employment or contract. The required reporting of termination for cause is particularly important in enabling the Department to identify and take quick action against those insurance agents who might attempt to use the federal marketing scheme to hide fraudulent and dishonest practices from Department review. Under federal law, the marketing of Medicare plans is regulated by federal authorities as outlined in the CMS guidelines. Additionally, CMS does not have authority to take direct action against an insurance agent's state-issued license. Although the Department cannot take direct action against an insurance agent for a violation of federal guidelines, the Department has authority under the Insurance Code, §4005.053(b)(5), to revoke an insurance agent's license or otherwise discipline an insurance agent for engaging in fraudulent and dishonest practices. The requirement in the emergency rule for direct notice to the Department that an insurance agent has been terminated for a violation of the CMS guidelines or other cause as outlined in the rule will allow the Department to identify persons who have used their insurance agent's license to engage in fraudulent and dishonest practices to prey on Texas' senior citizens and other Medicare beneficiaries. These requirements are indicated as being available to the states under the CMS guideline. The CMS guidelines provide "It is of paramount importance to CMS that a beneficiary enrolls in a plan that the beneficiary chooses based on the beneficiary's needs." (CMS guidelines, page 129). Further, CMS guidelines provide "An organization must utilize only a state licensed, certified, or registered individual to perform marketing, if a state has such a marketing requirement." (CMS guidelines, page 130). The CMS guidelines also provide "If a state has a law that requires an organization to report to the state:

"The identity and other information of a marketing representatives [sic] that is marketing the organization's plan(s), the organization must ensure that its marketing representative is reported to the state, in a format required by the state; and

"The termination of a marketing representative's employment or contract, an organization must report a termination for cause to the appropriate state agency or ensure that its subcontractor(s) or downstream subcontractor(s) reports the termination for cause to the appropriate state agency, in a format required by the state." (CMS guidelines, page 130).

The Insurance Code, §4051.051(3) and §4054.051(9) mandate that a person hold a general property and casualty license or a general life, accident, and health insurance license if the person acts as an insurance agent who writes any other kind of insurance as required by the Commissioner for the protection of the insurance consumers of this state. CMS guidelines clearly contemplate that state law may limit those persons suitable to sell such a product to a particular license type and further, under Texas state law, it is within the Commissioner's authority to determine which classification of licensed insurance agent is authorized to market such products in accordance with applicable Texas statutes.

Further, with respect to the required notice of employment, contracting, and termination for cause of the licensed insurance agent imposed under the adopted sections, these requirements are consistent with Texas laws. The Insurance Code, §4001.206, requires that the termination of an insurance agent appointment for cause be reported to the Commissioner. Under the Insurance Code, Chapter 4001, all Texas insurance agents must be appointed before they can represent an insurer; and notice of an appointment by either an insurer or another insurance agent is notice of a contractual relationship. Pursuant to the Insurance Code, §4001.204, the insurance agent must be appointed to act for an insurer; it is only notice of that agreement that is required under §4001.202(b) to be sent to the Department within 30 days following the appointment along with the non-refundable fee set by the Department. Notice of termination of an appointment for cause is notice that the insurance agent's employment or contractual relationship has been terminated for cause. Thus, while federal law pre-empts the Texas statutory requirement that the insurance agent be "appointed" by an insurer, the payment of the $10 appointment fee and the Department's procedural requirements to comply with Texas insurance agent notice forms, the requirements under the adopted sections are consistent with the CMS guidelines to the extent that they require notifying the Department of an insurance agent's employment or contract and termination of an insurance agent's employment or contract.

Significantly, the Department has determined that this emergency rule will not significantly diminish the available number of insurance agents that are authorized to market Medicare plans. As of November 1, 2007, 162,848 individuals held permanent general life, accident, and health insurance agent licenses, while only 774 individuals held temporary general life, accident, and health insurance agent licenses. However, even a small number of unscrupulous insurance agents can take advantage of tens or hundreds of Medicare beneficiaries who rely on these insurance agents to provide them with health coverage that is appropriate for their circumstances.

Based on the foregoing facts, the Commissioner has determined that Texas Medicare beneficiaries faced with the vitally important healthcare choice of choosing a suitable Medicare plan, or choosing other coverage, are in imminent peril from unqualified and/or unscrupulous persons engaging in fraudulent marketing of Medicare plans. Concomitantly, there is imminent peril to the health and welfare of these Medicare beneficiaries. A Medi-

care beneficiary's unsuitable choice may result in the Medicare beneficiary no longer being able to obtain care from a known physician or provider, confusion as to where and how to seek care, and potentially physical illness or death. Therefore, it is necessary to adopt these sections on an emergency basis to ensure that Texas Medicare beneficiaries faced with significant and complex healthcare choices are provided with proper and informed guidance from insurance agents holding permanent licenses who have demonstrated their knowledge concerning health insurance coverages and not from untrained, unqualified, and/or unscrupulous persons engaging in fraudulent marketing of Medicare plans.

The protection afforded to consumers by these emergency new sections will also be achieved through reporting requirements that will result in the Department having necessary information on Department-licensed insurance agents engaged in marketing these plans. This information will enable the Department to exercise the necessary regulatory oversight to identify any insurance agent who may be acting in violation of the law in marketing Medicare plans to the detriment of unsuspecting consumers and to take prompt action to stop the illegal activity.

Section 19.101 provides definitions of terms used in this subchapter. Section 19.102(a) authorizes permanently licensed general life, accident, and health insurance agents to market Medicare plans. Section 19.102(b), consistent with the Insurance Code, §4051.053, authorizes permanently licensed general property and casualty insurance agents to market Medicare plans, to the extent that the Medicare plans are marketed through a property and casualty insurer authorized to sell those products in this state. Section 19.102(c) clarifies that no other license type is authorized to market Medicare plans.

Because an individual must be appointed by an insurer, health maintenance organization, or insurance agent under Insurance Code, §4001.153, to receive a temporary license, the appointment of a temporary agent to engage in marketing CMS plans is also prohibited under this rule. Section 19.103(a) - (c) prohibit an insurer, health maintenance organization, or insurance agent from appointing a temporary agent to market Medicare plans; from allowing any temporary agent that it has appointed to market Medicare plans; and from assisting or participating in enrolling any individual in a Medicare plan contract marketed by a temporary agent or an unlicensed person, unless the unlicensed person is specifically authorized to engage in the activity under the CMS guidelines. Section 19.103(d) requires an insurer, health maintenance organization, or insurance agent to report in writing any violation of this section to the Department within four days of discovering the violation.

Section 19.104(a) requires the organization offering the Medicare plans to inform the Department of all licensed insurance agents employed by or contracted with the organization to market Medicare plans and further requires the organization to report to the Department all licensed insurance agents employed by or contracted with the organization that are terminated for cause. Section 19.104(b) requires the organization offering the Medicare plans to require its subcontractors to inform the Department of all licensed insurance agents employed by or contracted to the subcontractor market Medicare plans and further requires the organization to require the subcontractors to report to the Department all licensed insurance agents employed by or contracted to the subcontractor who are terminated for cause. Section 19.104(c) specifies termination reasons that constitute "for cause" for purposes of this emergency rule. Section 19.104(d) specifies the procedures for reporting this information to the Department.

STATUTORY AUTHORITY. Sections 19.101 - 19.104 are adopted under the Government Code, §2001.034, and the Insurance Code, §§4001.003(8), 4001.005, 4001.201, 4001.204, 4001.205, 4001.206, 4051.051(3), 4051.053, 4054.051(9), and 36.001. The Insurance Code, §4001.003(8), provides a definition of person for use in Insurance Code, Title 13, which concerns insurance agent licensing. The Insurance Code, §4001.005, authorizes the Commissioner to adopt rules necessary to implement Insurance Code, Title 13, and meet the minimum requirements of federal law, including regulations. The Insurance Code, §4001.201, requires insurance agents to be appointed before acting as an agent on behalf of an insurer. The Insurance Code, §4001.204, clarifies that an appointment is the agreement between the insurer or insurance agent and the appointed insurance agent, while the document filed with the Department is only notice of that agreement. The Insurance Code, §4001.205, allows insurance agents to appoint subagents, and requires the same notice of agreement to be filed with the Department and specifies that Insurance Code, §4001.206, applies to terminations of subagents for cause. Section 4001.206 requires that the insurer or insurance agent immediately file with the Department a statement of the facts relating to the termination for cause and the date and the cause of the termination. The Insurance Code, §4051.051(3), mandates that a person hold a general property and casualty license or a general life, accident, and health insurance license if the person acts as an insurance agent who writes any other kind of insurance as required by the Commissioner for the protection of the insurance consumers of this state. The Insurance Code, §4051.053, authorizes a person holding a general property and casualty insurance agent license to write health and accident insurance for a property and casualty insurer authorized to sell those insurance products in this state. The Insurance Code, §4054.051(9), mandates that a person hold a general life, accident, and health insurance license if the person acts as an insurance agent who writes any other kind of insurance as required by the Commissioner for the protection of the insurance consumers of this state. The Insurance Code, §36.001, provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of the state. The Government Code, §2001.034, authorizes a state agency to adopt administrative rules on an emergency basis without prior notice and hearing under certain statutorily specified circumstances, including a finding that there is imminent peril to the public health, safety, or welfare.

§19.101. Definitions.

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

(1) CMS--Centers for Medicare and Medicaid Services.

(2) CMS marketing guidelines--CMS' published marketing guidelines for use by Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, Prescription Drug plans, and 1876 Cost Plans, as revised July 25, 2006 and inclusive of all subsequent revisions.

(3) Medicare Plans--Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Prescription Drug Plans as described in the CMS marketing guidelines.

(4) Organization--A person that contracts with CMS to offer Medicare plans including Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Prescription Drug Plans.

(5) Permanent license--A license issued to a person satisfying all the requirements of the Insurance Code §§4001.105, 4056.052, and 4056.053. The term does not include an individual temporarily licensed under the Insurance Code §§4001.151- 4001.154.

(6) Person--An individual, partnership, corporation, or depository institution as defined in the Insurance Code §4001.003(8).

(7) Subcontractor(s) and downstream subcontractor(s)--Persons under contract with the organization to market Medicare plans as described and used in the CMS marketing guidelines.

§19.102. Agent Authority to Market Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Medicare Prescription Drug Plans.

(a) Persons holding a current permanent general life, accident, and health insurance license under the Insurance Code §4054.051 are authorized to act as marketing representatives to market Medicare plans pursuant to federal law, regulations and CMS marketing guidelines.

(b) In accord with the Insurance Code §4051.053, persons holding a current permanent general property and casualty insurance agent license under the Insurance Code §4051.051 are qualified to act as marketing representatives to market Medicare plans pursuant to federal law, regulations and CMS marketing guidelines, only to the extent that the Medicare plans are offered by a property and casualty insurer authorized to sell those products in this state.

(c) Unless qualifying under subsections (a) or (b) of this section, department licensees, including individuals holding a temporary general life, accident, and health insurance agent license or a temporary general property and casualty insurance agent license, are not qualified to act and are prohibited from acting as marketing representatives to market Medicare plans offered pursuant to federal law, regulations, and CMS marketing guidelines.

§19.103. Insurer, Health Maintenance Organization, and Agent Prohibitions Relating to Appointment and Use of Temporary Agents.

(a) An insurer, health maintenance organization, or insurance agent is prohibited from appointing a temporary agent for the purpose of marketing Medicare plans.

(b) An insurer, health maintenance organization, or insurance agent is prohibited from using any temporary agent that it has appointed to market Medicare plans.

(c) An insurer, health maintenance organization, or insurance agent is prohibited from assisting or participating in enrolling any individual in a Medicare plan contract marketed by a temporary agent or an unlicensed person, unless the unlicensed person is specifically authorized to engage in the activity under the CMS guidelines.

(d) An insurer, health maintenance organization, or insurance agent is required to report in writing any violation of this section within four calendar days of discovering the violation to the Enforcement Division, Compliance Intake Unit, Mail Code 110-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or as directed by the Department.

§19.104. Reporting Requirements for Organizations Marketing Medicare Advantage Plans, Medicare Advantage Prescription Drug Plans, and Medicare Part D Plans.

(a) Organizations marketing Medicare plan(s) in this state are required to report to the department as specified in subsection (d) of this section:

(1) the first, middle and last name; mailing address and department-issued license number of department-licensed marketing representatives that are marketing Medicare plan(s) and the date the employment or contract commenced and the date the employment or contract terminated; and

(2) the termination for cause of a department-licensed marketing representative's employment or contract and:

(A) the date of the event giving rise to the termination; and

(B) the date of the termination.

(b) An organization marketing Medicare plans in this state through subcontractor(s) and downstream subcontractor(s) is required to ensure that its subcontractor(s) or downstream subcontractor(s) report to the department as specified in subsection (d) of this section:

(1) the first, middle and last name; mailing address and department-issued license number of department-licensed marketing representatives that are marketing the organization's plan(s) and the date the employment or contract commenced and the date the employment or contract terminated; and

(2) the termination for cause of a department-licensed marketing representative's employment or contract and:

(A) the date of the event giving rise to the termination; and

(B) the date of the termination.

(c) As used in this section, the term "for cause" is defined as one or more of the following reasons:

(1) violation of CMS marketing guidelines;

(2) violation of the terminating person's Medicare plan's marketing guidelines;

(3) any reason, or cause, that is required to be reported to CMS;

(4) fraudulent or dishonest activity; and

(5) misrepresentation of a Medicare plan or insurance contract.

(d) Persons required to report a department-licensed marketing representative's employment or contract, or report the termination for cause of a department-licensed marketing representative's employment or contract, shall within 10 days following the employment, contracting, or termination for cause submit the information required in this section in a written report of the event to the department. Reports of "for cause" terminations must include an additional statement of the facts relating to the termination and the date and cause of the termination. Reports must be sent to: Licensing Division, Mail Code 107-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

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

Filed with the Office of the Secretary of State on November 9, 2007.

TRD-200705498

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective Date: November 9, 2007
Expiration Date: March 7, 2008
For further information, please call: (512) 475-2025

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

SUBCHAPTER F. REPORTING REQUIREMENT FOR A GENERAL-PURPOSE COMMITTEE

1 TAC §20.435

The Texas Ethics Commission (commission) proposes an amendment to §20.435, relating to special pre-election reports.

The proposed amendment to §20.435 would change the name of the report from "telegram report" to "special pre-election report." House Bill 350, 79th Legislature, Regular Session, changed the name of "telegram report" to "special report near election." By rule, the commission has proposed as a shorthand name for this report the term "special pre-election report." This amendment also reflects statutory changes made to §254.039 of the Election Code which requires a general-purpose committee to file a special pre-election report if it accepts political contributions from a person that in the aggregate exceed $5,000 during the reporting period. The proposed rule amendment also clarifies that the committee is required to file reports only if it is involved in the election.

David A. Reisman, Executive Director, has determined that, for each year of the first five years that the rule proposal is in effect, there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that, for each year of the first five years the rule proposal is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule proposal does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule proposal.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The amendment to §20.435 is proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed amendment to §20.435 affects Chapter 254 of the Election Code.

§20.435. Special Pre-Election [~~Telegram~~] Reports by Certain General-Purpose Committees.

(a) In addition to other reports required by this chapter, a general-purpose committee must file a special pre-election [~~telegram~~] report if the committee is involved in an election and if it:

(1) makes direct campaign expenditures supporting or opposing a single candidate that in the aggregate exceed $1,000 or a group of candidates that in the aggregate exceed $15,000 during the reporting period for special pre-election [~~telegram~~] reports; or [.]

(2) accepts political contributions from a person that in the aggregate exceed $5,000 during the reporting period for special pre-election reports.

(b) The period for special pre-election [~~telegram~~] reports begins on the ninth day before election day and ends at noon on the [~~second~~] day before election day.

[~~(c) A report under this section may be filed by telegram or telephonic facsimile machine or by hand.~~]

(c) [~~(d)~~] Except as provided by subsection (d) of this section, a [~~A~~] report under this section must be received by [~~filed with~~] the commission no [~~not~~] later than the first business day [~~48 hours~~] after the contribution is accepted or the expenditure is made.

(d) A special pre-election report that is exempt from electronic filing under §254.036(c), Election Code, must be received by the commission no later than 5 p.m. of the first business day after the contribution is accepted or the expenditure is made.

[~~(e) Section 20.23 of this title (relating to Timeliness of Action by Mail) does not apply to this section.~~]

[~~(f) The report does not have to be on a form issued by the commission.~~]

[~~(g) Reports required by this section need not include an affidavit.~~]

(e) [~~(h)~~] Expenditures and contributions [~~Contributions~~] reported under this section must be reported again in the next applicable sworn report of contributions and expenditures.

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

Filed with the Office of the Secretary of State on November 8, 2007.

TRD-200705445
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 463-5800

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TITLE 10. COMMUNITY DEVELOPMENT

PART 7. TEXAS RESIDENTIAL CONSTRUCTION COMMISSION

CHAPTER 303. REGISTRATION

SUBCHAPTER A. REGISTRATION OF BUILDERS

10 TAC §303.20

The Texas Residential Construction Commission (commission) proposes new 10 TAC §303.20, which sets forth the requirements for continuing education for all registered builders and remodelers. The new section implements legislative changes to the commission's enabling Act. The new section also describes the continuing education requirements, the procedure for fulfilling them, the process for education sponsors to seek course approval and the obligations of the commission in that process.

Susan K. Durso, General Counsel for the commission, has determined that for each year of the first five-year period that the proposed rule is in effect there will be a modest increase in expenditures or revenue for state government contemplated by House Bill 1038, an Act passed in the 80th Regular Session, of the Texas Legislature, and provided for in the state budget through additional personnel to implement this continuing education program. There will be no fiscal impact for local government as a result of enforcing or administering the section.

Ms. Durso has also determined that for each year of the first five-year period the proposed rule is in effect the public will benefit from the assurance that builders and remodelers in this state receive continuing education to stay abreast of changes in the industry.

Ms. Durso has also determined that for each year of the first five-year period the proposed rule is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act, §2001.022.

Ms. Durso has also determined that for each year of the first five-year period the proposed rule is in effect there will be an insignificant adverse economic impact on small business to the extent that maintaining the continuing education requirements may require the expenditure of funds. Continuing education for a participant in the residential construction industry is required by state law. However, the proposed new section includes options for accruing some of the continuing education requirements through self-study and through participation in meetings of organizations, to which the small businesses are likely to belong. Therefore, to the extent possible, the commission has provided methods for registered builders and remodelers to obtain the requisite continuing education credits without a significant expenditure of funds.

Interested persons may send written comments regarding the proposed new section to the Texas Residential Construction Commission, P.O. Box 13509, Austin, Texas 78711-3509. Comments regarding the section will be accepted for 30 days following the date of publication in the *Texas Register.* Thereafter, the comments will not be considered as timely filed. Comments may also be submitted electronically to comments@trcc.state.tx.us. For comments submitted electronically, please include "Continuing Education Requirements" in the subject line. Comments submitted electronically to another address or with a different subject line may not be considered.

The new section is proposed pursuant to Property Code §408.001, which provides general authority for the commission to adopt rules necessary for the implementation of Title 16, Property Code and Property Code §416.012.

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

§303.20. Required Builder/Remodeler Continuing Education.

(a) A person registered under this subchapter (registrant) must earn at least five hours of continuing education credit in each applicable reporting period as further described in subsections (e) and (f) of this section. A registrant can earn continuing education credit for educational, technical, ethical, or professional management activities related to the practice of residential construction, including:

(1) successfully completing or auditing a course sponsored by an institution of higher education;

(2) successfully completing a course certified by a professional or trade organization;

(3) attending a seminar, tutorial, short course, correspondence course, videotaped course, or televised course on the practice of residential construction;

(4) participating in an in-house course sponsored by a corporation or other business entity;

(5) teaching a course described by paragraphs (1) - (4) of this subsection;

(6) publishing an article, paper, or book on the practice of residential construction;

(7) making or attending a presentation made at a meeting of a residential or builder association or organization or writing a paper presented at the meeting, if the course sponsor has received prior commission approval for accreditation of the presentation;

(8) participating in the activities of a residential or builder association, including serving on a committee of the organization; and

(9) engaging in self-directed study on the practice of residential construction.

(b) Continuing education credit hours are computed based on actual time spent participating in a commission-approved course, program, or activity.

(c) The continuing education credit hours required per applicable reporting period under this section must include at least:

(1) one hour of ethics, which may not be earned through self-study; and

(2) two hours of education that address:

(A) limited statutory warranties;

(B) building and performance standards; and

(C) requirements of the International Residential Code as adopted under Property Code §430.001 and other statutes and rules that apply to builders Title 16 of the Property Code.

(d) A registrant may not satisfy more than:

(1) two credit hours of the five hour minimum continuing education requirement in a reporting period for engaging in self-directed study, which may be fulfilled by:

(A) reading materials and completing the course work specifically prepared for an accredited course without attending the course;

(B) reading substantive residential construction articles in recognized home builder publications;

(C) viewing videotapes or digital media produced for instruction of the residential construction industry;

(D) listening to audiotapes or digital media produced for instruction of the residential construction industry; and

(E) reading materials specifically designed to instruct professionals on the proper use and installation of materials designed for use in residential construction;

(2) one credit hour of the five hour minimum continuing education requirement in a reporting period by making a presentation or writing a paper presented at a meeting of a residential or builder association or organization;

(3) one credit hour of the five hour minimum continuing education requirement in a reporting period by attending a presentation made at a meeting of a residential or builder association or organization; and

(4) one credit hour of the five hour minimum continuing education requirement in a reporting period by participating in the activities of a residential or builder association, including serving on a committee of the organization.

(e) A registrant that registers with the commission for the first time on or after September 1, 2007:

(1) must earn five hours of continuing education credit within twelve months of the date of the initial registration; and

(2) must earn an additional five hours of continuing education credit every five years thereafter to remain in good standing.

(f) A registrant that was registered with the commission before September 1, 2007 and whose certificate of registration was in good standing before September 1, 2007:

(1) must earn five hours of continuing education credit by August 31, 2012; and

(2) must earn an additional five hours of continuing education credit every five years thereafter to remain in good standing.

(g) Each registrant must timely show proof of completion of the required credit hours in order to renew its registration and to maintain its certificate of registration in good standing.

(1) A course sponsor's failure to timely submit a registrant's proof of attendance at an approved continuing education course is not an excuse for the registrant's failure to timely report its compliance.

(2) Registrants who fail to comply timely with the minimum continuing education requirements in violation of this section shall be given a notice of the intent to impose a suspension of their certificate of registration or, if the deadline for compliance with the requirements of this section coincides with the registrant's registration renewal deadline, the application for renewal will be denied.

(A) The notice shall clearly state the reason for the action taken under paragraph (2) of this subsection and shall provide the registrant thirty days in which to come into compliance with the requirements of this section or to appeal the suspension or denial as stated in the notice.

(B) The notice will be sent to the registrant's official mailing address of record.

(h) Reinstatement of Registration Status.

(1) A registrant whose certificate of registration has been suspended for a violation of this section may seek reinstatement after completing the required continuing education hours for the compliance period by submitting a request for reinstatement of its certificate of registration.

(2) A registrant whose application for renewal is denied under this section may file an application for late renewal with proof of compliance with this section pursuant to §303.19 of this chapter.

(3) Credit hours earned during the period of non-compliance may not also be reported for credit toward the minimum credit hours required during the next compliance period.

(4) A registrant that fails to timely renew or whose certificate of registration is suspended may not continue to act as a builder or remodeler until their registration has been restored to a status in good standing.

(i) Continuing Education Approval.

(1) A course, program or activity must be submitted to the commission for approval of credit to fulfill the requirements of this section.

(2) A registrant or course sponsor may submit continuing education credit information to the commission.

(3) The burden of proof that a course, program or activity meets the requirements of this section for approval rests with the sponsor or registrant that submits the request for approval.

(4) Continuing education credit information must be submitted to the commission with any required fee and may be submitted via:

(A) a commission-approved form;

(B) if provided by the commission, an internet portal designated for such submission; or

(C) any other attendance submission format approved by the commission.

(5) A separate request is required for each course or program unless it is being repeated in exactly the same format on different dates and locations.

(6) A registrant may submit a request for credit under this section.

(A) For a course not approved prior to the date of the course, a registrant may submit a request for credit by submitting a course approval form which must include the name of the course, the name of the course sponsor, a copy of the agenda, a list of speakers and copy of each speaker's curriculum vitae or resume, the length of each presentation including a brief description of the materials, and a certification of attendance for the requested number of credit hours.

(B) For courses previously approved by the commission, a registrant may submit an attendance form issued by the program sponsor that includes the course name, builder name, builder number, attendee name, attendance date, and commission-assigned course number.

(C) To receive credit for activities related to participation in the activities of a residential or builder association, the registrant shall submit to the commission written verification of participation on association letterhead from the president, executive officer, or other equivalent of the association.

(7) A program sponsor must submit its request for approval at least 30 days in advance of the course or program and shall:

(A) submit the request on a form provided by the commission;

(B) submit all information and supporting documentation requested on the form, including:

(i) a sample brochure, agenda or program outline that describes the content, identifies the instructors, lists the time devoted to each topic and shows each date and location at which the program will be offered;

(ii) a calculation of the total number of continuing education hour credit to be satisfied by attendance;

(iii) include a method of presentation;

(iv) a resume or curriculum vitae demonstrating the qualifications of the instructors or presenters presenting the material; and

(v) registration contact and registration fee information which must include the sponsor's name, telephone and web site address.

(C) A course sponsor who submits a course for approval after the deadline for approval in this subsection must pay a late fee for course approval.

(8) Ethics courses offered by the Texas State Bar Association, a nationally recognized professional organization, or an accredited Texas institution of higher learning will be automatically approved for continuing education credit upon submission.

(j) Upon approval of a request submitted by a course sponsor, the commission will:

(1) issue course numbers;

(2) post course or program information and contact information to the commission Web site, if the course or program is publicly offered;

(3) remove courses or programs from the Web site within 30 days of receipt of a written request from the course sponsor; and

(4) provide attendance sheets for approved meetings.

(5) Approval shall not unreasonably be withheld once complete information for course approval required under this section is received.

(k) Registrants may not carry forward continuing education credit hours in excess of the required five-hour minimum from one reporting period to the next.

(l) A registrant that is a not an individual must designate an individual to earn the continuing education credit hours required under this section.

(1) An individual designated by registrant under this subsection must be either the registrant's primary registered agent or an individual employee involved in on-site construction activities who is responsible for residential construction activities that take place at the residential construction job site, including:

(A) acting as a project manager, superintendent, or foreman;

(B) supervising construction crews or subcontractors;

(C) scheduling the work of construction crews or subcontractors;

(D) inspecting the construction work of crews or subcontractors; or

(E) inventorying and inspecting the delivery of construction materials to the job site.

(2) All required credit hours earned in a single reporting period must be earned by the individual designated under this subsection except as provided in paragraph (3) of this subsection or unless undue hardship or good cause is established pursuant to subsection (m) of this section.

(3) If a registrant's designee leaves the employment of the registrant or becomes employed by another registrant, hours of credit earned remain with the original registrant.

(4) If a registrant or a registrant's designee is also an individual designated to earn continuing education credits for Texas Star Builder membership, credits earned under this section can be used as continuing education credit hours to satisfy the requirements of §303.300 of this chapter.

(m) Any registrant that is unable to satisfy the minimum continuing education requirements of this section during any reporting period may request a finding of undue hardship or good cause for failure to comply.

(1) A registrant may seek an extension of time to complete the requirements of this section for failure to comply due to undue hardship caused by illness, medical disability, or other extraordinary or extenuating circumstances beyond the control of the registrant.

(A) A request for extension for undue hardship must be accompanied by substantiating third-party documentation.

(B) An extension for undue hardship will be granted for a period of ninety days, unless a greater extension is approved by the Executive Director.

(2) A registrant that was unable to comply with this section for good cause may submit a request for a waiver of compliance to the Executive Director.

(A) The burden is on the registrant to demonstrate that good cause exists for failure to comply.

(B) A waiver granted by the Executive Director is a final agency decision not subject to further administrative appeal.

(3) Good cause or undue hardship shall not include: financial hardship, lack of time due to professional or personal schedule, or lack of information concerning continuing education requirements.

(4) A course sponsor's failure to timely submit a registrant's proof of attendance is not an excuse for the registrant's failure to timely report its compliance.

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

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705331
Susan K. Durso
General Counsel
Texas Residential Construction Commission
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 463-2886

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 2. INFORMAL COMPLAINT PROCEDURE

16 TAC §§2.1, 2.5, 2.7

The Railroad Commission of Texas proposes to amend §2.1, relating to Informal Complaint Procedure, and proposes new §2.5, relating to Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG), and new §2.7, relating to Administrative Penalties for Failure to Participate. The Commission proposes these rules to implement portions of legislation enacted by the 80th Legislature, specifically House Bills 1920 and 3273.

House Bill 1920 enacted a new section in Texas Natural Resources Code, Chapter 85, pertaining to the informal complaint process regarding loss of or inability to account for natural gas gathered or transported. New §85.065 authorizes a producer to submit a written request to a person who gathers or transports gas for the producer for an explanation of any loss of or inability to account for the gas tendered to the person by the producer; describes the contents of such requests; sets deadlines by which the response must be made; and establishes conditions under which a complaint may be filed at the Commission.

House Bill 3273 enacted new sections in Texas Natural Resources Code, Chapter 81, that give the Commission new authority with respect to certain natural gas-related activities. New §81.058(c) authorizes the Commission, after notice and opportunity for hearing, to impose an administrative penalty against a purchaser, transporter, gatherer, shipper, or seller of natural gas who is a party to an informal complaint resolution proceeding and is determined by the Commission to have failed to participate in the proceeding or failed to provide information requested by a mediator in the proceeding. An administrative penalty imposed under Texas Natural Resources Code, §81.058, may not exceed $5,000 a day for each violation, but each day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section. The remedy provided by this section is cumulative of any other remedy the Commission may order.

New Texas Natural Resources Code, §81.059(b), provides that if the parties request that an informal dispute resolution mediation be conducted at a location other than the headquarters of the Commission in Austin, the parties must reimburse the Commission for the Commission's costs related to travel to those other locations.

To implement these new statutory provisions, the Commission proposes to amend §2.1(c)(3) to include a reference to the more specific informal complaint procedure in new §2.5 for complaints pertaining to LUG. The Commission also proposes to amend §2.1 to add a new subsection (h) regarding the requirement that the participants in an informal dispute resolution proceeding reimburse the Commission for the travel related expenses of its employees when they travel to a location outside Austin to participate in a mediation meeting.

The Commission posted on its web site a draft version of proposed new §2.5 and received four informal comments. The proposal here incorporates some of the recommendations made in the informal comments; the Commission thanks these commenters for their close reading and their helpful suggestions. The proposal is slightly different in form from the draft version that was posted for informal comment. In subsection (d), the text in paragraph (2) and has been combined with the text in paragraph (4), because both of those deal with what the person who gathers or transports gas must do in response to a request for explanation. The text that was paragraph (3) has been renumbered as paragraph (2), and (4) is now (3).

The Commission proposes new §2.5, relating to Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG), to implement the provisions of Texas Natural Resources Code, §85.065, which applies only to the loss of or inability to account for natural gas that is tendered by a producer to a gatherer or transporter of gas on or after September 1, 2007. (The loss of or inability to account for natural gas that is tendered by a producer to a gatherer or transporter of gas before September 1, 2007, is governed by the law in effect on the date the gas was tendered.) The Commission will apply the policies, definitions, and procedures set forth in §2.1, relating to Informal Complaint Procedure, to the extent they are consistent with §2.5. If the provisions of §2.1 are inconsistent with §2.5 or are not applicable, the provisions of §2.5 will apply to LUG complaints filed pursuant to Texas Natural Resources Code, §85.065.

In proposed new §2.5(c), the Commission proposes to define the term "accounting" as a comprehensive record of the details of the taking or acceptance of a producer's gas and the movement of that gas from the time and place of taking or acceptance to a delivery point by a person who gathers or transports that gas, including but not limited to measurements, quality analyses, processing, and treatment; amounts used for fuel, dehydration, compression, or flaring; liquids extraction or removal of hydrocarbons; quantity of gas redelivered, allocated, or sold for the producer's account; and the physical system used by the person who gathers or transports gas for a producer. Based on informal comments, the Commission proposes to alter the proposed def-

inition of the term "lost or unaccounted for gas (LUG)" as gas that escapes from a system or that cannot be accounted for, the volume of which is the difference between the volume or units of gas measured or allocated into a system and the volume or units of gas measured or allocated out of that system. By defining LUG in this way, the distinction is made between "lost gas" and "unaccounted for gas" and is consistent with LUG (loss of or inability to account for the gas) as used in Texas Natural Resources Code, §85.065.

The Commission proposes to define the term "person who gathers or transports gas" as any common purchaser of gas, gas utility, or taker of natural gas including but not limited to a gas pipeline that provides gas gathering and/or transmission transportation service for a fee or some other compensation. One informal comment expressed concern that the requirement that the gathering or transportation be for a fee or other consideration is not in the statute and that the definition could be read to exclude gatherers and transporters that merely purchase gas rather than performing third-party gathering or transportation service. The Commission notes that the definition itself is "any common purchaser of gas, gas utility, or taker of natural gas," followed by the phrase "including but not limited to." An entity that provides gathering or transportation for a fee would be included, but the definition is not limited to such entities.

The Commission proposes to define the term "producer" as a person who owns or operates a well or wells producing oil or gas or both. Finally, the Commission proposes to define the term "waste" as it is defined in Texas Natural Resources Code, 85.046. The definitions in §2.1 apply in §2.5 as well.

Proposed new §2.5(d) provides that as a prerequisite to filing an informal complaint pursuant to Texas Natural Resources Code, §85.065, a producer must submit a written request for an explanation of loss to a person who gathers or transports gas for the producer in accordance with the requirements of this subsection. The subsection further describes the procedure by which the producer's request must be made and the information that the producer may ask for. Pursuant to an informal comment, proposed new subsection (d)(2) now requires that the producer send a request for explanation to the address shown on the Form P-5 on file at the Commission for the person who gathers or transports the gas.

Not later than the 30th day after the date the person who gathers or transports gas receives the request from the producer, the person must provide the producer a written explanation of any loss of or inability to account for the gas tendered to the person by the producer. The person must include in the response any relevant information requested by the producer that is available to the person. In addition, for each element of information sought in a request for explanation of loss for which an amount of gas is to be provided, the person who gathered or transported the gas must state the method by which the amount was determined (measured, allocated, estimated, or other).

Proposed new §2.5(e) prescribes the procedure for filing an informal complaint. If a producer has submitted a request under subsection (d) to a person who gathers or transports gas for the producer and the person provides an inadequate explanation of any loss of or inability to account for the gas or fails to provide any explanation of any loss of or inability to account for the gas by the deadline stated in that subsection, the producer may file with the Commission an informal complaint against the person. An informal complaint may not be filed before the 30th day after the end of the production period covered by the complaint. An informal complaint must comply with the requirements of §2.1 of this title, relating to Informal Complaint Procedure and, in addition, must include the items specified.

Not later than the 14th day after the date the complaint is filed at the Commission, the person who gathered or transported the gas must provide to the producer and the Commission an accounting of the gas tendered to the person by the producer for gathering or transport during the production period covered by the complaint. The person may provide the accounting on a thousand cubic feet or a million British thermal unit basis, as applicable, and must provide all elements of information listed in subsection (d)(1)(A) - (J), regardless of whether the producer requested each of those in the request for explanation of loss. In addition, for each element of information for which an amount of gas is to be provided, the person must state the method by which the amount was determined (measurement, allocation, estimation, or other).

The Commission may grant an extension of time to the person who gathered or transported the gas to provide the required accounting, but the additional time may not extend beyond the 45th day after the date the informal complaint was filed. If the person who gathered or transported the gas does not have the information necessary to provide the required accounting, the person must provide to the producer and to the Commission a written explanation of the reason the person does not have the information. If the person who gathered or transported the gas fails to provide the required accounting and the required explanation, the Commission will consider the informal complaint filed by the producer to be valid and will refer the matter for a formal evidentiary hearing. Some informal comments recommended adding another basis for referring a matter to a formal evidentiary hearing, specifically upon the Commission making a determination that the person who gathered or transported the gas committed waste. The Commission recognizes the statutory provision but must point out that there are due process considerations that must also be taken into account. The mediator in an informal complaint resolution proceeding cannot make determinations with respect to whether a person who gathered or transported gas committed waste, and the Commission cannot issue any orders based on a mediator's conclusions, precisely because the informal procedures are not evidentiary hearings. A mediator can, however, determine that an evidentiary hearing is warranted, and one reason might be that, based on information developed in the informal complaint resolution process, it appears that the person who gathered or transported the gas committed waste. That would be part of the mediator's confidential memorandum submitted pursuant to §2.1 of this title, relating to Informal Complaint Procedure.

The Commission also proposes new §2.7, relating to Administrative Penalties for Failure to Participate, to implement the authority delegated to the Commission by Texas Natural Resources Code, §81.058(c), which provides that the Commission, after notice and opportunity for hearing, may impose an administrative penalty against a purchaser, transporter, gatherer, shipper, or seller of natural gas who is a party to an informal complaint resolution proceeding and is determined by the Commission to have failed to participate in the proceeding or failed to provide information requested by a mediator in the proceeding. This section applies to informal complaint resolutions proceedings filed pursuant to §2.1 of this title, relating to Informal Complaint Procedure, and §2.5 of this title, relating to Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG).

Proposed new §2.7(b) identifies specific conduct that constitutes failure to participate in an informal complaint resolution proceeding. An administrative penalty imposed under proposed new §2.7 may not exceed $5,000 a day for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section.

The amount of any penalty requested, recommended, or finally assessed in an enforcement action brought pursuant to proposed new §2.7 will be determined on an individual case-by-case basis for each violation, taking into consideration the person's history of previous violations of §2.1 or §2.5, including the number of previous violations; the demonstrated good faith of the person charged; and any other factor the Commission considers relevant. The recommended penalty for a violation may be reduced by up to 50% if the person charged agrees to a settlement before the Commission conducts an administrative hearing to prosecute a violation. Once the hearing under proposed new §2.7 is convened, however, the opportunity for the person charged to reduce the penalty is no longer available. The remedy provided by this section is cumulative of any other remedy the Commission may order.

Stephen Pitner, Director, Gas Services Division, has determined that for each year of the first five years that the proposed amendments and new rules will be in effect, there will be no fiscal implications for state government. The proposed amendment to §2.1 to add new subsection (h) provides that the Commission will be reimbursed for travel expenses associated with attending mediation meetings held outside of Austin. The Commission cannot predict how many such meetings might be held; however, because this provision will allow the Commission to be reimbursed for travel expenses, the Commission will neither incur additional costs nor receive additional revenue, regardless of the number of meetings. Proposed new §2.5 provides specific guidance for informal complaints related to lost and unaccounted for gas, but the Commission cannot predict how many such complaints might be received. Proposed new §2.7 establishes procedures for bringing an enforcement action for failure to participate in an informal complaint proceeding filed under either §2.1 or §2.5; again, the Commission cannot predict how many such actions might be brought. However, the Commission expects to handle LUG complaints and enforcement actions within the current budget and with the current staff. Mr. Pitner has determined that there will be neither an increase nor a decrease in Commission revenue in each year of the first five years that the proposed amendments and new rules will be in effect. There will be no fiscal implications for local governments.

Mr. Pitner has also determined that for each year of the first five years that the proposed amendments and new rules will be in effect the public benefit expected will be the availability of an informal complaint resolution specifically crafted for complaints about LUG that is less expensive than a formal evidentiary proceeding. As with §2.1, proposed new §2.5 codifies the informal complaint procedure for issues related to LUG, and enhances the existing process by expanding it to include LUG complaints; mandating the participation of complainants and respondents; setting a reasonable deadline for dispute resolution; providing for the disclosure of necessary information; giving parties the option of choosing a third-party mediator; allowing parties to meet for mediation at a location of their choosing; and prohibiting retaliation by purchasers, gatherers, and transporters against shippers and sellers for pursuing an informal complaint about LUG. Proposed new §2.7 establishes that the Commission regards an entity's lack of participation in an informal complaint resolution proceeding to be significant and that the Commission could impose sanctions for that conduct.

Mr. Pitner has also developed the following analysis of the probable economic cost to persons required to comply with the proposed amendments and new rules for each year of the first five years that they will be in effect, as well as the analysis required by Texas Government Code, §2006.002. That statute requires that, before adopting a rule that may have an adverse economic effect on small businesses, a state agency prepare an economic impact statement and a regulatory flexibility analysis. The economic impact statement must estimate the number of small businesses subject to the proposed rule, project the economic impact of the rule on small businesses, and describe alternative methods of achieving the purpose of the proposed rule. A regulatory flexibility analysis must include the agency's consideration of alternative methods of achieving the purpose of the proposed rule. The analysis must consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses. The state agency must include in the analysis several proposed methods of reducing the adverse impact of a proposed rule on a small business.

The statute defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. A "micro-business" is a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has not more than 20 employees. Commission records show that there are approximately 7,239 operators of wells with active or delinquent P-5 organization reports on file, and 1,082 persons who gather or transport natural gas under a total of 1,136 T-4 permits to operate a pipeline. Many of these entities are small businesses, and some of them are likely to be micro-businesses or sole proprietorships. However, the Commission does not collect the information--such as annual gross receipts and number of employees--that would allow the Commission to determine the actual number of small businesses and micro-businesses that may be affected by this rule proposal. Therefore the Commission has calculated the potential cost of compliance with the rule proposal based on hypothetical business entities using the following assumptions: the owner of a sole proprietorship is the sole employee; a micro-business has five employees; a small business has 50 employees; and a large business has 1,000 employees.

With respect to proposed new §2.5, the estimated travel cost for a complainant or a respondent is based on the assumption that each trip will require one employee to stay overnight one night. The cost per trip of $500 is based on the travel reimbursement guidelines of the State of Texas. The total includes $100 for lodging, $300 for airfare or driving expense, and $100 for meals, parking, rental car, and other miscellaneous expenses.

The hourly cost for an employee of a complainant or respondent is based on information from the Texas Workforce Commission. For 2005, the average hourly wage for experienced workers in the oil and gas extraction industry was $44. Based on evidence in recent rate cases at the Commission, the estimated cost for an outside consultant or attorney, an optional expense for complainants and respondents, is assumed to be $200 per hour. As-

suming 40 hours of work at this fee rate yields an expense of $8,000.

Proposed new §2.5 allows a complainant and respondent to retain the services of an outside mediator, another optional expense. Based on conversations with the University of Texas Public Policy Center and Austin Dispute Resolution Center, the fee rate for an outside mediator (non-Commission employee) is assumed to be $100 per hour. Based on 12 hours of work (one-half day of preparation and one day of mediation), this expense would be $1,200. Under the proposed rule, all costs for an outside mediator must be shared by the complainant and respondent, so the cost for each would be $600.

Under proposed new §2.1(h), the participants in an informal complaint resolution proceeding would be required to reimburse the Commission for travel expenses incurred to attend a mediation meeting held outside Austin, Texas. Mr. Pitner estimates Commission travel cost based on the assumption that a trip will require one Commission employee to stay overnight one night. The cost per trip of $500 is based on the travel reimbursement guidelines of the State of Texas. The total includes $100 for lodging, $300 for airfare or driving expense, and $100 for meals, parking, rental car, and other miscellaneous expenses.

The analysis of the cost of compliance for a producer with a LUG complaint includes the following assumptions: Discussing the LUG complaint and the requirements for the request for explanation with the Commission Staff would take one employee approximately one hour ($44); sending the request for explanation to the person who gathers or transports gas for the producer would take approximately one hour ($44); and evaluating the person's response to the request for explanation would take approximately three hours ($132), for a total cost of $220.

If the person who gathers or transports gas for the producer does not respond or responds inadequately, the producer complainant would incur costs for the activities involved in filing an informal complaint. Discussing the LUG complaint with the Commission Staff would take one employee approximately one hour ($44); filing the LUG complaint and the supporting documentation would take one employee approximately three hours ($132); evaluating the respondent's response to the complaint would take one employee approximately one hour ($44); and travel to a mediation meeting would cost one employee approximately $500. If there were an outside mediator and an attorney or consultant, there would be additional costs. If the Commission staff were required to travel to a location outside Austin to attend the mediation meeting, the complainant would be required to reimburse the Commission for a share of the Commission's travel costs; if there are two participants, then the complainant would pay half the Commission's travel costs.

The projected economic impact of this rule proposal on sole proprietorship, small business, and micro-business producers that are complainants is expected to be neutral to positive, because these entities will be assured of a forum in which to resolve, on an informal basis if they so choose, disputes regarding lost or unaccounted for gas with persons who gather or transport natural gas. The informal complaint resolution process is optional, so each producer will be able to determine whether using the process is economically beneficial. The following chart shows the approximate costs for a LUG complainant in several scenarios:

Figure 1: 16 TAC Chapter 2--Preamble

The cost of compliance for a person who gathers or transports gas for a producer in responding to a request for explanation would be similar to the costs of a respondent in an informal complaint proceeding. Reviewing a producer's request for explanation would take approximately one hour of employee time ($44); locating and compiling the information requested by the producer would take approximately three hours ($132); and sending the information to the producer would take approximately one hour ($44), for a total cost of $220. If the person who gathers or transports gas for a producer receives a request for explanation but responds inadequately or does not respond at all, and the producer files an informal complaint, the person's costs to respond to the complaint will be the same as for responding to the request for explanation, if the person provides the requested information. If the person does not have the information, the person can provide a written explanation of the reason the person does not have the information, which would take approximately one employee one hour ($44) to compile, for a total cost of $44.

If a producer files an informal complaint, the analysis of the cost to the person who gathers or transports gas for complying includes the following assumptions: discussing the complaint with the Commission Staff would take one employee approximately one hour ($44); filing the response to the complaint and the required accounting would take one employee approximately three hours ($132); preparing and filing responses to Staff discovery requests (based on an estimate of 5 to 10 questions, for an average of 7.5 questions, and an estimate of two hours per question for completing the response) would take one employee approximately 15 hours ($660); and travel to a mediation meeting would cost one employee approximately $500.

The projected economic impact of this rule proposal on the individual, small business, and micro-business persons who gather or transport natural gas that are respondents is expected to be neutral to slightly negative, because if a producer files a complaint, the person is required to participate in the informal complaint resolution process or potentially be subject to Commission enforcement proceedings pursuant to proposed new §2.7. The following chart shows the approximate costs for a respondent in several scenarios:

Figure 2: 16 TAC Chapter 2--Preamble

Of course, the actual costs for both a producer and a person who gathers or transports gas will vary based on the complexity of the LUG complaint; whether the producer is satisfied with the response to the request for explanation; whether the person who gathers or transports gas for the producer responds inadequately or does not respond at all; whether the producer files an informal complaint; whether the complainant and respondent elect to engage the services of attorneys, consultants, or others; whether it is necessary to convene a mediation meeting; whether the mediator is a Commission employee or not; whether it is necessary to travel and, if so, the distance and duration of the trip, the type of transportation, and the cost of the particular lodgings, meals, and other expenses, for both the participants and the Commission employees. In a LUG matter, the costs for a respondent are likely to be higher than for a complainant for two reasons. First, initiating a complaint is a voluntary act for a complainant, but responding to a complaint is mandatory. Second, there is a high probability that a respondent will be required to respond in discovery. While the costs for compliance are disproportionate between large and small businesses, the very process that the rule embodies mitigates the adverse economic effect on sole proprietorships, small businesses, and micro-businesses.

Those benefits include expeditious resolution of disputes without the expense associated with a more formal, litigious process and a streamlined, more enforceable alternative that allows the Commission to address abusive or discriminatory behavior.

Mr. Pitner has determined that the cost of compliance with proposed new §2.7 will vary based on the conduct of the respondent who has failed or refused to participate in an informal complaint resolution proceeding at the Commission. At a minimum, the costs will include responding to the enforcement complaint petition; travel to Austin to attend any hearing or hearings that may be convened; participating in settlement discussions with the Staff; and paying any penalty that may be assessed.

Mr. Pitner estimates that the respondent's direct cost for responding to an enforcement complaint petition would require approximately two hours of employee time ($88). If the respondent engages an attorney, then the cost would increase. Based on evidence in recent rate cases at the Commission, the estimated cost for an attorney is $200 per hour. Assuming two hours to prepare and file a response, this would cost a respondent $400. If the respondent does not settle the matter without a hearing, then there would be travel expenses for the respondent. Assuming one employee travels to Austin for the hearing for one day, that would be a cost of $500, based on the assumptions stated in previous paragraphs regarding travel costs. If an attorney is engaged for the hearing, the assumption of 40 hours of work for one hearing yields a cost of compliance of $8,000. The following chart shows some potential costs of compliance for a respondent in an enforcement matter:

Figure 3: 16 TAC Chapter 2--Preamble

In preparing this rulemaking proposal, the Commission considered several alternative methods for achieving the purposes of this proposal. The Commission considered not adopting any rules to implement the legislation, but determined that it was useful to amend §2.1 to include a reference to the procedure for LUG complaints under §2.5, because HB 1920 prescribes some prerequisites before an informal complaint may be filed, and HB 3273 implemented one of the key recommendations of the Commission's Natural Gas Pipeline Competition Study Advisory Committee, which was that the Commission should have the authority to impose sanctions for failure to participate in an informal complaint resolution proceeding. In addition, the Commission determined that it is helpful to the industry to have a clear procedural path for particular types of informal complaints; it is helpful for the Commission staff to have guidance in administering the statutory provisions to ensure efficiency and consistency; and it is helpful for the public to know how the Commission regulates an important element of the Texas economy.

The Commission considered requiring, under proposed new §2.5(d) that a producer send the Commission a copy of each request for explanation that the producer sends to a person that gathers or transports the producer's gas, but this was rejected as excessively burdensome for both producers and the Commission. While the costs for compliance may be disproportionate between large and small businesses, the very process the proposed new rule embodies mitigates the adverse economic effect on sole proprietorships, small businesses, and micro-businesses. Those benefits include expeditious resolution of disputes without the expense associated with a more formal, litigious process and a streamlined, more enforceable alternative that allows the Commission to address issues pertaining to LUG.

The Commission also considered not specifying the conduct that constitutes failure to participate in an informal complaint resolution proceeding, but decided that industry participants would benefit from having a clear, specific articulation of the standards that could lead to the imposition of monetary penalties. To the extent that the rule clarifies the particular conduct that could subject an entity to an enforcement action and, potentially, an administrative penalty, it may have a deterrent effect, which is in itself valuable.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments until 5:00 p.m., Thursday, December 27, 2007, which is 34 days after expected publication in the *Texas Register.* Comments should refer to GUD No. 9755. The Commission has determined that this comment period provides interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing, as required by Texas Government Code, §2001.029(a), because a draft of proposed new §2.5 was been available on the Commission's web site for two weeks in September, 2007, to receive informal comments. In addition, although the proposal will not be published in the *Texas Register* until Friday, November 23, 2007, the event that initiates the formal comment period, the text of this rule proposal, including the preamble, will be posted on the Commission's web site beginning which allows interested persons more than two additional weeks to review and draft comments on the proposal. Wednesday, November 7, 2007, The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Bill Geise at (512) 463-8559. The status of Commission rulemakings in progress is available at http://www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the amendment and new sections pursuant to Texas Natural Resources Code, Title 3, Subtitle A, Chapter 81, and specifically, Texas Natural Resources Code, §§81.058 - 81.061, as enacted by House Bill 3273, 80th Legislature (2007). Among other things, these new provisions authorize the Commission, after notice and opportunity for hearing, to impose an administrative penalty against a purchaser, transporter, gatherer, shipper, or seller of natural gas who is a party to an informal complaint resolution proceeding and is determined by the Commission to have failed to participate in the proceeding or failed to provide information requested by a mediator in the proceeding. An administrative penalty imposed under Texas Natural Resources Code, §81.058, may not exceed $5,000 a day for each violation, but each day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section. The remedy provided by this section is cumulative of any other remedy the Commission may order. Texas Natural Resources Code, §81.059(b), provides that if the parties request that an informal dispute resolution mediation be conducted at a location other than the headquarters of the Commission in Austin, the parties must reimburse the Commission for the Commission's costs related to travel to those other locations. The Commission proposes the amendment and new sections pursuant to Texas Natural Resources Code, Title 3, Subtitle B, Chapter 85, and specifically Texas Natural Resources Code, §85.065, as enacted by House Bill 1920, 80th Legislature (2007). This new section authorizes a producer to submit a written re-

quest to a person who gathers or transports gas for the producer for an explanation of any loss of or inability to account for the gas tendered to the person by the producer; describes the contents of such requests; sets deadlines by which the response must be made; and establishes conditions under which a complaint may be filed at the Commission. The Commission proposes the amendment and new sections pursuant to Texas Natural Resources Code, Title 3, Subtitle D, Chapter 111, and specifically Texas Natural Resources Code, §111.083, which requires common purchasers, as defined in Texas Natural Resources Code, §111.081(a)(2), to purchase or take the natural gas purchased or taken by it as a common purchaser under rules prescribed by the Commission in the manner, under the inhibitions against discriminations, and subject to the provisions applicable to common purchasers of oil; Texas Natural Resources Code, §111.086, which requires common purchasers to purchase without discrimination in favor of one producer or person against another producer or person in the same field and without unjust or unreasonable discrimination between fields in this state; Texas Natural Resources Code, §111.087, which prohibits common purchasers from discriminating between or against production of a similar kind or quality in favor of its own production; and Texas Natural Resources Code, §111.090, which authorizes the Commission to adopt rules that may be necessary to prevent discrimination. The Commission also finds authority for the proposed rule in Texas Utilities Code, Title 3, Subtitle A, which authorizes the Commission to regulate gas utilities, to protect the public interest inherent in the rates and services of gas utilities, and to assure rates, operations, and services that are just and reasonable to the consumers and to the utilities; Texas Utilities Code, §102.003, which grants the Commission the power to require that gas utilities report to the Commission information relating to themselves and affiliated interests both within and without the State of Texas as it may consider useful in the administration of Title 3, Subtitle A (the Gas Utilities Regulatory Act); to require the filing with the Commission of, among other things, a copy of a contract or arrangement between a gas utility and an affiliate or a report filed with a federal agency or a governmental agency or body of another state; and to require that a contract or arrangement between a utility and an affiliate that is not in writing be reduced to writing and filed with the Commission; Texas Utilities Code, §104.003, which states that it is the duty of the Commission to ensure that every rate made, demanded, or received by any gas utility, or by any two or more gas utilities jointly, is just and reasonable, and directs that rates may not be unreasonably preferential, prejudicial, or discriminatory, but must be sufficient, equitable, and consistent in application to each class of consumers; Texas Utilities Code, §104.004, which prohibits a gas utility, as to rates or services, from making or granting any unreasonable preference or advantage to any corporation or person within any classification, or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage, and from establishing and maintaining any unreasonable differences as to rates of service either as between localities or as between classes of service; and Texas Utilities Code, §104.007, which prohibits gas utilities from discriminating against any person or corporation that sells or leases equipment or performs services in competition with the gas utility, and from engaging in any other practice that tends to restrict or impair that competition. Additional authority is found in Texas Utilities Code, Title 3, Subtitle B, and specifically, Texas Utilities Code, §121.104, which prohibits pipeline public utilities from discriminating in favor of or against any person, place or corporation, either in apportioning the supply of natural gas or in their charges therefor, and from directly or indirectly charging, demanding, collecting or receiving from any one a greater or less compensation for any service rendered than from another for a like and contemporaneous service; and Texas Utilities Code, §121.151, which directs the Commission to establish and enforce rules for transporting, producing, distributing, buying, selling, and delivering gas by pipelines subject to this chapter in this state, to establish fair and equitable rules and regulations for the full control and supervision of said gas pipelines and all their holdings pertaining to the gas business in all their relations to the public, and to prescribe and enforce rules and regulations for the government and control of such pipelines in respect to their gas pipelines and producing, receiving, transporting, and distributing facilities.

Texas Natural Resources Code, Title 3, Subtitle A, Chapter 81, and specifically, §§81.058 - 81.061; Texas Natural Resources Code, Title 3, Subtitle B, Chapter 85, and specifically, §85.065; Texas Natural Resources Code, Title 3, Subtitle D, Chapter 111, and specifically, §111.083, §111.086, §111.087, and §111.090; and Texas Utilities Code, Title 3, Subtitles A and B, and specifically, §102.003, §104.003, §104.004, §104.007, §121.104, and §121.151, are affected by the proposed new section.

Statutory authority: Texas Natural Resources Code, §§81.058 - 81.061; §85.065; §111.083, §111.086, §111.087, and §111.090; and Texas Utilities Code, §102.003, §104.003, §104.004, §104.007, §121.104, and §121.151.

Cross-reference to statutes: Texas Natural Resources Code, §§81.058 - 81.061; §85.065; §111.083, §111.086, §111.087, and §111.090; and Texas Utilities Code, §102.003, §104.003, §104.004, §104.007, §121.104, and §121.151.

Issued in Austin, Texas, on November 6, 2007.

§2.1. Informal Complaint Procedure.

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

(c) Policy.

(1) - (2) (No change.)

(3) Filing a complaint pursuant to this section is not a prerequisite to the filing of a formal complaint. If a complaint pertains to LUG, the complaint must be filed pursuant to §2.5 of this title (relating to Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG)). The informal complaint resolution process is an optional method for resolving complaints. However, if an informal complaint is filed and the Commission determines that there is sufficient reason to go forward, the respondent shall participate in the process. At any time prior to the mediator's issuance of the confidential memorandum pursuant to subsection (e)(13) of this section, a complainant may unilaterally withdraw an informal complaint or a complainant and respondent may jointly agree to the dismissal of an informal complaint.

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

(h) Reimbursement. If the participants request that a mediation meeting be conducted at a location other than the headquarters of the Commission in Austin, Texas, pursuant to subsection (e)(11) of this section, the participants shall reimburse the Commission for the Commission's costs related to travel to that location.

§2.5. Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG).

(a) Scope. This section implements the provisions of Texas Natural Resources Code, §85.065, which applies only to the loss of or inability to account for natural gas that is tendered by a producer to a gatherer or transporter of gas on or after September 1, 2007. The loss of

or inability to account for natural gas that is tendered by a producer to a gatherer or transporter of gas before September 1, 2007, is governed by the law in effect on the date the gas was tendered.

(b) Policy. The Commission will apply the policies, definitions, and procedures set forth in §2.1 of this title (relating to Informal Complaint Procedure), to the extent they are consistent with this section. If the provisions of §2.1 of this title are inconsistent with this section or are not applicable, the provisions of this section will apply to complaints filed pursuant to Texas Natural Resources Code, §85.065.

(c) Definitions. In addition to the definitions in §2.1 of this title, the following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accounting--A comprehensive record of the details of the taking or acceptance of a producer's gas and the movement of that gas from the time and place of taking or acceptance to a delivery point by a person who gathers or transports that gas, including but not limited to measurements, quality analyses, processing, and treatment; amounts used for fuel, dehydration, compression, or flaring; liquids extraction or removal of hydrocarbons; quantity of gas redelivered, allocated, or sold for the producer's account; and the physical system used by the person who gathers or transports gas for a producer.

(2) Lost or unaccounted for gas (LUG)--Gas that:

(A) escapes from a system; or

(B) cannot be accounted for, the volume of which is the difference between the volume or units of gas measured or allocated into a system and the volume or units of gas measured or allocated out of that system.

(3) Person who gathers or transports gas--Any common purchaser of gas, gas utility, or taker of natural gas including but not limited to a gas pipeline that provides gas gathering and/or transmission transportation service for a fee or some other compensation.

(4) Producer--A person who owns or operates a well or wells producing oil or gas or both.

(5) Waste--Waste of gas as defined in Texas Natural Resources Code, §85.046.

(d) Explanation of loss of or inability to account for gas. As a prerequisite to filing an informal complaint pursuant to Texas Natural Resources Code, §85.065, and this section, a producer must submit a written request for an explanation of loss of or inability to account for gas to a person who gathers or transports gas for the producer in accordance with the requirements of this subsection.

(1) A producer's request to a person who gathers or transports gas for the producer for an explanation of any loss of or inability to account for the gas tendered by the producer to the person shall be in writing and may ask the person to provide any or all of the following information:

(A) the amount of gas tendered by the producer from each well that has a meter;

(B) a laboratory analysis of the composition and heating value of the gas and other substances tendered by the producer, if such an analysis has been performed;

(C) if available, a schematic drawing of the person's system for gathering or transporting gas that shows:

(i) each meter type;

(ii) the date each meter was last calibrated;

(iii) the accuracy of each meter; and

(iv) all equipment that alters, disposes of, or otherwise consumes any of the gas tendered to the person;

(D) the amount of gas used for fuel, flared, or vented for construction, repair, maintenance, or other operational uses and, if the information is available, the location of that use;

(E) the amount of contaminants or other impurities removed from the gas and the location at which the impurities were removed;

(F) the amount of liquid hydrocarbons and condensate removed from the gas and the location at which the liquid hydrocarbons and condensate were removed;

(G) the amount of gas lost and the location at which the gas was lost;

(H) the amount of gas redelivered by the person, including the amount of gas sold that was allocated to the producer, and the location at which the re-delivery of the gas occurred;

(I) any amount of gas received from the producer by the person that remains unaccounted for; and

(J) any other information the person who gathered or transported the gas considers relevant to the request for explanation of loss of or inability to account for gas.

(2) The producer shall submit the written request to the person who gathers or transports gas for the producer. The producer shall address the request to the contact person at the address shown on the Form P-5 for the person who gathers or transports gas for the producer that is on file with the Commission. If there is no Form P-5 for the person who gathers or transports gas for the producer on file at the Commission, the producer shall use the address on the producer's contract with the person who gathers or transports gas for the producer. The producer shall mail the request using United States Postal Service certified mail, return receipt requested, and shall retain a complete copy of the written request and the returned certified mail receipt.

(3) Not later than the 30th day after the date the person who gathers or transports gas receives the request from the producer, the person shall provide the producer a written explanation of any loss of or inability to account for the gas tendered to the person by the producer. The person shall include in the response any relevant information requested by the producer that is available to the person. For each element of information sought in a request for explanation for which an amount of gas is to be provided, the person who gathered or transported the gas shall state the method by which the amount was determined (measured, allocated, estimated, or other).

(e) Informal complaint. If a producer has submitted a request under subsection (d) of this section to a person who gathers or transports gas for the producer and the person provides an inadequate explanation of any loss of or inability to account for the gas, or fails to provide any explanation of any loss of or inability to account for the gas by the deadline stated in that subsection, the producer may file with the Commission an informal complaint against the person.

(1) An informal complaint may not be filed before the 30th day after the end of the production period covered by the complaint.

(2) An informal complaint shall comply with the requirements of §2.1 of this title and, in addition, shall:

(A) specify the production period covered by the complaint;

(B) state that at least 30 days have elapsed since the end of the production period covered by the complaint;

(C) if the producer metered the volume of gas tendered to the person who gathered or transported the gas:

(i) describe the type of meter used; and

(ii) state the date the meter was last calibrated; and

(D) include a copy of the producer's request to the person who gathers or transports gas for the producer for an explanation of loss of or inability to account for gas and a copy of the returned certified mail receipt.

(3) Not later than the 14th day after the date the complaint is filed at the Commission, the person who gathered or transported the gas shall provide to the producer and the Commission an accounting of the gas tendered to the person by the producer for gathering or transport during the production period covered by the complaint. The person may provide the accounting on a thousand cubic feet or a million British thermal unit basis, as applicable, and shall provide all elements of information listed in subsection (d)(1)(A) - (J) of this section, regardless of whether the producer requested each of those in the request for explanation of loss. In addition, for each element of information for which an amount of gas is to be provided, the person shall state the method by which the amount was determined (measurement, allocation, estimation, or other).

(4) The Commission may grant an extension of time to the person who gathered or transported the gas to provide the accounting required by paragraph (3) of this subsection, but the additional time may not extend beyond the 45th day after the date the informal complaint was filed.

(5) If the person who gathered or transported the gas does not have the information necessary to provide the accounting required by paragraph (3) of this subsection, the person shall provide to the producer and to the Commission a written explanation of the reason the person does not have the information.

(6) If the person who gathered or transported the gas fails to provide the accounting required by paragraph (3) of this subsection and the explanation required by paragraph (5) of this subsection, the Commission shall consider the informal complaint filed by the producer to be valid and shall refer the matter for a formal evidentiary hearing.

§2.7. Administrative Penalties for Failure to Participate.

(a) This section implements the authority delegated to the Commission by Texas Natural Resources Code, §81.058(c), which provides that the Commission, after notice and opportunity for hearing, may impose an administrative penalty against a purchaser, transporter, gatherer, shipper, or seller of natural gas who is a party to an informal complaint resolution proceeding and is determined by the Commission to have failed to participate in the proceeding or failed to provide information requested by a mediator in the proceeding. This section applies to informal complaint resolutions proceedings filed pursuant to §2.1 of this title (relating to Informal Complaint Procedure), and §2.5 of this title (relating to Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG)).

(b) Failure to participate in an informal complaint resolution proceeding includes but is not limited to:

(1) a person who gathers or transports gas not providing, by the 30th day after the date the person receives a request from a producer, a written explanation of any loss of or inability to account for the gas tendered to the person by the producer;

(2) a respondent not replying in writing to both the monitor and the complainant within 14 calendar days from the date of the monitor's notification letter that a complaint has been filed at the Commission;

(3) a respondent's written reply that does not address the substance of the complaint;

(4) a respondent's written reply that does not either propose a solution or explain why the complaint is incorrect;

(5) a person who gathers or transports gas not providing, by the 14th day after the date a complaint is filed at the Commission, the producer and the Commission an accounting of the gas tendered to the person by the producer for gathering or transport during the production period covered by the complaint;

(6) if the Commission has granted an extension of time to the person who gathered or transported the gas to provide the accounting required by §2.5(e)(3) of this title, the failure of the person to respond by the deadline;

(7) if the person who gathered or transported the gas does not have the information necessary to provide the accounting required by §2.5(e)(3) of this title, the failure of the person to provide to the producer and to the Commission a written explanation of the reason the person does not have the information;

(8) the person who gathered or transported the gas not providing either the accounting required by §2.5(e)(3) of this title or the explanation required by §2.5(e)(5) of this title;

(9) a complainant or a respondent not communicating with the other during the 14 calendar days from the date of the respondent's reply to attempt resolve the complaint without the participation of a mediator;

(10) a complainant or a respondent not advising the Commission monitor within seven days after expiration of the period allowed for informal resolution whether the person wants the matter referred to a Commission or non-Commission employee mediator;

(11) in the event the complainant and respondent desire to use a non-Commission employee mediator and are unable to agree upon the selection of a non-Commission employee mediator, failure of a complainant or a respondent to submit the name of a preferred mediator to work with the other's preferred mediator to choose a third mediator who will preside over the process;

(12) a complainant or respondent not providing documents or information the mediator considers necessary in evaluating the complaint and has requested;

(13) a complainant or respondent not attending a scheduled mediation meeting, absent good cause and prior notice to all participants;

(14) a complainant or respondent not participating in the mediation meeting or not undertaking in good faith to settle all issues raised in the complaint; or

(15) a complainant or respondent not making available during the mediation meeting, in person, representatives who are empowered to make decisions on their behalf.

(c) An administrative penalty imposed under this section may not exceed $5,000 a day for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section.

(d) The amount of any penalty requested, recommended, or finally assessed in an enforcement action brought pursuant to this section will be determined on an individual case-by-case basis for each violation, taking into consideration the following factors:

(1) the person's history of previous violations of §2.1 or §2.5 of this title, including the number of previous violations;

(2) the demonstrated good faith of the person charged; and

(3) any other factor the Commission considers relevant.

(e) The recommended penalty for a violation may be reduced by up to 50% if the person charged agrees to a settlement before the Commission conducts an administrative hearing to prosecute a violation. Once the hearing is convened, the opportunity for the person charged to reduce the penalty is no longer available.

(f) The remedy provided by this section is cumulative of any other remedy the Commission may order.

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

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705370
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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CHAPTER 7. GAS SERVICES DIVISION
SUBCHAPTER G. CODE OF CONDUCT

16 TAC §7.7003, §7.7005

The Railroad Commission of Texas proposes new §7.7003, relating to Administrative Penalties and Other Remedies for Discrimination, and new §7.7005, relating to Authority to Set Rates, to implement the authority delegated to the Commission by Texas Natural Resources Code, §81.058(a) and (b), and §81.061, as enacted by House Bill 3273, 80th Legislature (2007).

Texas Natural Resources Code, §81.058(a) and (b) authorize the Commission, after notice and opportunity for hearing, to impose an administrative penalty against a purchaser, transporter, gatherer, shipper, or seller of natural gas, a person described by Texas Natural Resources Code, §81.051(a) or §111.081(a), or any other entity under the jurisdiction of the Commission under the Texas Natural Resources Code that the Commission determines has violated a Commission rule adopting standards or a code of conduct for entities in the natural gas industry prohibiting unlawful discrimination or unreasonably discriminated against a seller of natural gas in the purchase of natural gas from the seller, and against a purchaser, transporter, or gatherer of natural gas if the Commission determines that the person engaged in prohibited discrimination against a shipper or seller of natural gas because the shipper or seller filed a formal or informal complaint with the Commission against the person relating to the person's purchase, transportation, or gathering of the gas.

Texas Natural Resources Code, §81.061, authorizes the Commission to use a cost-of-service method or a market-based rate method in setting a rate in a formal rate proceeding. On the filing of a complaint by a shipper or seller of natural gas, the Commission may set a transportation or gathering rate in a formal rate proceeding if the Commission determines that the rate is necessary to remedy unreasonable discrimination in the provision of transportation or gathering services. The Commission may set a rate regardless of whether the transporter or gatherer is classified as a utility by other law.

Proposed new §7.7003 implements the authority delegated to the Commission by Texas Natural Resources Code, §81.058(a) and (b). The terms used in this section have the same meaning as in §2.1 of this title, relating to Informal Complaint Procedure; §2.5, relating to Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG); and §7.115 of this title, relating to Definitions. In subsection (c), the scope of the rule is set forth.

In subsection (d), the Commission proposes that, in determining whether an entity has violated §7.7001 or has unreasonably discriminated against a seller of natural gas in the purchase of natural gas from the seller, the Commission will consider the factors set forth in the definition of "similarly situated shipper" in §7.115 of this title, relating to Definitions. In determining whether conditions of service are the same or substantially the same, the Commission will evaluate the significance and degree of similarity or difference in relevant conditions between sellers that are material and probative, including, but not limited to service requirements; location of facilities; receipt and delivery points; length of haul; quality of service (firm, interruptible, etc.); quantity; swing requirements; credit worthiness; gas quality; pressure (including inlet or line pressure); duration of service; connect requirements; and conditions and circumstances existing at the time of agreement or negotiation.

In subsection (e), the Commission proposes that in determining whether an entity has engaged in prohibited discrimination against a shipper or seller of natural gas because the shipper or seller filed a formal or informal complaint with the Commission against the person relating to the person's purchase, transportation, or gathering of the gas, the Commission will consider the time elapsed between the conclusion of the informal or formal complaint filed by a shipper or seller of natural gas and the conduct alleged to constitute prohibited discrimination; whether other shippers or sellers of natural gas have been offered the same or similar rates, terms, and conditions of service; the timing of those offers; and whether those offers were accepted; whether a shipper or seller of natural gas has been refused service under rates, terms, and conditions that are the same or similar as other shippers or sellers of natural gas; whether a shipper or seller has had service terminated without cause; and whether a shipper or seller of natural gas has experienced damage or destruction of property by a person that purchases, transports, or gathers the shipper's or seller's gas that results in lost revenue, lost production capability, or other economic harm.

In subsection (f), the Commission proposes to restate Texas Natural Resources Code, §81.058(d), which provides that an administrative penalty imposed under this section [of the statute] may not exceed $5,000 a day for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section.

In subsection (g), the Commission proposes that if the Commission determines after notice and opportunity for hearing that an entity has engaged in prohibited discrimination for which a penalty may be imposed under this section, the Commission may issue any order necessary and reasonable to prevent the discrimination from continuing, including an order setting rates pursuant to §7.7005 of this title, relating to Authority to Set Rates.

In subsection (h), the Commission proposes that the remedy provided by this section is cumulative of any other remedy the Commission may order.

In subsection (i), the Commission proposes examples of conduct that are considered to be unreasonable or prohibited discrimination. This subsection does not provide an exhaustive listing of all conduct that the Commission would interpret as constituting discrimination; they are illustrative only. In all situations, the Commission will apply the relevant statutory and rule provisions to achieve the intended statutory purposes of preventing or remedying undue discrimination and ensuring that natural gas transportation and gathering services are provided at rates and under terms and conditions that are just and reasonable.

Proposed new §7.7005 implements the authority of the Commission pursuant to Texas Natural Resources Code, §81.061, as enacted by House Bill 3273, 80th Legislature (2007).

Proposed new subsection (b) provides that the terms used in this section have the same meaning as in §2.1 of this title, relating to Informal Complaint Procedure; §2.5, relating to Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG); and §7.115 of this title, relating to Definitions.

Proposed new subsection (c) declares that, except for rates established under Texas Utilities Code, Chapter 103, or Texas Utilities Code, Chapter 104, Subchapters C or G, the Commission may use a cost-of-service method or a market-based rate method in setting a rate in a formal rate proceeding.

Proposed new subsection (d) provides that on the filing of a complaint by a shipper or seller of natural gas, the Commission may set a transportation or gathering rate in a formal rate proceeding if the Commission determines that the rate is necessary to remedy unreasonable discrimination in the provision of transportation or gathering services. The Commission may set a rate regardless of whether the transporter or gatherer is classified as a utility by other law.

Proposed new subsection (e) states that the Commission may use a cost-of-service method or a market-based method in setting a rate pursuant to this section in a formal rate proceeding conducted after notice and an opportunity for hearing in accordance with the Commission's rules of practice and procedure in 16 Texas Administrative Code, Chapter 1.

Proposed new subsection (f) provides that in determining whether to use a cost-of-service method or a market-based method to set rates for transportation or gathering service, the Commission will consider all relevant factors including but not limited to whether there is effective competition in the provision of transportation or gathering services for which rates are at issue.

Stephen Pitner, Director, Gas Services Division, has determined that for each year of the first five years that the proposed new rules will be in effect, there will be no fiscal implications for state government. Mr. Pitner has determined that there may be an increase in revenue in each year of the first five years that the proposed new rules will be in effect, but that it is not possible to determine the amount. While proposed new §7.7003 gives the Commission authority to impose administrative penalties for unreasonable or prohibited discrimination in the provision of natural gas gathering and transportation services, the amount of penalties in any year will depend on whether any enforcement actions are brought; the amount of penalties sought; whether the cases are settled prior to hearing; and whether the Commission enters orders imposing recommended penalties. Proposed new §7.7005 relates to the Commission's authority to set rates using either a market-based approach or a cost-of-service approach, and there is no revenue associated with that rule. The Commission expects to handle enforcement actions and formal rate hearings within the current budget and with the current staff, so there will not be an increase in Commission costs. There will be no fiscal implications for local governments.

Mr. Pitner has also determined that for each year of the first five years that the proposed new rules will be in effect the public benefit expected will be the availability of both rate proceedings and enforcement actions in matters where the Commission determines that an entity within the Commission's jurisdiction has violated a Commission rule adopting standards or a code of conduct for entities in the natural gas industry prohibiting unlawful discrimination or has unreasonably discriminated against a seller of natural gas in the purchase of natural gas from the seller, or if the Commission determines that a purchaser, transporter, or gatherer of natural gas has engaged in prohibited discrimination against a shipper or seller of natural gas because the shipper or seller filed a formal or informal complaint with the Commission against the person relating to the person's purchase, transportation, or gathering of the gas. These provisions give the Commission a wide range of remedies for the most serious misconduct.

Mr. Pitner has also developed the following analysis of the probable economic cost to persons required to comply with the proposed new rules for each year of the first five years that they will be in effect, as well as the analysis required by Texas Government Code, §2006.002. That statute requires that, before adopting a rule that may have an adverse economic effect on small businesses, a state agency prepare an economic impact statement and a regulatory flexibility analysis. The economic impact statement must estimate the number of small businesses subject to the proposed rule, project the economic impact of the rule on small businesses, and describe alternative methods of achieving the purpose of the proposed rule. A regulatory flexibility analysis must include the agency's consideration of alternative methods of achieving the purpose of the proposed rule. The analysis must consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses. The state agency must include in the analysis several proposed methods of reducing the adverse impact of a proposed rule on a small business.

The statute defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has fewer than 100 employees or less than $6 million in annual gross receipts. A "micro-business" is a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated; and has not more than 20 employees. Commission records show that there are approximately 7,239 operators of wells with active or delinquent P-5 organization reports on file, and 1,082 persons who gather or transport natural gas under a total of 1,136 T-4 permits to operate a pipeline. Many of these entities are small businesses, and some of them are likely to be micro-businesses or sole proprietorships. However, the Commission does not collect the information--such as annual gross receipts and number of employees--that would allow the Commission to determine the actual number of small businesses and micro-businesses that may be affected by this rule proposal. Therefore the Commission has calculated the potential cost of compliance with the rule proposal based on hypothetical business entities using the following assumptions: the owner of a sole proprietorship is the sole employee; a micro-busi-

ness has five employees; a small business has 50 employees; and a large business has 1,000 employees.

With respect to proposed new §7.7003, the following assumptions apply to entities that are respondents in Commission enforcement actions. The hourly cost for an employee is based on information from the Texas Workforce Commission. For 2005, the average hourly wage for experienced workers in the oil and gas extraction industry was $44. Based on evidence in recent rate cases at the Commission, the estimated cost for an outside consultant or attorney, an optional expense for complainants and respondents, is assumed to be $200 per hour. The estimated travel cost for a respondent is based on the assumption that each trip will require one employee to stay overnight one night. The cost per trip of $500 is based on the travel reimbursement guidelines of the State of Texas. The total includes $100 for lodging, $300 for airfare or driving expense, and $100 for meals, parking, rental car, and other miscellaneous expenses.

The analysis of the cost of compliance for a respondent in a Commission enforcement action is based on the following assumptions: The enforcement petition alleges conduct that constitutes unreasonable discrimination, and seeks a penalty of $5,000. Discussing the enforcement action with the Commission Staff would take one employee approximately one hour ($44); filing a response to the enforcement petition would take approximately three hours ($132), for a total employee cost of $176. If the respondent engages an attorney to file the response, there would be an additional three hours of attorney time for a total of $600.

Assuming that the enforcement attorney submits one round of discovery constituting 20 questions, the respondent would incur additional expenses for one or more employees and/or an attorney to prepare responses. Assuming two hours to answer each question results in employee costs of $1,760 and attorney costs of $8,000. If the respondent settles the case before an evidentiary hearing is convened, the settlement amount could be reduced by half, for an administrative penalty of $2,500. If the respondent does not settle the case, the respondent would incur additional expenses for at least one employee to travel to Austin for the hearing and possibly for an attorney to attend the hearing. Assuming a minimum attorney billing for two days (16 hours) is an expense of $3200, and employee time and travel expense for two days is a cost of $1,204. If the examiner recommends the full penalty requested, and the Commission agrees with the recommendation, the penalty amount would be $5,000. The following chart is a comparison of the cost for each of the business entities:

Figure: 16 TAC Chapter 7--Preamble

Of course, the actual costs for a respondent in a Commission enforcement action will vary based on the complexity of the complaint; whether the respondent engages an attorney or other experts to assist in responding; whether there is discovery and how extensive it may be; whether the respondent settles before a hearing is convened; if there is a hearing, whether it is necessary to travel and, if so, the distance and duration of the trip, the type of transportation, and the cost of the particular lodgings, meals, and other expenses, for both the respondent and any professionals engaged by the respondent; and whether the Commission imposes a penalty in a final order.

In preparing this rulemaking proposal, the Commission considered several alternative methods for achieving the purposes of this proposal. The Commission considered not adopting any rules to implement the legislation, but determined that it was useful to propose new §7.7003 to implement the provisions of HB 3273, which itself implemented key recommendations of the Commission's Natural Gas Pipeline Competition Study Advisory Committee. One important element of the legislation is that the Commission should have the authority to impose administrative penalties against entities that engage in unreasonable discrimination or retaliate against an entity that files a complaint at the Commission. In particular, the Commission determined that it is helpful to the industry to have a clear statement, as provided in subsection (d), that relates the provisions of proposed new §7.7003 to those of the Commission's code of conduct rule, 16 Texas Administrative Code §7.7001, which has been in place for more than ten years.

The Commission also considered not stating the factors that would be used in determining what conduct constitutes prohibited discrimination (retaliation), but the Commission decided that industry participants, Commission staff, and the general public would benefit from having a clear, specific articulation of the standards pertaining to this determination. Further, having guidelines in place helps ensure that the statute itself is administered efficiently and consistently, which promotes the economic welfare of Texas.

The Commission also considered omitting the examples of prohibited conduct that are set forth in subsection (i), but determined that it is helpful to industry, Commission staff, and the general public to understand the conduct that constitutes discrimination *per se.*

With respect to proposed new §7.7005, Mr. Pitner has determined that there is no cost of compliance for sole proprietorships, small businesses, or micro-businesses. This proposed new rule simply states the circumstances under which the Commission may set rates for certain entities and under which the Commission is authorized to use a market-based approach and the standard by which the Commission will determine whether to use a market-based method or a cost-of-service method.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments until 5:00 p.m., Thursday, December 27, 2007, which is 34 days after expected publication in the *Texas Register.* Comments should refer to GUD No. 9756. The Commission has determined that this comment period provides interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing, as required by Texas Government Code, §2001.029(a), because although the proposal will not be published in the *Texas Register* until Friday, November 23, 2007, the event that initiates the formal comment period, the text of this rule proposal, including the preamble, will be posted on the Commission's web site beginning Wednesday, November 7, 2007, which allows interested persons more than two additional weeks to review and draft comments on the proposal. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Bill Geise at (512) 463-8559. The status of Commission rulemakings in progress is available at http://www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the new sections pursuant to Texas Natural Resources Code, Title 3, Subtitle A, Chapter 81, and specifically, Texas Natural Resources Code, §§81.058 - 81.061, as enacted by House Bill 3273, 80th Legislature (2007). Among other things, these new provisions authorize the Commission, after notice and opportunity for hearing, to impose an administrative penalty against a purchaser, transporter, gatherer, shipper, or seller of natural gas who is a party to an informal complaint resolution proceeding and is determined by the Commission to have failed to participate in the proceeding or failed to provide information requested by a mediator in the proceeding. An administrative penalty imposed under Texas Natural Resources Code, §81.058, may not exceed $5,000 a day for each violation, but each day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section. The remedy provided by this section is cumulative of any other remedy the Commission may order. Texas Natural Resources Code, §81.059(b), provides that if the parties request that an informal dispute resolution mediation be conducted at a location other than the headquarters of the Commission in Austin, the parties must reimburse the Commission for the Commission's costs related to travel to those other locations.

The Commission also proposes the new sections pursuant to Texas Natural Resources Code, Title 3, Subtitle D, Chapter 111, and specifically Texas Natural Resources Code, §111.083, which requires common purchasers, as defined in Texas Natural Resources Code, §111.081(a)(2), to purchase or take the natural gas purchased or taken by it as a common purchaser under rules prescribed by the Commission in the manner, under the inhibitions against discriminations, and subject to the provisions applicable to common purchasers of oil; Texas Natural Resources Code, §111.086, which requires common purchasers to purchase without discrimination in favor of one producer or person against another producer or person in the same field and without unjust or unreasonable discrimination between fields in this state; Texas Natural Resources Code, §111.087, which prohibits common purchasers from discriminating between or against production of a similar kind or quality in favor of its own production; and Texas Natural Resources Code, §111.090, which authorizes the Commission to adopt rules that may be necessary to prevent discrimination.

The Commission also finds authority for the proposed rule in Texas Utilities Code, Title 3, Subtitle A, which authorizes the Commission to regulate gas utilities, to protect the public interest inherent in the rates and services of gas utilities, and to assure rates, operations, and services that are just and reasonable to the consumers and to the utilities; Texas Utilities Code, §102.003, which grants the Commission the power to require that gas utilities report to the Commission information relating to themselves and affiliated interests both within and without the State of Texas as it may consider useful in the administration of Title 3, Subtitle A (the Gas Utilities Regulatory Act); to require the filing with the Commission of, among other things, a copy of a contract or arrangement between a gas utility and an affiliate or a report filed with a federal agency or a governmental agency or body of another state; and to require that a contract or arrangement between a utility and an affiliate that is not in writing be reduced to writing and filed with the Commission; Texas Utilities Code, §104.003, which states that it is the duty of the Commission to ensure that every rate made, demanded, or received by any gas utility, or by any two or more gas utilities jointly, is just and reasonable, and directs that rates may not be unreasonably preferential, prejudicial, or discriminatory, but must be sufficient, equitable, and consistent in application to each class of consumers; Texas Utilities Code, §104.004, which prohibits a gas utility, as to rates or services, from making or granting any unreasonable preference or advantage to any corporation or person within any classification, or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage, and from establishing and maintaining any unreasonable differences as to rates of service either as between localities or as between classes of service; and Texas Utilities Code, §104.007, which prohibits gas utilities from discriminating against any person or corporation that sells or leases equipment or performs services in competition with the gas utility, and from engaging in any other practice that tends to restrict or impair that competition.

Additional authority for the proposed new rules is found in Texas Utilities Code, Title 3, Subtitle B, and specifically, Texas Utilities Code, §121.104, which prohibits pipeline public utilities from discriminating in favor of or against any person, place or corporation, either in apportioning the supply of natural gas or in their charges therefor, and from directly or indirectly charging, demanding, collecting or receiving from any one a greater or less compensation for any service rendered than from another for a like and contemporaneous service; and Texas Utilities Code, §121.151, which directs the Commission to establish and enforce rules for transporting, producing, distributing, buying, selling, and delivering gas by pipelines subject to this chapter in this state, to establish fair and equitable rules and regulations for the full control and supervision of said gas pipelines and all their holdings pertaining to the gas business in all their relations to the public, and to prescribe and enforce rules and regulations for the government and control of such pipelines in respect to their gas pipelines and producing, receiving, transporting, and distributing facilities.

Texas Natural Resources Code, Title 3, Subtitle A, Chapter 81, and specifically, §§81.058 - 81.061; Texas Natural Resources Code, Title 3, Subtitle D, Chapter 111, and specifically, §111.083, §111.086, §111.087, and §111.090; and Texas Utilities Code, Title 3, Subtitles A and B, and specifically, §102.003, §104.003, §104.004, §104.007, §121.104, and §121.151, are affected by the proposed new section.

Statutory authority: Texas Natural Resources Code, §§81.058 - 81.061; §111.083, §111.086, §111.087, and §111.090; and Texas Utilities Code, §102.003, §104.003, §104.004, §104.007, §121.104, and §121.151.

Cross-reference to statutes: Texas Natural Resources Code, §§81.058 - 81.061; §111.083, §111.086, §111.087, and §111.090; and Texas Utilities Code, §102.003, §104.003, §104.004, §104.007, §121.104, and §121.151.

Issued in Austin, Texas, on November 6, 2007.

§7.7003. Administrative Penalties and Other Remedies for Discrimination.

(a) This section implements the authority delegated to the Commission by Texas Natural Resources Code, §81.058(a) and (b), as enacted by House Bill 3273, 80th Legislature (2007).

(b) Terms used in this section shall have the same meaning as in §2.1 of this title (relating to Informal Complaint Procedure); §2.5 of this title (relating to Informal Complaint Process Regarding Lost or Unaccounted for Gas (LUG)); and §7.115 of this title (relating to Definitions).

(c) The Commission, after notice and opportunity for hearing, may impose an administrative penalty against:

(1) a purchaser, transporter, gatherer, shipper, or seller of natural gas; a person described by Texas Natural Resources Code, §81.051(a) or §111.081(a); or any other entity under the jurisdiction of the Commission under the Texas Natural Resources Code that the Commission determines has:

(A) violated §7.7001 of this title (relating to Code of Conduct), or any other Commission rule adopting standards for entities in the natural gas industry prohibiting unlawful discrimination; or

(B) unreasonably discriminated against a seller of natural gas in the purchase of natural gas from the seller; and

(2) a purchaser, transporter, or gatherer of natural gas if the Commission determines that the person engaged in prohibited discrimination against a shipper or seller of natural gas because the shipper or seller filed a formal or informal complaint with the Commission against the person relating to the person's purchase, transportation, or gathering of the gas.

(d) In determining whether an entity has violated §7.7001 of this title or has unreasonably discriminated against a seller of natural gas in the purchase of natural gas from the seller, the Commission will consider the factors set forth in the definition of "similarly situated shipper" in §7.115 of this title. In determining whether conditions of service are the same or substantially the same, the Commission shall evaluate the significance and degree of similarity or difference in relevant conditions between sellers that are material and probative, including, but not limited to, the following:

(1) service requirements;

(2) location of facilities;

(3) receipt and delivery points;

(4) length of haul;

(5) quality of service (firm, interruptible, etc.);

(6) quantity;

(7) swing requirements;

(8) credit worthiness;

(9) gas quality;

(10) pressure (including inlet or line pressure);

(11) duration of service;

(12) connect requirements; and

(13) conditions and circumstances existing at the time of agreement or negotiation.

(e) In determining whether an entity has engaged in prohibited discrimination against a shipper or seller of natural gas because the shipper or seller filed a formal or informal complaint with the Commission against the person relating to the person's purchase, transportation, or gathering of the gas, the Commission will consider the following factors:

(1) the time elapsed between the conclusion of the informal or formal complaint filed by a shipper or seller of natural gas and the conduct alleged to constitute prohibited discrimination;

(2) whether other shippers or sellers of natural gas have been offered the same or similar rates, terms, and conditions of service; the timing of those offers; and whether those offers were accepted;

(3) whether a shipper or seller of natural gas has been refused service under rates, terms, and conditions that are the same or similar as other shippers or sellers of natural gas;

(4) whether a shipper or seller has had service terminated without cause;

(5) whether a shipper or seller of natural gas has experienced damage or destruction of property by a person that purchases, transports, or gathers the shipper's or seller's gas that results in lost revenue, lost production capability, or other economic harm.

(f) An administrative penalty imposed under this section may not exceed $5,000 a day for each violation. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty under this section.

(g) If the Commission determines after notice and opportunity for hearing that an entity has engaged in prohibited discrimination for which a penalty may be imposed under this section, the Commission may issue any order necessary and reasonable to prevent the discrimination from continuing, including an order setting rates pursuant to §7.7005 of this title (relating to Authority to Set Rates).

(h) The remedy provided by this section is cumulative of any other remedy the Commission may order.

(i) The fact situations in paragraphs (1) - (5) of this subsection are examples of conduct that would be considered unreasonable or prohibited discrimination, based on the Commission's interpretation and application of provisions in Texas Natural Resources Code, Title 3, Subtitles A, B, and D, and Texas Utilities Code, Title 3, Subtitles A and B, and the Commission rules adopted pursuant to those statutes. The fact situations are not an exhaustive listing of all conduct that the Commission would interpret as constituting discrimination; they are illustrative only. In all situations, the Commission will apply the relevant statutory and rule provisions to achieve the intended statutory purposes of preventing or remedying undue discrimination and ensuring that natural gas transportation and gathering services are provided at rates and under terms and conditions that are just and reasonable. Examples of discrimination include but are not limited to:

(1) a gatherer or transporter that limits transportation on its system to only its affiliates;

(2) a gatherer or transporter that shares market information, such as gas use, names of contact people, contract terms, etc., with an affiliate shipper without simultaneously sharing the same information with other similarly situated shippers;

(3) an officer or employee of a gatherer or transporter who represents any other affiliate entity involved in negotiating and providing supply and transportation service to a customer;

(4) a gatherer or transporter that attempts to prohibit or discourage connection to its pipeline system by using or quoting preferential charges for taps and meters for certain shippers and not offering the same charges to all shippers; and

(5) a gatherer or transporter that threatens a shipper or seller with removal of meter facilities or refusal of service if the shipper or seller seeks competitive supply or transportation options.

§7.7005. Authority to Set Rates.

(a) This section implements the authority of the Commission pursuant to Texas Natural Resources Code, §81.061, as enacted by House Bill 3273, 80th Legislature (2007).

(b) Terms used in this section shall have the same meaning as in §2.1 of this title (relating to Informal Complaint Procedure); §2.5 of this title (relating to Informal Complaint Process Regarding Lost

or Unaccounted for Gas (LUG)); and §7.115 of this title (relating to Definitions).

(c) Except for rates established under Texas Utilities Code, Chapter 103, or Texas Utilities Code, Chapter 104, Subchapters C or G, the Commission may use a cost-of-service method or a market-based rate method in setting a rate in a formal rate proceeding.

(d) On the filing of a complaint by a shipper or seller of natural gas, the Commission may set a transportation or gathering rate in a formal rate proceeding if the Commission determines that the rate is necessary to remedy unreasonable discrimination in the provision of transportation or gathering services. The Commission may set a rate regardless of whether the transporter or gatherer is classified as a utility by other law.

(e) The Commission may use a cost-of-service method or a market-based method in setting a rate pursuant to this section in a formal rate proceeding conducted after notice and an opportunity for hearing in accordance with the Commission's rules of practice and procedure in 16 Texas Administrative Code, Chapter 1, (relating to Practice and Procedure).

(f) In determining whether to use a cost-of-service method or a market-based method to set rates for transportation or gathering service, the Commission will consider all relevant factors including but not limited to whether there is effective competition in the provision of transportation or gathering services for which rates are at issue.

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

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705364
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 475-1295

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PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 45. MARKETING PRACTICES
SUBCHAPTER A. STANDARDS OF IDENTITY FOR DISTILLED SPIRITS

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of §§45.8, 45.9, and 45.11 - 45.16, relating to label information and requirements for distilled spirits; and §45.33, relating to certificate of label approval; and new §45.33, relating to application, requirements and fees for certificate of label approval for distilled spirits.

Senate Bill 904, §21, 80th Legislature, Regular Session, 2007, amended Chapter 101 of the Texas Alcoholic Beverage Code (Code) to add new §101.671 to the Code. This new section provides, in part, that an authorized permit holder may not ship distilled spirits into the state, or sell distilled spirits within the state without first registering and obtaining a certificate of label approval from the commission. An applicant for a certificate of label approval for distilled spirits must include a Certificate of Label Approval (COLA) issued by the United States Alcohol and Tobacco Tax and Trade Bureau (TTB). The commission must accept the COLA issued by the TTB as evidence that the distilled spirit meets the standards of quality, purity, and identity required by §5.38 of the Code. The effect of this section makes obtaining a COLA mandatory for all products shipped into or sold within the state. The commission will no longer issue a Certificate of Label Approval to any product without a COLA. The new section also provides that the distilled spirit may not be registered if the application is not submitted with a fee sufficient to cover the cost of administration of the section.

Sections 45.8, 45.9, 45.11 - 45.16, and 45.33, are being repealed because they are no longer necessary after the adoption of proposed new §45.33. The proposed new section authorizes the acceptance of TTB COLA as evidence that the product and label has satisfied each labeling standard contained in the repealed sections.

New §45.33 sets forth the requirements for application and approval of a Certificate of Label Approval (Certificate) by the commission. The section describes activities that are prohibited without first obtaining a certificate, who may submit an application for a Certificate, the form and required content of the application, the application fee of $25.00 to be submitted with the application and a statement that the commission does not require additional product approval or testing to issue the Certificate.

Lou Bright, General Counsel, has determined that for the first five year period that the proposed repeal and new rule are in effect there will be no fiscal impact on units of state or local government as a result of enforcing and administering the proposal.

Lou Bright has also determined that for each year of the first five years that the proposed repeal and new rule are in effect there is a fiscal impact on small and micro-businesses or individuals required to comply with the proposal. Each authorized permittee must submit the required fee of $25.00 with the application to obtain the Certificate from the commission. There will, however, be no additional fiscal impact on small, micro-businesses or individuals required to comply with the proposal. The current rules for certificate of label approval require a fee of $25.00, and this fee is not changed under the proposed new section.

Lou Bright has determined that for each of the first five years that the repeal and new section are in effect the public will benefit from the adoption of the proposal. The anticipated public benefit will be the simplification of the application process for label approval of wine, and eliminates a duplication of the label approval process that has already taken place at the TTB. It also requires the commission to accept the COLA issued by the TTB as evidence that the product meets the standards of quality, purity, and identity adopted by the agency under §5.38 of the Code.

Comments on the proposed repeal and new section may be addressed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711. Comments will be accepted for 30 days following publication of the proposed repeal and new section in the *Texas Register.*

16 TAC §§45.8, 45.9, 45.11 - 45.16, 45.33

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

The repeal is proposed under §5.31 and §101.671 of the Code. Section 5.31 gives the commission authority to prescribe and publish rules necessary to carry out the provisions of the Code. Section 101.671 provides the specific authority to adopt these rules to establish a procedure for accepting federal certificates of registration.

Cross Reference: Sections 5.31, 5.38, and 101.671 of the Code are affected by this action.

§45.8. Mandatory Label Information.

§45.9. Labels: Additional Requirements.

§45.11. Labels: Class and Type.

§45.12. Labels: Name and Address.

§45.13. Labels: Alcoholic Content.

§45.14. Labels: Net Contents.

§45.15. Labels: Presence of Neutral Spirits and Coloring, Flavoring, and Blending Materials.

§45.16. Labels: Statements of Age and Percentage.

§45.33. Certificate of Label Approval.

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

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705352
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 206-3204

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16 TAC §45.33

The new section is proposed under §5.31 and §101.671 of the Code. Section 5.31 gives the commission authority to prescribe and publish rules necessary to carry out the provisions of Code. Section 101.671 provides the specific authority to adopt these rules to establish a procedure for accepting federal certificates of registration.

Cross Reference: Sections 5.31, 5.38, and 101.671 of the Code are affected by this action.

§45.33. Certificate of Label Approval.

(a) No distilled spirit may be shipped into the state or sold or marketed within the state without a Certificate of Label Approval (Certificate) issued by the commission.

(b) An applicant for a Certificate of Label Approval under this section must hold a Distiller's & Rectifier's Permit or a Nonresident Seller's Permit issued by the commission.

(c) An applicant must submit an Application for Approval of Label (application) on the form prescribed by the commission along with the application fee to the commission. The application must contain the following information:

(1) A certificate of label approval (COLA) issued by the United States Alcohol and Tobacco Tax and Trade Bureau;

(2) product brand name; and

(3) product class and type.

(d) A legible copy of the COLA must be included with the application. If the COLA is not legible, an actual label that is affixed to the distilled spirit as shipped, sold, or marketed, or an exact color copy of a label must be included with the application.

(e) The application fee for a Certificate of Label Approval is $25.00.

(f) No additional approval or testing of the distilled spirit is required for issuance of a Certificate of Label Approval.

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

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Alan Steen
Administrator
Texas Alcoholic Beverage Commission
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For further information, please call: (512) 206-3204

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SUBCHAPTER B. STANDARDS OF IDENTITY FOR WINE

The Texas Alcoholic Beverage Commission (commission) proposes the repeal of §45.50, relating to label application for wine and §45.51, relating to mandatory label information for wine, and proposes new §45.50, relating to requirements and fees for certificate of label approval for wine.

Senate Bill 904, §21, 80th Legislature, Regular Session, 2007, amended Chapter 101 of the Texas Alcoholic Beverage Code (Code) to add new §101.671 to the Code. This new section provides, in part, that an authorized permit holder may not ship wine into the state, or sell wine within the state without first registering and obtaining a certificate of label approval from the commission. An applicant for a certificate of label approval must include a Certificate of Label Approval (COLA) issued by the United States Alcohol and Tobacco Tax and Trade Bureau (TTB). The commission must accept the COLA issued by the TTB as evidence that the wine meets the standards of quality, purity, and identity required by §5.38 of the Code. The effect of this section makes obtaining a COLA mandatory for all products shipped into or sold within the state. The commission will no longer issue a Certificate of Label Approval to any product without a COLA. The new section also provides that the wine may not be registered if the application is not submitted with a fee sufficient to cover the cost of administration of the section.

Section 45.50 and §45.51 are being repealed because they are no longer necessary after the adoption of proposed new §45.50. The proposed new section authorizes the acceptance of a TTB COLA as evidence that the product and label have satisfied each labeling standard contained in the repealed sections.

New §45.50 sets forth the requirements for application and approval of a Certificate of Label Approval (Certificate) by the commission. The section describes activities that are prohibited without first obtaining a Certificate, who may submit an application

for a Certificate, the form and required content of the application, the application fee of $25.00 to be submitted with the application and a statement that the commission does not require additional product approval or testing to issue the Certificate.

Lou Bright, General Counsel, has determined that for the first five years that the proposed repeal and new rule are in effect there will be no fiscal impact on units of state or local government as a result of enforcing and administering the proposal.

Mr. Bright has determined that for the first five years that the proposed repeal and new rule are in effect there is a fiscal impact on small and micro-businesses and individuals required to comply with the proposal. Each authorized permittee must submit the required fee of $25.00 with the application to obtain the Certificate from the commission. There will, however, be no additional fiscal impact on small, micro-businesses or individuals required to comply with the proposal. The current rules for certificate of label approval require a fee of $25.00, and this fee is not changed under the proposed new section.

Mr. Bright has determined that for each of the first five years that the repeal and new section are in effect the public will benefit from the adoption of the proposal by the simplification of the application process for label approval of wine, and by eliminating a duplication of the label approval process that has already taken place at the TTB. It also requires the commission to accept the COLA issued by the TTB as evidence that the product meets the standards of quality, purity, and identity adopted by the agency under §5.38 of the Code.

Comments on the proposed repeals and new rule may be addressed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711. Comments will be accepted for 30 days following publication of the proposed repeal and new section in the *Texas Register.*

16 TAC §45.50, §45.51

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

The proposed repeal is authorized by §5.31 and §101.671 of the Code. Section 5.31 gives the commission authority to prescribe and publish rules necessary to carry out the provisions of the Code. Section 101.671 provides the specific authority to adopt these rules to establish a procedure for accepting federal certificates of registration.

Cross Reference: Sections 5.31, 5.38 and 101.671 of the Code will be affected by this action.

§45.50. Label: Application.

§45.51. Mandatory Information.

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

Filed with the Office of the Secretary of State on November 8, 2007.

TRD-200705443

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 206-3204

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16 TAC §45.50

The proposed new section is authorized by §5.31 and §101.671 of the Alcoholic Beverage Code (Code). Section 5.31 gives the commission authority to prescribe and publish rules necessary to carry out the provisions of the Code. Section 101.671 provides the specific authority to adopt these rules to establish a procedure for accepting federal certificates of registration.

Cross Reference: Sections 5.31, 5.38 and 101.671 of the Code will be affected by these actions.

§45.50. Certificate of Label Approval.

(a) No wine may be shipped into the state or sold or marketed within the state without a Certificate of Label Approval (Certificate) issued by the commission.

(b) An applicant for a Certificate of Label Approval under this section must hold a Winery or a Nonresident Seller's Permit issued by the commission.

(c) An applicant must submit an Application for Approval of Label (application) on the form prescribed by the commission along with the application fee to the commission. The application must contain the following information:

(1) A certificate of label approval (COLA) issued by the United States Alcohol and Tobacco Tax and Trade Bureau (TTB);

(2) product brand name; and

(3) product class and type;

(4) fanciful name;

(5) appellation and vintage;

(6) alcohol content;

(7) size of container.

(d) A legible copy of the COLA must be included with the application. If the COLA is not legible, an actual label that is affixed to the wine as shipped, sold, or marketed, or an exact color copy of a label must be included with the application.

(e) The application fee for a Certificate of Label Approval is $25.00.

(f) No additional approval or testing of the wine is required for issuance of a Certificate of Label Approval.

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

Filed with the Office of the Secretary of State on November 8, 2007.

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Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 206-3204

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TITLE 22. EXAMINING BOARDS

PART 15. TEXAS STATE BOARD OF PHARMACY

CHAPTER 291. PHARMACIES

SUBCHAPTER B. COMMUNITY PHARMACY (CLASS A)

22 TAC §291.33, §291.34

The Texas State Board of Pharmacy proposes amendments to §291.33 concerning Operational Standards and §291.34 concerning Records. The proposed amendments, if adopted, provide guidelines for pharmacists to reuse prescription vials in certain situations, update citations, and will allow physicians, dentists, veterinarians, and podiatrists properly licensed in other states to issue telephonic or electronic prescriptions for controlled substances to be filled in Texas pharmacies.

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 allow patients who are unable to read or understand a prescription label to reuse special vials with audio-recorded messages and to allow prescribers in other states to issue telephonic or electronic prescriptions to patients to be filled in Texas pharmacies. There is no fiscal impact for individuals, small or large businesses or to other entities which 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., January 4, 2008.

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 the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.33. Operational Standards.

(a) Licensing requirements.

(1) A Class A pharmacy shall register annually or biennially with the board on a pharmacy license application provided by the board, following the procedures specified in §291.1 of this title (relating to Pharmacy License Application).

(2) A Class A pharmacy which changes ownership shall notify the board within ten days of the change of ownership and apply for a new and separate license as specified in §291.3 of this title (relating to Required Notifications). [§291.4 of this title (relating to Change of Ownership).]

(3) A Class A pharmacy which changes location and/or name shall notify the board within ten days of the change and file for an amended license as specified in §291.3 of this title (relating to Required Notifications). [§291.2 of this title (relating to Change of Location and/or Name).]

(4) A Class A pharmacy owned by a partnership or corporation which changes managing officers shall notify the board in writing of the names of the new managing officers within ten days of the change, following the procedures in §291.3 of this title (relating to Required Notifications [Change of Managing Officers]).

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

(9) A Class A (community) pharmacy engaged in the compounding of non-sterile pharmaceuticals shall comply with the provisions of §291.131 [§291.25] of this title (relating to Pharmacies Compounding Non-sterile Preparations [Pharmaceuticals]).

(10) A Class A (community) pharmacy engaged in the compounding of sterile pharmaceuticals shall comply with the provisions of §291.133 [§291.26] of this title (relating to Pharmacies Compounding Sterile Preparations [Pharmaceuticals]).

(11) A Class A (Community) pharmacy engaged in the provision of remote pharmacy services, including storage and dispensing of prescription drugs, shall comply with the provisions of §291.121 [§291.20] of this title (relating to Remote Pharmacy Services).

(12) Class A (Community) pharmacy engaged in centralized prescription dispensing and/or prescription drug or medication order processing shall comply with the provisions of §291.123 of this title (relating to Centralized Prescription Drug or Medication Order Processing) and/or §291.125 of this title (relating to Centralized Prescription Dispensing). [§291.37 of this title (relating to Centralized Prescription Dispensing) and/or §291.38 of this title (relating to Centralized Prescription Drug or Medication Order Processing).]

(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;

(ii) shall be provided for any prescription drug order dispensed by the pharmacy on the request of the patient or patient's agent;

(iii) shall be communicated orally in person unless the patient or patient's agent is not at the pharmacy or a specific communication barrier prohibits such oral communication; and

(iv) shall be reinforced with written information relevant to the prescription and provided to the patient or patient's agent. The following is applicable concerning this written information.

(I) Written information must be in plain language designed for the consumer, such as the USP DI patient information leaflets, and printed in an easily readable font size. [designed for the

~~consumer such as the USP DI patient information leaflets shall be provided.~~]

(II) When a compounded product is dispensed, information shall be provided for the major active ingredient(s), if available.

(III) For new drug entities, if no written information is initially available, the pharmacist is not required to provide information until such information is available, provided:

(-a-) the pharmacist informs the patient or the patient's agent that the product is a new drug entity and written information is not available;

(-b-) the pharmacist documents the fact that no written information was provided; and

(-c-) if the prescription is refilled after written information is available, such information is provided to the patient or patient's agent.

(C) - (I) (No change.)

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

(6) Prescription containers.

(A) A drug dispensed pursuant to a prescription drug order shall be dispensed in a child-resistant container unless:

(i) the patient or the practitioner requests the prescription not be dispensed in a child-resistant container; or

(ii) the product is exempted from requirements of the Poison Prevention Packaging Act of 1970.

(B) A drug dispensed pursuant to a prescription drug order shall be dispensed in an appropriate container as specified on the manufacturer's container.

(C) Prescription containers or closures shall not be reused [~~re-used~~]. However, if a patient or patient's agent has difficulty reading or understanding a prescription label, a prescription container may be reused provided:

(i) the container is designed to provide audio-recorded information about the proper use of the prescription medication;

(ii) the container is reused for the same patient;

(iii) the container is cleaned; and

(iv) a new safety closure is used each time the prescription container is reused.

(7) Labeling.

(A) At the time of delivery of the drug, the dispensing container shall bear a label in plain language and printed in an easily readable font size with at least the following information:

(i) name, address and phone number of the pharmacy;

(ii) unique identification number of the prescription;

(iii) date the prescription is dispensed;

(iv) initials or an identification code of the dispensing pharmacist;

(v) name of the prescribing practitioner;

(vi) name of the patient or if such drug was prescribed for an animal, the species of the animal and the name of the owner;

(vii) instructions for use;

(viii) quantity dispensed;

(ix) appropriate ancillary instructions such as storage instructions or cautionary statements such as warnings of potential harmful effects of combining the drug product with any product containing alcohol;

(x) if the prescription is for a Schedules II - IV controlled substance, the statement "Caution: Federal law prohibits the transfer of this drug to any person other than the patient for whom it was prescribed";

(xi) if the pharmacist has selected a generically equivalent drug pursuant to the provisions of the Act, Chapters 562 and 563, the statement "Substituted for Brand Prescribed" or "Substituted for 'Brand Name'" where "Brand Name" is the actual name of the brand name product prescribed;

(xii) the name of the advanced practice nurse or physician assistant, if the prescription is carried out or signed by an advanced practice nurse or physician assistant in compliance with Subtitle B, Chapter 157, Occupations Code; and

(xiii) the name and strength of the actual drug product dispensed, unless otherwise directed by the prescribing practitioner.

(I) The name shall be either:

(-a-) the brand name; or

(-b-) if no brand name, then the generic name and name of the manufacturer or distributor of such generic drug. (The name of the manufacturer or distributor may be reduced to an abbreviation or initials, provided the abbreviation or initials are sufficient to identify the manufacturer or distributor. For combination drug products or non-sterile compounded drug products having no brand name, the principal active ingredients shall be indicated on the label.)

(II) Except as provided in clause (xi) of this subparagraph, the brand name of the prescribed drug shall not appear on the prescription container label unless it is the drug product actually dispensed.

(B) (No change.)

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

(h) Customized patient medication packages.

(1) - (2) (No change.)

(3) Label.

(A) The patient med-pak shall bear a label stating:

(i) the name of the patient;

(ii) the unique identification number for the patient med-pak itself and a separate unique identification number for each of the prescription drug orders for each of the drug products contained therein;

(iii) the name, strength, physical description or identification, and total quantity of each drug product contained therein;

(iv) the directions for use and cautionary statements, if any, contained in the prescription drug order for each drug product contained therein;

(v) if applicable, a warning of the potential harmful effect of combining any form of alcoholic beverage with any drug product contained therein;

(vi) any storage instructions or cautionary statements required by the official compendia;

(vii) the name of the prescriber of each drug product;

(viii) the date of preparation of the patient med-pak and the beyond-use date assigned to the patient med-pak (which such beyond-use date shall not be later than 60 days from the date of preparation);

(ix) the name, address, and telephone number of the pharmacy;

(x) the initials or an identification code of the dispensing pharmacist; and

(xi) any other information, statements, or warnings required for any of the drug products contained therein.

(B) If the patient med-pak allows for the removal or separation of the intact containers therefrom, each individual container shall bear a label identifying each of the drug product contained therein.

(C) The dispensing container is not required to bear the label specified in subparagraph (A) of this paragraph if:

(i) the drug is prescribed for administration to an ultimate user who is institutionalized in a licensed health care institution (e.g., nursing home, hospice, hospital);

(ii) no more than a 34-day supply or 100 dosage units, whichever is less, is dispensed at one time;

(iii) the drug is not in the possession of the ultimate user prior to administration;

(iv) the pharmacist-in-charge has determined that the institution:

(I) maintains medication administration records which include adequate directions for use for the drug(s) prescribed;

(II) maintains records of ordering, receipt, and administration of the drug(s); and

(III) provides for appropriate safeguards for the control and storage of the drug(s); and

(v) the dispensing container bears a label that [~~the system employed by the pharmacy in dispensing the prescription drug order~~] adequately:

(I) identifies the:

(-a-) pharmacy by name and address;

(-b-) unique identification number of the prescription;

(-c-) name and strength of each drug product dispensed;

(-d-) name of the patient;

(-e-) name of the prescribing practitioner of each drug product and if applicable, the name of the advanced practice nurse or physician assistant who signed the prescription drug order; and

(II) for each drug product sets forth the directions for use and cautionary statements, if any, contained on the prescription drug order or required by law.

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

(i) (No change.)

§291.34. Records.

(a) (No change.)

(b) Prescriptions.

(1) (No change.)

(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 physician, dentist, veterinarian, or podiatrist [~~practitioner~~] in another state provided:

(-a-) the prescription drug order is a written, oral, or telephonically or electronically communicated prescription, as allowed by the DEA [~~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 DEA [~~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) (No change.)

(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) - (B) (No change.)

(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; or

[(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~~]

(ii) [~~(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) - (7) (No change.)

(c) - (j) (No change.)

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

Filed with the Office of the Secretary of State on November 12, 2007.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 305-8028

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SUBCHAPTER D. INSTITUTIONAL PHARMACY (CLASS C)

22 TAC §291.74

The Texas State Board of Pharmacy proposes amendments to §291.74 concerning Operational Standards. The proposed amendments, if adopted, will clarify the use of formularies in hospitals.

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 clarify the rules regarding the use of formularies in hospitals. There is no fiscal impact for individuals, small or large businesses or to other entities which 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., January 4, 2008.

The amendments are proposed under §§551.002, 554.005(a), 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 §554.005(a) as authorizing the Board to regulate the delivery or distribution of a prescription drug or device. 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 the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.74. Operational Standards.

(a) - (e) (No change.)

(f) Drugs.

(1) (No change.)

(2) Formulary.

(A) A formulary shall be developed by the facility committee performing the pharmacy and therapeutics function for the facility. For the purpose of this section, a formulary is a compilation of pharmaceuticals that reflects the current clinical judgment of a facility's medical staff.

(B) The pharmacist-in-charge or pharmacist designated by the pharmacist-in-charge shall be a full voting member of the committee performing the pharmacy and therapeutics function for the facility, when such committee is performing the pharmacy and therapeutics function.

(C) A practitioner may grant approval for pharmacists at the facility to substitute, in accordance with the facility's formulary, for the prescribed drugs on the practitioner's medication orders provided:

(i) the pharmacy and therapeutics committee has developed a formulary;

(ii) the formulary has been approved by the medical staff committee of the facility;

(iii) there is a reasonable method for the practitioner to override any substitution; and

(iv) the practitioner authorizes pharmacists in the facility to substitute on his/her medication orders in accordance with the facility's formulary through his/her written agreement to the policies and procedures of the facility.

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

(5) Distribution.

(A) Medication orders.

(i) Drugs may be given to patients in facilities only on the order of a practitioner. No change in the order for drugs may be made without the approval of a practitioner except as authorized by the practitioner through the practitioner's written approval of the facility's formulary in compliance with paragraph (2)(C) of this subsection.

(ii) Drugs may be distributed only from the original or a direct copy of the practitioner's medication order.

(iii) Supportive personnel may not receive verbal medication orders.

(iv) Institutional pharmacies shall be exempt from the labeling provisions and patient notification requirements of §562.006 and §562.009 of the Act, as respects drugs distributed pursuant to medication orders.

(B) (No change.)

(g) - (j) (No change.)

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

Filed with the Office of the Secretary of State on November 12, 2007.

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 305-8028

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SUBCHAPTER G. SERVICES PROVIDED BY PHARMACIES

22 TAC §291.131

The Texas State Board of Pharmacy proposes amendments to §291.131 concerning Pharmacies Compounding Non-Sterile Preparations. The proposed amendments, if adopted, implement the provisions of S.B. 1274 passed during the 80th Regular Session of the Texas Legislature and outline the procedures for pharmacists to add flavoring to prescriptions and over-the-counter products.

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 requirements for pharmacists to add flavoring to prescriptions and over-the-counter products. There is no fiscal impact for individuals, small or large businesses or to other entities which 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., January 4, 2008.

The amendments are proposed under §§551.002, 554.051, and 554.056 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 §554.056 as authorizing the agency to adopt rules governing the procedures for a pharmacist to add flavoring to commercial products.

The statutes affected by the amendments: Chapters 551 - 566 and 568 - 569, Texas Occupations Code.

§291.131. Pharmacies Compounding Non-Sterile Preparations.

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

(d) Operational Standards.

(1) General requirements.

(A) Non-sterile drug preparations may be compounded in licensed pharmacies:

(i) upon presentation of a practitioner's prescription drug or medication order based on a valid pharmacist/patient/prescriber relationship;

(ii) in anticipation of future prescription drug or medication orders based on routine, regularly observed prescribing patterns; or

(iii) in reasonable quantities for office use by a practitioner and for use by a veterinarian.

(B) Non-sterile compounding in anticipation of future prescription drug or medication orders must be based upon a history of receiving valid prescriptions issued within an established pharmacist/patient/prescriber relationship, provided that in the pharmacist's professional judgment the quantity prepared is stable for the anticipated shelf time.

(i) The pharmacist's professional judgment shall be based on the criteria used to determine a beyond-use date outlined in paragraph (5)(C) of this subsection.

(ii) Documentation of the criteria used to determine the stability for the anticipated shelf time must be maintained and be available for inspection.

(iii) Any preparation compounded in anticipation of future prescription drug or medication orders shall be labeled. Such label shall contain:

(I) name and strength of the compounded preparation or list of the active ingredients and strengths;

(II) facility's lot number;

(III) beyond-use date as determined by the pharmacist using appropriate documented criteria as outlined in paragraph (5)(C) of this subsection; and

(IV) quantity or amount in the container.

(C) Commercially available products may be compounded for dispensing to individual patients provided the following conditions are met:

(i) the commercial product is not reasonably available from normal distribution channels in a timely manner to meet patient's needs;

(ii) the pharmacy maintains documentation that the product is not reasonably available due to a drug shortage or unavailability from the manufacturer; and

(iii) the prescribing practitioner has requested that the drug be compounded as described in subparagraph (D) of this paragraph.

(D) A pharmacy may not compound preparations that are essentially copies of commercially available products (e.g., the preparation is dispensed in a strength that is only slightly different from a commercially available product) unless the prescribing practitioner specifically orders the strength or dosage form and specifies why the patient needs the particular strength or dosage form of the preparation. The prescribing practitioner shall provide documentation of a patient specific medical need and the preparation produces a clinically significant therapeutic response (e.g. the physician requests an alternate product due to hypersensitivity to excipients or preservative in the FDA-approved product, or the physician requests an effective alternate dosage form) or if the drug product is not commercially available. The unavailability of such drug product must be documented prior to compounding. The methodology for documenting unavailability includes maintaining a copy of the wholesaler's notification showing back-ordered, discontinued, or out-of-stock items. This documentation must be available in hard-copy or electronic format for inspection by the board.

(E) A pharmacy may enter into an agreement to compound and dispense prescription/medication orders for another pharmacy provided the pharmacy complies with the provisions of §291.125 of this title (relating to Centralized Prescription Dispensing).

(F) Compounding pharmacies/pharmacists may advertise and promote the fact that they provide non-sterile prescription compounding services, which may include specific drug products and classes of drugs.

(G) A pharmacy may not compound veterinary preparations for use in food producing animals except in accordance with federal guidelines.

(H) A pharmacist may add flavoring to a prescription at the request of a patient or patient's agent provided the pharmacy has documentation of testing provided by the manufacturer of the flavoring product, documentation of testing from appropriate literature sources, or documentation of direct testing to show that the addition of the flavoring does not alter the desired clinical outcomes and contains the same amount of active ingredient per dosage unit as the dosage prescribed for the patient. The pharmacy shall maintain such documentation in the pharmacy and make it available to agents of the board. A pharmacist may not add flavoring to an over-the-counter product at the request of a patient or patient's agent unless the pharmacist obtains a prescription for the over-the-counter product from the patient's practitioner.

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

(e) - (g) (No change.)

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

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Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 213. EDWARDS AQUIFER

Texas Commission on Environmental Quality (commission) proposes amendments to §§213.9, 213.13, 213.14, and 213.26 - 213.28.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed amendments is to implement legislative changes to Texas Water Code (TWC), §26.0461(b), (d), (e), and (h) and the addition of Subsection (d-1) regarding Fees for Edwards Aquifer Plans, as enacted by House Bill 3098, 80th Legislature, 2007. Texas Water Code, §26.0461(b) and (e), as amended, authorizes the commission to assess fees for contributing zone plans. Texas Water Code, §26.0461(d), as amended, and new subsection (d-1), raises the cap on any fee imposed under §26.0461 from $5,000 to $6,500 for plans forty acres or less in size and sets a cap of $13,000 for plans more than forty acres in size. In addition, Texas Water Code, §26.0461(e), as amended, authorizes the commission to base fees imposed under §26.0461 on the type of activity subject to regulation. Lastly, Texas Water Code, §26.0461(h), as amended, provides the commission with flexibility in spending fee revenue for support activities of the Edwards Aquifer Protection Program.

SECTION BY SECTION DISCUSSION

Subchapter A, Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis, and Williamson Counties

The proposed amendment to §213.9, Exceptions, will increase the fee for submittal of an Edwards Aquifer protection plan exception from $250 to $500.

The proposed amendment to §213.13, Fees Related to Requests for Extensions, will increase the fee for an Edwards Aquifer protection plan extension from $100 to $150.

The proposed amendment to §213.14, Fee Schedule, contains the criteria for calculating the application fee for the review of an Edwards Aquifer protection plan and modifications to a plan. The water pollution abatement plan fee schedule for single-family residential dwellings has been revised to reflect seven categories based on size in acres with fees set at $650 for one single-family dwelling on less than five acres, $1,500 for multiple single-family dwellings and parks on less than five acres, $3,000 for five to less than ten acres, $4,000 for ten to less than forty acres, $6,500 for forty to less than one hundred acres, $8,000 for one hundred to less than five hundred acres, and $10,000 for five hundred acres or greater. The fee schedule for commercial and other sites where regulated activities will occur has also been revised to reflect six categories based on size in acres with fees set at $3,000 for less than one acre, $4,000 for one to less than five acres, $5,000 for five to less than ten acres, $6,500 for ten to less than forty acres, $8,000 for forty to less than one hundred acres, and $10,000 for one hundred acres and greater. The cap for fees for organized sewage collection systems and underground and aboveground storage tank facilities has been raised to $6,500.

Subchapter B, Contributing Zone to the Edwards Aquifer in Medina, Bexar, Comal, Kinney, Uvalde, Hays, Travis, and Williamson Counties

The proposed amendment to §213.26, Exceptions, will increase the fee for submittal of an Edwards Aquifer contributing zone plan exception from $250 to $500.

The proposed amendment to §213.27, Contributing Zone Plan Application and Exception Fees, will establish the same criteria for calculating the application fee for the review of an Edwards Aquifer contributing zone plan and modifications to a plan as designated by the proposed amendment to §213.14. The contributing zone plan fee has been revised from a flat fee of $250 regardless of the size of development and the new fee schedule is reflective of the same specific fee categories based on size in acres as designated in amended §213.14 for water pollution abatement plans with the exception of plans for organized sewage collection systems and underground and aboveground storage tank facilities, as these activities are exempt from application requirements in the contributing zone under current rules.

The proposed amendment to §213.28, Fees Related to Requests for Contributing Zone Plan Approval Extensions, will increase the fee for submittal of an Edwards Aquifer contributing zone plan extension from $100 to $150.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Jeff Horvath, Analyst, Strategic Planning and Assessment Section, has determined that for the first five-year period the proposed rules are in effect, significant fiscal implications are anticipated for the agency. Other units of state or local government conducting activities in the geographical areas subject to the proposed rules will also be subject to the proposed fee changes and may also experience fiscal implications as a result of the administration or enforcement of the proposed rules. Any fiscal implications would depend upon the type of project and its size, and where the project is located over the Edwards Aquifer.

The proposed rulemaking implements House Bill 3098, 80th Legislature, 2007, and establishes a new fee structure for regulated activities conducted in the Edwards Aquifer recharge or contributing zones. The new fee structure will allow the agency to more equitably distribute fee increases based upon the size of developments and the varying workload demands of projects of differing sizes and complexities. The proposed tiered fee structure will also replace a flat fee structure for regulated activity in the contributing zone of the Edwards Aquifer.

The agency is anticipated to experience an increase in fee revenue as a result of the implementation of the proposed rules. The increased fee revenue will provide funding for Edwards Aquifer program activities such as monitoring surface water and storm water, as well as groundwater quality in the Edwards Aquifer program area. The increased amount of regulated activity in the Edwards Aquifer region, especially the contributing zone, has necessitated hiring additional TCEQ staff to keep up with the workload of plan reviews. The legislature appropriated over $640,000 in additional funding for the fiscal 2008-2009 biennium from increased fee revenue to ensure compliance with regulations for development over the Edwards Aquifer region. Fee revenue is deposited into the Water Resource Management Account 153, and funding for the Edwards Aquifer program is from the same account. Depending upon the level of development over the Edwards region, fee revenue is expected to increase in amounts necessary to cover the additional appropriations beginning after the proposed rules are in effect, toward the end of fiscal 2008.

State agencies conducting activities in the geographical areas subject to these rules will be subject to the effects of changes to fee schedules similar to any other party conducting regulated activities. At this time, the Texas Department of Transportation

(TxDOT) currently maintains a two-year contract with TCEQ in the amount of $70,000 per year for review of TxDOT Edwards Aquifer plans. The current contract will expire on August 31, 2008. The contract amounts provided by TxDOT are expected to increase in subsequent contracts due to the increased fee structure proposed in this rulemaking.

The Edwards Aquifer boundaries lie in the following eight counties: Williamson, Travis, Hays, Comal, Bexar, Medina, Kinney, and Uvalde. All counties, municipalities, school districts, river authorities, water districts, or other districts located within the jurisdictional boundaries of the Edwards Aquifer recharge, transition, or contributing zones will also be affected by the proposed rules. No new requirements will be imposed upon units of state or local government other than an increase in fees. The commission receives approximately 750-800 plans for review each year, and it is estimated that between 15% and 20% of these plans are from local governments. Any costs to affected local governments would depend upon their future development activities and the size of the site, although fiscal implications will be more significant for those conducting regulated activities over the contributing zone of the Edwards Aquifer.

The proposed amendments will affect the Edwards Aquifer Protection Program fees in the following ways: 1) The contributing zone plan fee has been revised from a flat fee of $250 regardless of the size of development and will be replaced with the same tiered water pollution abatement plan fee schedule proposed for the recharge zone with the exception of plans for organized sewage collection systems and underground storage tank facilities. These activities are exempt from application requirements in the contributing zone under current rules; 2) The proposed rule will increase the fee for an Edwards Aquifer recharge protection plan extension from $100 to $150; 3) The proposed rule will increase the fee for submittal of an Edwards Aquifer contributing zone protection plan extension from $100 to $150; 4) The proposed rule will increase the fee for submittal of an Edwards Aquifer recharge protection plan exception from $250 to $500; and 5) The proposed rule will increase the fee for submittal of an Edwards Aquifer contributing zone protection plan exception from $250 to $500; and 6) The cap for fees for organized sewage collection systems and underground and aboveground storage tank facilities has been raised to $6,500.

Fees for Edwards Aquifer protection plans located in the recharge zone will increase from between $150 to $1,500 per plan for smaller developments and from between $3,000 to $5,000 per plan for larger developments. In addition, fees for Edwards Aquifer protection plans located in the contributing zone will increase from between $400 to $6,250 per plan for smaller developments and from between $7,750 to $9,750 per plan for larger developments.

PUBLIC BENEFITS AND COSTS

Mr. Horvath also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be improved protection of the quality of water resources in newly developed urban and suburban areas in the Edwards Aquifer Region, a reduction in the risk to human health and safety from degradation of water quality, the preservation of aquatic and related biological resources, and the maintenance of the quality of public and recreational resources.

No significant fiscal implications are anticipated for businesses or individuals conducting regulated construction activities over the Edwards Aquifer recharge zone as a result of the proposed rules for the first five years the rules are in effect. However, for those businesses or individuals conducting regulated activities over the Edwards Aquifer contributing zone, fiscal implications may be more significant depending upon the size of the site. The majority of plan reviews conducted each year by the commission are from large businesses.

Any entity conducting construction activity in the Edwards Aquifer regulated zones must submit an Edwards Aquifer protection plan to either the TCEQ Austin Regional Office or the San Antonio Regional Office for review and approval prior to beginning the regulated activity. An Edwards Aquifer protection plan indicates specific best management practices that will be utilized during and after construction to protect the Edwards Aquifer and connected surface streams within the jurisdictional boundaries of the Edwards Aquifer recharge, transition, or contributing zones from contamination from surface water runoff.

The cost implications of the proposed fees for any Edwards Aquifer project will vary on a case-by-case basis depending upon the type of project and its size. Fees for Edwards Aquifer plans located in the recharge zone will increase from between $150 to $1,500 per plan for smaller developments and from between $3,000 to $5,000 per plan for larger developments.

The rules propose a tiered fee structure rather than a flat fee as is currently assessed for each contributing zone plan. This tiered fee structure is identical to that proposed for the recharge zone. Therefore, more significant fiscal impacts are anticipated for businesses, individuals, or industries who propose to develop in the Edwards Aquifer contributing zone. Fees for Edwards Aquifer plans located in the contributing zone will increase from between $400 to $6,250 per plan for smaller developments and from between $7,750 to $9,750 per plan for larger developments.

The Edwards Aquifer contributing zone typically represents more rural areas and is generally less densely populated than the recharge zone. Any increased costs to businesses or local governments are anticipated to be recovered through an increase in costs to consumers of goods and services, though this increase is not anticipated to be significant.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are expected for small or micro-businesses conducting construction or other regulated activities located in the Edwards Aquifer region as a result of the proposed rules. It is not known how many small or micro-businesses will conduct regulated construction activities over the Edwards Aquifer in the future. The commission receives approximately 750 to 800 plans for review each year, and it is estimated that between 10% and 15% of these plans are from small or micro-businesses. The proposed fee structure will affect those small or micro-businesses over the contributing zone more significantly. However, based upon current data from agency staff the majority of residential development plans in the contributing zone are for large subdivision developments between 40 and 100 acres and are not owned by small or micro-businesses. The majority of commercial development plans in the contributing zone are between 10 and 40 acres in size are mostly for school districts, multifamily dwellings, and public utilities and are not owned by small or micro-businesses. Agency staff therefore do not anticipate adverse fiscal implications for small or micro-businesses who wish to conduct construction activities over the Edwards Aquifer.

The purpose of the proposed rulemaking is to establish a new fee structure that will allow the agency to more equitably distribute fee increases based upon the size of developments and the varying workload demands of projects of differing sizes and complexities. The increased amount of regulated activity in the Edwards Aquifer region, especially the contributing zone, has necessitated hiring additional TCEQ staff to keep up with the workload of plan reviews. If fees were not increased, the alternative would be to re-prioritize and re-allocate other funds, either in the Water Resource Management Account or from General Revenue, but these alternatives would have unacceptable consequences for other water related program areas, while legislative authority to support the selected alternative has clearly been established. In order to maintain the water quality integrity of the Edwards Aquifer, it is imperative that all regulated activity be conducted in compliance with Chapter 213; therefore, there are no proposed alternative regulatory methods.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

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

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking under the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of "a major environmental rule" as defined in the statute. "A major environmental rule" means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Furthermore, the proposed rulemaking does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The amendments to TWC, §26.0461 authorize the commission to base fees on the type of activity subject to regulation, assess fees for contributing zone plans, and raises the maximum fee from $5,000 to $6,500 for plans forty acres or less in size. The amendments also set a maximum fee of $13,000 for plans more than forty acres in size and provide flexibility in the use of spending fee revenue to support the Edwards Aquifer Protection Program. Because the proposed rules are not specifically intended to protect the environment or to reduce risks to human health from environmental exposure, this rulemaking is not a major environmental rule. The amendments to TWC, §26.0461 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments simply alter the fee structure by increasing the amounts based on the activities regulated. The commission invites public comment regarding this draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact analysis for this rule pursuant to Texas Government Code, Chapter 2007 to determine whether the proposed rules constitute a taking. The following is a summary of that analysis. The specific purpose of the rulemaking is to amend the regulations set forth in Chapter 213 to adjust the amount of fees imposed for processing plans or amendments to plans subject to review and approval under the commission's Edwards Aquifer rules. The proposed rules would substantially advance the stated purpose by increasing the fees as required by statutes. Promulgation and enforcement of this rule will not affect private real property.

Promulgation and enforcement of these rules will not restrict or limit the owner's right to the property that would otherwise exist in the absence of the rulemaking. Owners of property that is used for activities having the potential for polluting the Edwards Aquifer and owners of property that are hydrologically connected to surface water are presently required to submit to the Executive Director for approval an Edwards Aquifer Protection Plan application or an application to modify an approved plan. An owner must also submit an application fee at the time the original application or an application to modify an approved plan is filed. This rulemaking only affects the amount of the fees charged by the commission to review plans under the Edwards Aquifer Protection Program. The proposed rulemaking will not affect a landowner's right in private property because it does not burden nor restrict or limit the owner's right to property. Also, this proposed rulemaking should not reduce the market value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, this action does not create a burden on any affected private real property.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

ANNOUNCEMENT OF HEARING

Public hearings on this proposal will be held in Austin on December 10, 2007, at 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearings will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, agency staff will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lesley Williamson, Office of Legal Services, at (512) 239-2461. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Lesley Williamson, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomment*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-032-213-CE. The comment period closes January 7, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Tracy Miller, Field Operations Support Division, (512) 239-4127.

SUBCHAPTER A. EDWARDS AQUIFER IN MEDINA, BEXAR, COMAL, KINNEY, UVALDE, HAYS, TRAVIS, AND WILLIAMSON COUNTIES

30 TAC §§213.9, 213.13, 213.14

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, authorizing the commission to perform any acts authorized by the TWC or other law which are necessary and convenient to the exercise of its jurisdiction and powers; TWC, §5.103, authorizing the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §26.011, authorizing the commission to control the quality of water in the state; TWC, §26.0461, authorizing fees for the Edwards Aquifer program; TWC, §26.121, prohibiting the discharge of waste into water in the state except as authorized by the commission; and TWC, §26.341, regarding the state policy to protect the quality of groundwater and surface water from pollution by substances in underground and aboveground storage tanks and Texas Health and Safety Code, §366.012, authorizing the commission "to adopt rules governing the installation of on-site sewage disposal systems."

The amendments implement TWC, §§5.102, 5.103, 26.011, 26.0461, 26.121, and 26.341 and Texas Health and Safety Code, §366.012.

§213.9. Exceptions.

(a) Granting of exceptions. Exceptions to any substantive provision of this chapter related to the protection of water quality may be granted by the executive director if the requestor can demonstrate equivalent water quality protection for the Edwards Aquifer. No exception will be granted for a prohibited activity. Prior approval under this section must be obtained from the executive director for the exception to be authorized.

(b) Procedure for requesting an exception. A person requesting an exception to the provisions of this chapter relating to the protection of water quality must file an original and three copies of a written request with the executive director at the appropriate regional office stating in detail:

(1) the name, address, and telephone numbers of the requestor;

(2) site and project name and location;

(3) the nature of the exception requested;

(4) the justification for granting the exception as described in subsection (a) of this section; and

(5) any other pertinent information that the executive director requests.

(c) Fees related to requests for exceptions. A person submitting an application for an exception, as described in this section, must pay $500 [~~$250~~] for each exception request. The fee is due and payable at the time the exception request is filed, and should be submitted as described in §213.12 of this title (relating to Application Fees). If the exception request fee is not submitted in the correct amount, the executive director is not required to consider the exception request until the correct fee is submitted.

§213.13. Fees Related to Requests for Extensions.

The person submitting an application for an extension of an approval of any plan under this chapter must pay $150 [~~$100~~] for each extension request. The fee is due and payable at the time the extension request is filed, and should be submitted as described in §213.12 of this title (relating to Application Fees). If the extension fee is not submitted in the correct amount, the executive director is not required to consider the extension request until the correct fee is submitted. The extension request must be submitted to the appropriate regional office and must include a copy of the Edwards Aquifer protection plan and approval letter that is the subject of the extension request.

§213.14. Fee Schedule.

(a) Water Pollution Abatement Plans. For water pollution abatement plans and modifications to those plans, the application fee shall be based on the classification and total acreage of the site where regulated activities will occur as specified in Table 1 of this subsection.
Figure 30 TAC §213.14(a)
[~~Figure 30 TAC §213.14(a)~~]

(b) Organized sewage collection systems. For sewage collection system plans and modifications, the application fee shall be based on the total number of linear feet of all lines for which approval is sought. The fee shall be $.50 per linear foot, with a minimum fee of $650 [~~$500~~] and a maximum fee of $6,500 [~~$5,000~~].

(c) Underground and aboveground storage tank facilities. For underground or permanent aboveground storage tank system facility plans and modifications, the application fee shall be based on the number of tanks or piping systems for which approval is sought. The fee shall be $650 [~~$500~~] per tank or piping system, with a minimum fee of $650 [~~$500~~] and a maximum fee of $6,500 [~~$5,000~~].

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

Filed with the Office of the Secretary of State on November 9, 2007.

TRD-200705481
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 239-2461

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SUBCHAPTER B. CONTRIBUTING ZONE TO THE EDWARDS AQUIFER IN MEDINA, BEXAR, COMAL, KINNEY, UVALDE, HAYS, TRAVIS, AND WILLIAMSON COUNTIES

30 TAC §213.26 - 213.28

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.102, authorizing the commission to perform any acts authorized by the TWC or other law which are necessary and convenient to the exercise of its jurisdiction and powers; TWC, §5.103, authorizing the commission to adopt rules necessary to carry out its powers and duties under the TWC; TWC, §26.011, authorizing the commission to control the quality of water in the state; TWC, §26.0461, authorizing fees for the Edwards Aquifer program; TWC, §26.121, prohibiting the discharge of waste into water in the state except as authorized by the commission; and TWC, §26.341, regarding the state policy to protect the quality of groundwater and surface water from pollution by substances in underground and aboveground storage tanks and Texas Health and Safety Code, §366.012, authorizing the commission to "adopt rules governing the installation of on-site sewage disposal systems."

The amendments implement TWC, §§5.102, 5.103, 26.011, 26.0461, 26.121, and 26.341 and Texas Health and Safety Code, §366.012.

§213.26. Exceptions.

(a) Granting of exceptions. Exceptions to any substantive provision of this subchapter related to the protection of water quality may be granted by the executive director if the requestor can demonstrate equivalent water quality protection for surface streams which enter the recharge zone of the Edwards Aquifer. Prior approval under this section must be obtained from the executive director for the exception to be authorized.

(b) Procedure for requesting an exception. A person requesting an exception to the provisions of this subchapter relating to the protection of water quality must file an original and one copy of a written request with the executive director at the appropriate regional office stating in detail:

(1) the name, address, and telephone numbers of the requestor;

(2) site and project name and location;

(3) the nature of the exception requested;

(4) the justification for granting the exception as described in subsection (a) of this section; and

(5) any other pertinent information that the executive director requests.

(c) Fees related to requests for exceptions. A person submitting an application for an exception, as described in this section, must pay $500 for each exception request. The fee is due and payable at the time the exception request is filed, and should be submitted as described in §213.27 of this title (relating to Application Fees). [~~A complete application for an exception, as described in this section, must be submitted with the appropriate fee as specified in §213.28 of this title (relating to Contributing Zone Plan Application and Exception Fees).~~] If the exception request fee is not submitted in the correct amount, the executive director is not required to consider the exception request until the correct fee is submitted.

§213.27. [~~Contributing Zone Plan~~] Application [~~and Exception~~] Fees.

(a) The person submitting an application for approval or modification of any contributing zone plan [~~or exception~~] under this subchapter must pay an application fee in the amount set forth in subsection (b) of this section [~~of $250~~]. The fee is due and payable at the time the application is filed. The fee must be sent to either the appropriate regional office or the cashier in the agency headquarters located in Austin, accompanied by an Edwards Aquifer Contributing Zone Fee Application Form, provided by the executive director. Application fees must be paid by check or money order, payable to the "Texas Commission on Environmental Quality." If the application fee is not submitted in the correct amount, the executive director is not required to consider the application until the correct fee is submitted.

(b) For contributing zone plans and modifications to those plans, the application should be based on the classification and the total acreage of the site where regulated activities will occur as specified in Table 2 of this subsection.

Figure 30 TAC §213.27(b)

§213.28. Fees Related to Requests for Extensions [~~Contributing Zone Plan Approval Extension~~].

The person submitting an application for an extension of an approval of any contributing zone plan under this subchapter must pay $150 [~~$100~~] for each extension request. The fee is due and payable at the time the extension request is filed, and should be submitted as described in §213.27 of this title (relating to [~~Contributing Zone Plan~~] Application [~~and Exception~~] Fees). If the extension fee is not submitted in the correct amount, the executive director is not required to consider the extension request until the correct fee is submitted. The extension request must be submitted to the appropriate regional office and must include a copy of the contributing zone plan application and approval letter that is the subject of the extension request.

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

Filed with the Office of the Secretary of State on November 9, 2007.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2461

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.341

(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

Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Comptroller of Public Accounts proposes the repeal of §3.341, concerning sales of governmental publications, records, or documents. This rule is no longer needed since its substance already exists in other comptroller rules.

John Heleman, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. Heleman also has determined the repeal would benefit the public by eliminating redundant sections of the Texas Administrative Code. There would be no anticipated significant economic cost to the public. This repeal is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This repeal is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The repeal implements Tax Code, Chapter 151.

§3.341. Sales of Governmental Publications, Records, or Documents.

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

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705387
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 475-0387

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34 TAC §3.368

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

The Comptroller of Public Accounts proposes the repeal of §3.368, concerning certified public accountant (CPA) audit program. This section is being repealed pursuant to House Bill 3319, 80th Legislature, 2007, which repealed the program under Tax Code, §151.0232, effective September 1, 2007.

John Heleman, Chief Revenue Estimator, has determined that repeal of the rule will not result in any fiscal implications to the state or to units of local government.

Mr. Heleman also has determined the repeal would benefit the public by making administrative rules consistent with statutory language. There would be no anticipated significant economic cost to the public. This repeal is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711.

This repeal is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The repeal implements Tax Code, §151.0232.

§3.368. Certified Public Accountant (CPA) Audit Program.

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

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705388
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 475-0387

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PART 3. TEACHER RETIREMENT SYSTEM OF TEXAS

CHAPTER 31. EMPLOYMENT AFTER RETIREMENT

SUBCHAPTER C. EMPLOYMENT AFTER DISABILITY RETIREMENT

34 TAC §§31.35 - 31.37

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) proposes new §§31.35 - 31.37 relating to disability retiree report of excess compensation earned for work during retirement and forfeiture of annuity payments due to excess compensation. The new rules are proposed in response to legislation providing for the suspension or reduction of disability retirement annuity benefits received by a TRS disability retiree based on excess compensation earned for work.

Proposed new §§31.35 - 31.37 are proposed in response to House Bill 2427, 80th Legislature, Regular Session (2007) ("H.B. 2427"). H.B. 2427 amended the provisions of the TRS retirement plan to authorize TRS to adopt rules relating to the suspension or reduction of disability retirement annuities based on compensation earned by a disability retiree. H.B. 2427 also requires a disability retiree whose annuity is suspended to pay an additional premium for coverage under the retirees' health benefit plan, TRS-Care, as determined by TRS as the trustee for TRS-Care, up to the total cost of coverage for the retiree and any dependents, during the period of time the annuity is suspended. To implement the payment of any additional TRS-Care premiums because of the forfeiture of disability retirement annuities under proposed new §§31.35 - 31.37, TRS proposes amendments to

TRS-Care rule 34 TAC §41.5, as published elsewhere in this issue of the *Texas Register*.

Proposed new §31.35 concerns a disability retiree's report of excess compensation. The proposed new section would require a new disability retiree to report earned compensation to TRS when the annual compensation exceeds the greater of the disability retiree's highest salary in any school year before retirement or $40,000. Under the proposed rule, a report would not be required for a calendar year in which the retirement annuity payments totaled $2,000 or less. The proposed new rule would also establish administrative requirements relating to the required report, including a description of "compensation," a calendar year schedule for the filing of a report (beginning with the first full calendar year after the retiree's effective date of retirement), and a May 1 annual deadline for the report. Under proposed new §31.35, TRS may audit the compensation report of disability retiree by requiring the retiree to provide more information and may obtain independent information regarding earnings.

Proposed new §31.36 concerns forfeiture of disability retirement annuity payments due to excess compensation. Under the proposed new section, a disability retiree's annuities would be forfeited if the retiree reported earned compensation in excess of the limit established under proposed new §31.35. Proposed new §31.36 provides, however, that TRS would resume annuity payments following receipt of a new report showing that compensation had ceased or decreased sufficiently. The proposed new rule also provides for the forfeiture of disability retirement annuities if TRS were to learn that a disability retiree had failed to report compensation in excess of the limit.

Proposed new §31.37 concerns the applicability of excess compensation provisions to employment after retirement in Texas public educational institutions. Under the proposed new section, a disability retiree is subject to the reporting and forfeiture provisions if the retiree earns compensation for employment by a Texas public educational institution, regardless of whether the employment results in forfeiture of an annuity in the month of employment under existing employment after retirement rules.

Pattie Featherston, TRS Chief Operating Officer, estimates that for each year of the first five years the proposed new rules will be in effect, additional personnel would be required to implement their provisions with estimated associated costs of $475,348 in fiscal year 2008 and $225,348 in subsequent years, to be paid from the TRS Pension Trust Fund. Assuming that disability retirement annuity payments for disability retirees who are subject to the proposed new rules were reduced by 5%, Ms. Featherston also estimates that implementing the proposed new rules would yield an annual savings to the Pension Trust Fund of about $500,000 for each year of the first five years the proposed new rules will be in effect.

For each year of the first five years that the proposed rules will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the proposed rules will be to implement legislation restructuring TRS's disability retirement benefit program to achieve the purpose for which TRS pays a disability retirement annuity, which is to lessen the financial hardships faced by a member with a disability. Ms. Featherston has determined that for each year of the first five years the proposed new rules are in effect, the economic cost to persons required to comply with the new rules would generally be the gross amount of their monthly TRS disability retirement annuity, multiplied by the number of the months that the annuity payment is required to be forfeited under the rules. This economic cost would result for disability retirees required to comply with the rules who have excess earnings for work during disability retirement; however, a disability retiree who is required to comply with the rule but who does not have excess compensation for work during disability retirement will have no economic cost. The economic cost to any individual disability retiree who must forfeit a disability retirement annuity under the proposed rules cannot reasonably be estimated in specific dollar terms at this time because the cost will depend on the retiree's gross amount of the monthly disability retirement annuity and the number of months of forfeiture. Any costs related to making a required report under the proposed rules are estimated to be insignificant. There will be no measurable impact on a local economy or local employment because of the rule proposal, and, therefore, no local employment impact statement is required under §2001.022 of the Government Code. Moreover, the proposed rules will have no adverse economic effect on small businesses or micro-businesses, and, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than thirty (30) days after publication of this notice and proposed rule.

Statutory Authority: The new rules are proposed under the following statutes: §824.310, Government Code, which authorizes TRS to adopt rules relating to the suspension or reduction of disability retirement annuities based on compensation earned by a disability retiree; §824.301, Government Code, which authorizes the Board to adopt rules requiring the submission to TRS of additional information about a disability; and §825.102, Government Code, which authorizes the Board to adopt rules for the administration of the funds of the retirement system.

Cross-reference to Statute: The proposed new rules affect §§824.302, 824.304, 824.308, 824.601, and 824.602 Government Code, and §1575.004 and §1575.213, Insurance Code.

§31.35. Disability Retiree Report of Excess Compensation.

(a) A disability retiree who applies for disability retirement after August 31, 2007, and whose effective date of retirement is after August 31, 2007, shall report to TRS compensation earned for work performed during disability retirement in accordance with this section.

(b) A disability retiree is not subject to the reporting requirement for compensation earned in a calendar year in which the disability retiree's annual gross disability retirement annuity payments from TRS total $2,000 or less.

(c) Unless excluded under subsection (a) or (b) of this section, a disability retiree is required to report to TRS compensation earned in a calendar year when the compensation exceeds the greater of the disability retiree's highest salary in any school year before disability retirement or $40,000.

(d) The reporting requirement applies to compensation earned in the first full calendar year that begins following the effective date of disability retirement and to compensation earned in each subsequent calendar year of disability retirement.

(e) Compensation that is required to be reported to TRS is payment, earnings, or net income for employment, work, labor, or services, whether performed for a Texas public education institution or another employer or entity. Compensation includes but is not limited to the following:

(1) "Wages" as defined under §3121 of the Internal Revenue Code of 1986 that are subject to Federal Insurance Contributions Act ("FICA") Social Security or Medicare employment taxes;

(2) Salary and wages, even if not subject to FICA taxes because of a technical exclusion of a type of employer or type of employment;

(3) Self-employment earnings, including net income from a trade or business;

(4) Compensation for work performed as an independent contractor;

(5) Net income earned as a sole proprietor or partner in a business; and

(6) Net income earned as an S corporation shareholder.

(f) A disability retiree shall submit a report required by this section to TRS after the end of the calendar year in which the compensation was earned but no later than May 1 of the calendar year following the year for which the report is due. A disability retiree shall submit all required information in the format designated by TRS.

(g) TRS may audit the compensation report of a disability retiree and require the disability retiree to provide supporting documentation, including copies of tax returns, W-2 forms, 1099 forms, and employment payroll records as necessary to verify the accuracy of a compensation report.

(h) TRS may obtain information from other sources with regard to the compensation earned by a disability retiree in order to administer applicable requirements.

(i) A report is due under this section for a calendar year in which one or more annuities have been forfeited pursuant to §31.36 of this title (relating to Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation).

§31.36. Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation.

(a) If a disability retiree earned compensation in excess of the applicable limit in §31.35(c) of this title (relating to Disability Retiree Report of Excess Compensation) in a calendar year for which a report is due, the disability retiree's annuities shall be forfeited in accordance with this section, beginning with the annuity payable for May of the calendar year following the year for which the report is due.

(b) A forfeiture of annuity payments under this section shall continue until the disability retiree submits a new report to TRS showing that the compensation has ceased or decreased sufficiently that it will no longer exceed the applicable limit. TRS will resume annuity payments following the receipt of the retiree's new report. Annuity payments shall be resumed no earlier than the payment for the calendar month following the month in which the compensation ceased or decreased. An annuity payment is not due for a month in which a disability retiree earns compensation that caused the annuity for the month to be forfeited prior to the retiree's new report, even if the total compensation for the calendar year is below the applicable limit in §31.35 (c) of this title.

(c) A disability retiree who forfeits one or more annuities from TRS is also required to pay the total monthly cost of TRS-Care coverage as described in §41.5(f) of this title (relating to Payment of Contributions).

(d) Annuity payments are forfeited for a disability retiree who is required to file a report but fails to do so or for a disability retiree who fails to report all compensation required to be reported, beginning with annuity payments for the month following the month in which TRS discovers the failure.

(e) Nothing in this section shall be construed to prevent TRS from collecting the gross amount of ineligible annuity payments if TRS determines that a disability retiree knowingly failed to report compensation as required and the failure resulted in payment of annuities by TRS that the disability retiree was not eligible to receive.

(f) Forfeiture of annuity payments under this section shall not extend the guaranteed period of annuity payments, if the disability retiree elected a payment option described under Government Code §824.308(c)(3) or (4).

§31.37. Applicability of Excess Compensation Provisions to Employment in Texas Public Educational Institutions.

A disability retiree who earns compensation for employment by a public educational institution covered by TRS is subject to §31.35 of this title (relating to Disability Retiree Report of Excess Compensation), §31.36 of this title (relating to Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation), and §41.5 of this title (relating to Payment of Contributions), regardless of whether the employment results in the forfeiture of the annuity in the month in which the employment occurs, as provided for in Subchapter C of Chapter 31 of this title (relating to Employment after Disability Retirement).

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

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705404
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 542-6438

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CHAPTER 41. HEALTH CARE AND INSURANCE PROGRAMS
SUBCHAPTER A. RETIREE HEALTH CARE BENEFITS (TRS-CARE)

34 TAC §41.5

The Board of Trustees (Board) of the Teacher Retirement System of Texas (TRS) proposes amendments to §41.5 concerning disability retirees' payment of monthly contributions for their and their dependents' participation in the retirees' health benefit plan (TRS-Care). The amended rule is proposed in response to legislation providing for an additional contribution by disability retirees who earn excess compensation for work during retirement.

Amended §41.5 is proposed in response to House Bill 2427, 80th Legislature, Regular Session (2007) ("H.B. 2427"). H.B. 2427 authorizes TRS to adopt rules requiring TRS disability retirees to report income earned from other employment and providing for forfeiture of TRS disability retirement annuity benefits if earned income exceeds limits established by TRS. To implement the reporting and forfeiture provisions of H.B. 2427, TRS proposes new §§31.35, 31.36, and 31.37, as published elsewhere in this issue of the *Texas Register*. H.B. 2427 also authorizes

TRS to adopt rules requiring a disability retiree whose annuity is suspended to pay an additional contribution to TRS-Care, as determined by TRS as the trustee for the plan. To that end, the proposed amendments to §41.5 would require a disability retiree whose annuity payments have been forfeited to pay the total cost of TRS-Care coverage, including dependent coverage, during the months of annuity forfeiture. Failure to timely pay such total costs will result in the suspension of TRS-Care coverage for the disability retiree and his dependents. During the suspension, coverage under TRS-Care will cease and the costs of coverage for TRS-Care will no longer accrue. If a disability retiree's TRS-Care coverage is suspended and thereafter, TRS resumes payment of an annuity to the disability retiree, then the disability retiree will have a limited amount of time during which to pay all costs of coverage due and owing, including past due amounts for coverage prior to the suspension and the costs of coverage for all months during which the disability retiree's annuity payments are resumed, if any. If payment in full of all required contributions then due and owning is not timely received by TRS-Care, then TRS-Care coverage for the dependents of that disability retiree shall be terminated and the disability retiree shall be enrolled in TRS-Care 1 coverage. The disability retiree will not be able to change his TRS-Care 1 coverage tier or add dependents unless and until the disability retiree has an additional enrollment opportunity as set out in §41.2 or some other opportunity under Insurance Code, Section 1575.161.

Pattie Featherston, TRS Chief Operating Officer, estimates that for each year of the first five years the proposed amended rule will be in effect, there will be no significant administrative costs to implement the proposed amendments. Ms. Featherston also estimates that any savings to the state's general revenue fund associated with increased contributions by disability retirees to TRS-Care are not expected to be significant.

For each year of the first five years that the proposed rule amendments will be in effect, Ronnie Jung, TRS Executive Director, has determined that the public benefits expected as a result of the adoption of the proposed amendments will be to implement legislation restructuring TRS's disability retirement benefit program to achieve the purpose for which TRS pays a disability retirement annuity, which is to lessen the financial hardships faced by a member with a disability. Ms. Featherston has determined that for each year of the first five years the proposed rule amendments are in effect, the economic cost to persons required to comply with the amended rule will be an average additional monthly contribution of $265 for their and their dependents' coverage under TRS-Care for the number of months the disability retirement annuity is forfeited, if a disability retiree has excess compensation for work during disability retirement. However, there is no economic cost to a disability retiree who is subject to the limit on compensation for work during disability retirement but who does not earn excess compensation. Any costs related to making a required report under the proposed rule are estimated to be insignificant. There will be no measurable impact on a local economy or local employment because of the rule proposal, and, therefore, no local employment impact statement is required under §2001.022, Government Code. Moreover, the proposed amendments will have no adverse economic effect on small businesses or micro-businesses, and, therefore, neither an economic impact statement nor a regulatory flexibility analysis is required under §2006.002 of the Government Code.

Comments may be submitted in writing to Ronnie Jung, Executive Director, 1000 Red River Street, Austin, Texas 78701. To be considered, written comments must be received by TRS no later than thirty (30) days after publication of this notice and proposed rule.

Statutory Authority: The amended rule is proposed under the following statutes: §1575.052, Insurance Code, which authorizes TRS as trustee for TRS-Care to adopt rules reasonably necessary to implement and administer TRS-Care, including procedures for contributions and deductions, and §1575.212, Insurance Code, which authorizes TRS as trustee for TRS-Care to establish ranges for payment of the share of total costs allocated under §1575.211, Insurance Code, to retirees.

Cross-reference to Statute: The proposed amended rule affects §1575.004 and §1575.213, Insurance Code, and §824.304 and §824.310, Government Code.

§41.5. Payment of Contributions.

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

(d) Failure to timely pay the full amount of a [~~make any~~] required contribution for coverage of a dependent or a surviving dependent child will result in termination of coverage for the dependent or surviving dependent child at the end of the month for which the last contribution was made.

(e) Failure to timely pay the full amount of a [~~make any~~] required contribution for coverage of a retiree or a surviving spouse enrolled in TRS-Care 2 or TRS-Care 3 will result in termination of coverage in TRS-Care 2 or TRS-Care 3, as applicable, and enrollment in TRS-Care 1 for the retiree or surviving spouse, resulting in a decrease in coverage at the end of the month for which the last contribution was made. The retiree or surviving spouse will not be able to change his or her TRS-Care coverage tier unless and until the retiree or surviving spouse has an additional enrollment opportunity as set out in §41.2 of this title (relating to Additional Enrollment Opportunity) or some other opportunity under Insurance Code, §1575.161.

(f) A disability retiree whose annuity payments are forfeited under §31.36 of this title (Relating to Forfeiture of Disability Retirement Annuity Payments Due to Excess Compensation) shall pay the total monthly cost of coverage, as determined by the trustee, attributable to the participation of that disability retiree and the dependents of that disability retiree during the months for which the disability retiree's annuity payments are forfeited. A disability retiree shall pay the total monthly cost of coverage starting with the calendar month for which the first annuity payment is forfeited. The disability retiree shall continue to pay the total monthly cost of coverage for each month of coverage in which the annuity payment for that month is forfeited in accordance with §31.36 of this title. Nothing in this section shall be construed to prevent TRS from collecting the total monthly cost of coverage for months in which annuities should have been but were not forfeited if TRS determines that a disability retiree knowingly failed to report compensation as required and the failure resulted in payment of annuities by TRS that the disability retiree was not eligible to receive.

(g) Notwithstanding subsections (d) and (e) of this section, a disability retiree whose annuity payments are forfeited under §31.36 of this title who fails to timely pay the full amount of a required contribution for coverage attributable to his participation or that of his dependents, including but not limited to amounts found due and owing pursuant to a TRS determination that a disability retiree knowingly failed to report compensation as required and the failure resulted in payment of annuities by TRS that the disability retiree was not eligible to receive, shall have coverage under TRS-Care for himself and his dependents suspended unless TRS-Care receives full payment of all costs of coverage currently due and owing within thirty-one (31) days after TRS-Care mails written notice to the disability retiree of the current amount due and owing. Under such circumstances, the suspension

of coverage will be effective at midnight of the last day of the month in which TRS-Care mailed the above written notice to the disability retiree of the current amount due and owing. During such a suspension, coverage under TRS-Care will cease and the costs of coverage for TRS-Care will no longer accrue.

(h) If TRS resumes payment of an annuity to a disability retiree whose coverage has been suspended as described in subsection (g) of this section, the following shall apply:

(1) Such disability retiree shall pay, no later than the last day of the month in which TRS resumes annuity payments to the disability retiree, all costs of coverage due and owing attributable to the participation of that disability retiree and the dependents of that disability retiree, including past due amounts for coverage prior to the suspension and the costs of coverage for all months during which the disability retiree's annuity payments are resumed, if any.

(2) Upon payment, reinstatement of TRS-Care coverage shall be effective the first day of the earliest month for which the disability retiree's annuity payments are resumed.

(3) If payment in full of all required contributions then due and owing is not timely received by TRS-Care, then notwithstanding subsections (d) and (e) of this section:

(A) TRS-Care coverage for the dependents of that disability retiree shall be terminated effective the last day of the month in which coverage was suspended under subsection (g) of this section;

(B) TRS-Care coverage for the disability retiree enrolled in TRS-Care 2 or TRS-Care 3 prior to the suspension, as applicable, will terminate effective the last day of the last month during which the disability retiree's coverage was suspended and the disability retiree will be enrolled in TRS-Care 1, effective the first day of the earliest month for which the disability retiree's annuity payments are resumed following the suspension, resulting in a decrease in coverage; and

(C) TRS-Care coverage for the disability retiree enrolled prior to the suspension in TRS-Care 1 will resume effective the first day of the earliest month for which the disability retiree's annuity payments are resumed following the suspension. The disability retiree will not be able to change his TRS-Care coverage tier or add dependents unless and until the disability retiree has an additional enrollment opportunity as set out in §41.2 of this title (relating to Additional Enrollment Opportunity) or some other opportunity under Insurance Code, §1575.161.

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

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705405
Ronnie G. Jung
Executive Director
Teacher Retirement System of Texas
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 542-6438

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.5

The Texas Commission on Fire Protection (the Commission) proposes an amendment to Chapter 421, Standards for Certification, §421.5, Definitions, regarding college credits. The purpose of this proposed amendment is to allow the Commission to accept college courses from an institution that has been accredited by a nationally recognized accrediting agency as approved by the U.S. Secretary of Education.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that, for the first five-year period the proposed amendment is in effect, there will be no fiscal impact on state or local governments.

Jake Soteriou has also determined that, for each year of the first five years the proposed amendment is in effect, there will be a public benefit anticipated as a result of enforcing the amendments in that other college courses approved by a nationally accredited agency will be accepted for higher levels of certification. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with these proposed amendments.

Comments regarding these proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

This amendment is proposed under Texas Government Code, §419.028, which allows the Commission to authorize training programs and instructors.

Cross reference to statute: Texas Government Code, §419.030.

§421.5. Definitions.

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

(1) - (10) (No change.)

(11) College credits--Credits earned for studies satisfactorily completed at an [~~a regionally accredited~~] institution of higher education accredited by an agency recognized by the U.S. Secretary of Education and including National Fire Academy (NFA) open learning program colleges, or courses recommended for college credit by the American Council on Education (ACE) or delivered through the National Emergency Training Center (both EMI and NFA) programs. A course of study satisfactorily completed and identified on an official transcript from a college or in the ACE National Guide that is primarily related to Fire Service, Emergency Medicine, Emergency Management, or Public Administration is defined as applicable for Fire Science college credit, and is acceptable for higher levels of certification.

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

Filed with the Office of the Secretary of State on November 9, 2007.

TRD-200705499
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 936-3838

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CHAPTER 427. TRAINING FACILITY CERTIFICATION
SUBCHAPTER A. ON-SITE CERTIFIED TRAINING PROVIDER

37 TAC §427.1

The Texas Commission on Fire Protection (the Commission) proposes an amendment to Chapter 427, Training Facility Certification, regarding Subchapter A, §427.1, Minimum Standards for Certified Training Facilities for Fire Protection Personnel. The purpose of this proposed amendment is to require all certified training providers to submit in writing all requests to provide certification training and all requests for course deviations.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each year of the first five years the proposed amendment is in effect, there will be a public benefit anticipated as a result of enforcing the amendment. This will allow for the timely approval and scheduling of courses and provide documentation of course deviations. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with these proposed amendments.

Comments regarding this proposed amendment may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

This amendment is proposed under Texas Government Code, §419.0341 which allows the Commission to request, in writing, satisfactory evidence to the Commission regarding all training certifications.

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

§427.1. Minimum Standards for Certified Training Facilities for Fire Protection Personnel.

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

(g) All training for certification must be submitted to the commission in writing for approval at least 20 days prior to the proposed starting date of the training. Approved courses are subject to audit by commission staff any time during the approved schedule. Any deviation in the approved course schedule or content must be reported to the commission within three business days of the deviation. The academy coordinator will:

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

(h) (No change.)

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

Filed with the Office of the Secretary of State on November 9, 2007.

TRD-200705501
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 936-3838

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CHAPTER 431. FIRE INVESTIGATION
SUBCHAPTER A. MINIMUM STANDARDS FOR ARSON INVESTIGATOR CERTIFICATION

37 TAC §431.3

The Texas Commission on Fire Protection (the Commission) proposes an amendment to Chapter 431, Fire Investigation, regarding Subchapter A, §431.3, Minimum Standards for Basic Arson Investigator Certification. The purpose of this proposed amendment is to make a subparagraph out of the "Note" portion of this section of the rule to make it more readable.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that for the first five-year period this proposed amendment is in effect there will be no fiscal impact on state or local governments.

Mr. Soteriou has also determined that for each year of the first five years this proposed amendment is in effect, there will be no public benefit anticipated as a result of enforcing this amendment. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with this proposed amendment.

Comments regarding this proposed amendment may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

This amendment is proposed under Texas Government Code, §419.008, which provides the Commission with the authority to propose rules for the administration of its powers and duties.

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

§431.3. Minimum Standards for Basic Arson Investigator Certification.

(a) In order to be certified by the commission as a Basic Arson Investigator an individual must:

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

(4) complete a commission approved basic fire investigation training program and successfully pass the commission examination as specified in Chapter 439 of this title (relating to Examination for

Certification). An approved fire investigation training program shall consist of one of the following:

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

(D) successful completion of the following college courses: Arson Investigator, 3 semester hours; Hazardous Materials, 3 semester hours; Building Construction, 3 semester hours; Fire Protection Systems, 3 semester hours. Total semester hours, 12.

(E) NOTE: The three semester hour course "Building Codes and Construction" may be substituted for Building Construction. Arson Investigator I or II may be used to satisfy the requirements of Arson Investigation. Hazardous Materials I or II may be used to satisfy the requirements of Hazardous Materials.

(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 November 9, 2007.

TRD-200705503
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 936-3838

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CHAPTER 437. FEES

37 TAC §437.15

The Texas Commission on Fire Protection (the Commission) proposes an amendment to Chapter 437, Fees; §437.15, International Fire Service Accreditation Congress (IFSAC) Seal Fees. The purpose of this proposed amendment is to increase the fee to cover the cost of processing the application.

Jake Soteriou, Director of the Fire Service Standards and Certification Division, has determined that, for the first five-year period this proposed amendment is in effect, there will be no fiscal impact on state or local governments. These seals are not required by the state. Individuals who apply for these seals pay the fee themselves.

Jake Soteriou has also determined that, for each year of the first five years this proposed amendment is in effect, there will be no public benefit anticipated as a result of enforcing this amendment. There are no additional costs of compliance for small or large businesses or individuals that are required to comply with this proposed amendment.

Comments regarding this proposed amendment may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Gary L. Warren, Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mailed to info@tcfp.state.tx.us. Comments will be reviewed and discussed at a future Commission meeting.

This amendment is proposed under Texas Government Code, §419.026, which provides the Commission with the authority to set and collect fees for examinations and certificates.

There is no cross reference to this statute.

§437.15. International Fire Service Accreditation Congress (IFSAC) Seal Fees.

A non-refundable $10.00 [~~$5.00~~] fee shall be charged for each IFSAC seal issued by the commission.

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

Filed with the Office of the Secretary of State on November 9, 2007.

TRD-200705504
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 936-3838

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 5. TEXAS VETERANS LAND BOARD

CHAPTER 175. GENERAL RULES OF THE VETERANS LAND BOARD

SUBCHAPTER B. MORTGAGE FINANCING

40 TAC §§175.54, 175.56, 175.58, 175.59, 175.62

The Veterans Land Board of the State of Texas (the "Board") proposes amendments to the following sections of Title 40, Part 5, Chapter 175, Subchapter B of the Texas Administrative Code: §175.54 (relating to "Protection of Security Interests"), §175.56 (relating to "Fees, Loan Amount, Interest Rate, and Down Payment"), §175.58 (relating to "Removal of Material Assets, Releases, and Payment in Full"), §175.59 (relating to "Easements and Mineral Leases"), and §175.62 (relating to "Trustee's Sale") of the General Rules of the Veteran Land Board. One amendment is proposed as a result of the amendment to §161.503 of the Texas Natural Resources Code. That amendment would eliminate any requirement for private mortgage insurance. The other amendments would eliminate certain requirements the board finds unnecessary, and would allow the Board to require a down payment that conforms to its credit, underwriting, and appraisal standards.

Section 161.503(d) of the Texas Natural Resources Code authorizes the Board to adopt rules to implement Subchapter K loans, known as the mortgage loans. The Board finds that it serves the best interest of the programs if the rules are changed as proposed.

Section 161.503(c) of the Texas Natural Resources Code was amended to remove the requirement for mortgage insurance. The amendment to §175.54 would delete the mortgage insurance requirement in the rules and would require the Board to adopt credit, underwriting, and appraisal standards to protect the program. This amendment would match the change to §161.503(c).

Section 175.56(f) limits the down payment to 5% of the purchase price. Section 175.55(b) allows the veteran to increase his down payment if the Board approves a loan for an amount less than was requested by the borrower. The Board finds that the 5% maximum down payment required in §175.56(f) is in conflict with §175.55(b). The Board also finds that if it adopts credit, underwriting, and appraisal standards to protect the program, the amount of the down payment from each purchaser may have to vary and cannot be limited to 5%. The amendment to §175.56(f) would end any limitation on the down payment amount. This change would eliminate any conflict with §175.55(b). This would also allow the Board to require additional down payment if required by credit, underwriting or appraisal standards adopted by the Board.

The Board finds that requiring that a borrower obtain the Board's approval of a sale of a material asset, a grant of easement, or an oil and gas leases is unnecessary in a mortgage loan. Requiring such approval does not provide sufficient benefit to the program to justify the process. The amendments to §175.58 and §175.59 would end those requirements.

The Board finds that the program may benefit if repossessed mortgaged property is sold at a private sale. The amendment to §175.62 would allow the program the flexibility of selling repossessed mortgaged property at either private sale, or, through the bidding process presently used for forfeited contract property.

Paul E. Moore, Executive Secretary of the Veterans Land Board, has determined that for each year of the first five years that the sections as proposed will be in effect, there will be no significant fiscal implication to state or local government as a result of enforcing or administering the sections as amended.

Mr. Moore has determined that for each year of the first five years that the sections as proposed will be in effect, the public will benefit because the proposed amendments will allow the Board to make loans that comply with the statute and will streamline the program.

Mr. Moore has determined that the proposed amendments will have no significant effect on small businesses during each year of the first five years the sections are in effect.

Mr. Moore has also determined that during each year of the first five years the proposed amendments are in effect, the anticipated economic cost to persons who are required to comply with the sections will be insignificant. Persons who seek financing from the Board through the Program will pay the same fees to the Board and costs to third parties, as previously required.

Mr. Moore has determined that during each year of the first five years the proposed amendments are in effect, the anticipated impact on local employment will be insignificant.

Comments may be submitted to Walter Talley, Texas General Land Office, Legal Services, 1700 North Congress Avenue, Austin Texas, facsimile (512) 463-6311, by no later than 30 days after publication.

The amendments to these sections are proposed under the Texas Natural Resources Code, Title 7, Chapter 161, §161.503. This section authorizes the Board to adopt rules that it considers necessary and advisable for the Land Mortgage Program.

The proposed amendments affect §§161.501 - 161.515 of the Texas Natural Resources Code.

§175.54. Protection of Security Interests.

(a) (No change.)

(b) The security for the board's loan will be provided by:

(1) (No change.)

[~~(2) Mortgage insurance providing for repayment of at least 50% of the total outstanding principal balances of all loans, or repayment of at least 50% of all anticipated losses, based upon an analysis and forecast of potential losses shown by the actual experience of the mortgage lending industry on similar types of loans. The board may contract with a mortgage insurance company for pooled coverage or with individual companies for insurance on each loan, or the board may elect to be self insured in part or in whole.~~]

(2) [~~(3)~~] Hazard insurance on any improvements securing the loan. The policy must name the board loss payee in at least the amount of the board's loan.

(c) The board shall adopt credit, underwriting, and appraisal standards that protect the best interest of the program and limit the exposure of the fund to any losses.

§175.56. Fees, Loan Amount, Interest Rate, and Down Payment.

(a) - (e) (No change.)

(f) The chairman, in compliance with §175.6 and §175.55 of this chapter, shall [~~board may by resolution~~] set the amount of the down payment required of borrowers. [~~The down payment shall not exceed five percent (5.0%) of the total purchase price of the land.~~] This down payment shall be paid to the closing agent at or before closing.

§175.58. Removal of Material Assets, Releases, and Payment in Full.

(a) The borrower is liable to the board for any decrease in value of the land due to any sale or removal of [~~shall not sell or remove~~] timber, rock, gravel, sand, chemicals, or other material assets, the loss of which tends to lower the value of the land[~~, except as provided by §175.13, relating to Sale of Material Assets, and Improvements, of this chapter~~].

(b) - (c) (No change.)

§175.59 Easements and Mineral Leases.

A borrower may grant easements or rights of way, or execute mineral leases over or covering the land being purchased with a loan from the board. Borrower is liable to the board for any decrease in value of the land due to any grant of easement or lease of minerals by the borrower.

[~~(a) A borrower may grant easements or rights of way by obtaining the written permission of the board and paying the fee required in §175.17, relating Fees and Deposits, of this chapter.~~]

[~~(b) If the borrower wishes to execute mineral leases covering the land being purchased with a loan from the board, the following conditions must be met:~~]

[~~(1) No oil and gas lease will be approved unless the board's standard form is used. Copies of this form will be furnished upon request.~~]

[~~(2) The lease must be approved by the chairman, executive secretary, or assistant executive secretary of the board.~~]

[~~(3) The applicable requirements of §175.14, relating to Mineral Leases, of this chapter, must be satisfied.~~]

§175.62. Trustee's Sale.

(a) The chairman may bid for the land at any trustee's sale for any amount that the chairman deems to be in the best interest of the program. All land purchased by the Board at a foreclosure sale shall be resold by private sale according to the practices prevalent in the mortgage industry, or, in the same manner as forfeited land under §175.18 of this title.

(b) - (c) (No change.)

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

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705428
Trace Finley
Deputy Commissioner, Policy and Governmental Affairs
Texas Veterans Land Board
Earliest possible date of adoption: December 23, 2007
For further information, please call: (512) 475-1859

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 358. MEDICAID ELIGIBILITY SUBCHAPTER E. INCOME

1 TAC §358.450

Pursuant to House Bill (HB) 52, 80th Legislature, Regular Session, 2007, amending Subchapter A, Chapter 32 of the Human Resources Code, the Texas Health and Human Services Commission (HHSC) adopts an amendment to §358.450(h), concerning General Principles Concerning Income, without changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6228) and will not be republished.

This amendment is adopted to clarify that HHSC sets the Personal Needs Allowance (PNA) in accordance with Chapter 32 of the Human Resources Code. House Bill 52 raised the minimum PNA to $60 a month. This amendment allows the Executive Commissioner of HHSC to set the PNA at $60 or more, without the necessity of further amendments to the rule.

Background and Justification

The 80th Texas Legislature passed HB 52 which increased the minimum PNA amount. The PNA is established by federal law to provide Medicaid residents in long-term care facilities funds to purchase goods and services. The federal minimum PNA is $30 a month. House Bill 52 makes the statutory change to raise the minimum PNA from $45 to no less than $60 per month, conforming statute to current practice.

Rule Change Summary

This amendment removes the reference to the Department of Human Services Commissioner and substitutes a reference to the Health and Human Services Executive Commissioner as the official who sets the amount of the PNA. The rule also deletes the reference to the $45 minimum PNA and allows for HHSC to set the PNA in any amount consistent with Chapter 32 of the Human Resources Code.

HHSC received no comments on the amendment. The Medical Care Advisory Committee voted to support this amendment at its July 12, 2007 meeting. The HHSC Council voted to support this amendment at its August 6, 2007 meeting.

The amendment is adopted under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code, §32.021 and the Texas Government Code, §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705384
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: November 27, 2007
Proposal publication date: September 14, 2007
For further information, please call: (512) 424-6900

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

10 TAC §1.20

The Texas Department of Housing and Community Affairs (the Department) adopts amendments to §1.20, concerning Asset Resolution and Contract Enforcement. The amendments are adopted without change to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5845) and will not be republished.

The adopted amendments eliminate references to compliance penalties which are now addressed as administrative penalties in Chapter 60, Subchapter C of this title. The amended section also defines a process for the disposition of department assets for which early delinquency intervention and workout approaches have not been successful and provides a process for enforcing Department contracts.

Public hearings on the adopted amendments were held in El Paso (September 24, 2007); Lubbock (September 28, 2007); Brownsville (October 3, 2007); Houston (September 26, 2007); Dallas (October 1, 2007); and Austin (October 4, 2007). Additionally, written comments on the amendments to the rule were accepted by mail, e-mail, and facsimile through October 10, 2007.

SUMMARY OF COMMENTS AND STAFF RESPONSES

Public comments on the proposed amendments were received by the Rural Rental Housing Association of Texas ("RRHA").

COMMENT: RRHA expressed a concern that anytime the Department considers imposing debarments of a year that the Department be sure that the debarment has been well thought out and that there would be no unintended consequences.

STAFF RESPONSE: The Department agrees with commenter that debarment is a serious consequence that may affect the livelihood of the person referred for debarment. However, Staff believes there are sufficient procedural safeguards in place to protect the rights of persons referred for debarment. The debarment process provides for notice and opportunity for participation by the referred person, at least three levels of review including the division director, the Department Review Committee, and the Board, the opportunity for ADR and for an appeal from the decision of the Review Committee. Accordingly, staff does not recommend any changes to the proposed amendments.

BOARD RESPONSE: The Board approved the final order adopting these amendments on November 8, 2007.

The amended section is adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically, §2306.053, which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306; §2306.124 which authorizes the Department to adopt and publish rules regarding the making of mortgage loans, the regulation of borrowers, and the resale and disposition of real property, or an interest in the property, that is financed by the Department; and §2306.124 which requires the Board to establish a schedule of fees and penalties relating to the operation of the finance division.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

TRD-200705535
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 2, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 475-3916

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10 TAC §1.22

The Texas Department of Housing and Community Affairs (the Department) adopts new §1.22 concerning Providing Current Contact Information to the Department without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5849) and will not be republished.

The adopted new section addresses the problems associated with updating business contact information with the Department. Currently, it is possible for several divisions doing business with the same person to have different contact information on file for that person. This can lead to problems when, for example, a tax credit application deficiency notice with a stated response deadline is delivered late to an applicant's place of business because the Department used an out-dated address, or when the Department sends a notice to an out-dated address notifying a person of a negative ruling from the Department on an issue that has an appeal deadline. The new section addresses the problem by providing a single point of contact within the Department (by mail, electronic mail and the Internet) where all persons doing business with the Department must provide updates to their business contact information. The rule further provides that updating is mandatory for persons doing business with the Department and that the Department may rely on the most recent contact information on file with the Department.

Public hearings on the new rule were held in El Paso (September 24, 2007); Lubbock (September 28, 2007); Brownsville (October 3, 2007); Houston (September 26, 2007); Dallas (October 1, 2007); and Austin (October 4, 2007). Additionally, written comments on the new rule were accepted by mail, e-mail, and facsimile through October 10, 2007.

There were no public comments concerning the adoption of this new section.

BOARD RESPONSE: The Board approved the final order adopting the new section on November 8, 2007.

The new section is adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically, §2306.053, which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306; §2306.053(b)(10) which gives the Department the authority to administer federal housing, community affairs or community development programs, including the low income housing tax credit program; and §2306.053(b)(13) which authorizes the Department to obtain, retain, and disseminate records and other documents in electronic form.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

TRD-200705536
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 2, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 475-3916

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CHAPTER 7. TEXAS FIRST-TIME HOMEBUYER PROGRAM

10 TAC §§7.1 - 7.9

The Texas Department of Housing and Community Affairs (the Department) adopts new §§7.1 - 7.9, concerning the Texas First-Time Homebuyer Program. Chapter 7 is adopted without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5867) and will not be republished.

The new chapter implements new Subchapter MM of the Texas Government Code, Chapter 2306, as amended by H.B. 1637

and S.B. 1908 in the 80th Regular Legislative Session, and other provisions of Texas Government Code, Chapter 2306, authorizing the Department to administer federal housing programs. The new chapter relates to the Department's operation and administration of the Texas First-Time Homebuyers Program which will facilitate the origination of single-family mortgage loans for eligible first-time homebuyers, down payment and closing cost assistance, and the issuance of mortgage credit certificates.

Title 10 Texas Administrative Code, Chapter 7 implements Subchapter MM of the Texas Government Code, Chapter 2306, as amended by H.B. 1637 and S.B. 1908 in the 80th regular legislative session. The new chapter relates to the Department's operation and administration of the Texas First time Homebuyer Program which facilitates the origination of single family mortgage loans for eligible first time homebuyers, downpayment and closing cost assistance and the issuance of mortgage credit certificates.

The new rule is separated into several sections. Section 7.3 relates to the program eligibility requirements; including the availability of downpayment and closing cost assistance for borrowers whose income does not exceed 80% of the area median family income, the application procedures applicable on applications filed on or after January 1, 2008 and the application fees that may be charged by participating mortgage lenders. This section of the rule implements the legislature's directive to make available downpayment and closing cost assistance to borrowers earning up to 80% of the area median family income.

Section 7.4 of the rule outlines the criteria for approving participating mortgage lenders. The criteria include the maintenance of a loan origination office in Texas for one year, approval by the Federal Housing Administration ("FHA), Veteran's Administration ("VA"), Rural Housing Services ("RHS") or Fannie Mae and/or Freddie Mac. Additionally, mortgage lenders must have a minimum net worth as required by the program's master servicer, agree to originate and assign mortgages and servicing to the Department's master servicer, originate, process underwrite, close and fund originated loans in the mortgage lender's own name and be an approved seller/servicer with the program's master servicer.

The First Time Homebuyer Program occupancy and use requirements are addressed in §7.6. This portion of the rule requires the first time homebuyer to occupy the home within 60 days after the closing date as required in the Affidavit of Eligible Borrower. It also prohibits the use of the property as an investment/rental property or vacation/second home. First time homebuyers may also not use more than 15% of the residence in a trade or business on a regular basis for compensation.

Section 7.7 relates to the Department's contract requirements with the mortgage lenders. As a participant in the program, a mortgage lender must execute a master mortgage origination agreement, a mortgage lender questionnaire, opinion of counsel to mortgage lender and board resolution. Upon each program release, a mortgage lender must also submit to the Department an offer to originate mortgage loans for each new bond program.

Public hearings on the new rules were held in El Paso (September 24, 2007), Lubbock (September 28, 2007), Brownsville (October 3, 2007), Houston (September 26, 2007), Dallas (October 1, 2007), and Austin (October 4, 2007). Additionally, written comments on the new rules were accepted by mail, e-mail, and facsimile through October 10, 2007.

No comments were received regarding adoption of these new sections.

The Board approved the final order adopting this Chapter on November 8, 2007.

The new sections are adopted pursuant to authority granted in Chapter 2306, Texas Government Code, Subchapter MM, which establishes the Texas First-Time Homebuyer Program; and specifically §2306.1073 which requires the Department to adopt rules governing the program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-3916

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CHAPTER 51. HOUSING TRUST FUND RULES

10 TAC §§51.1 - 51.11

The Texas Department of Housing and Community Affairs (Department) adopts the repeal of §§51.1 - 51.11, concerning the Housing Trust Fund Rules. The repeal is adopted without changes to the proposal as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5932) and will not be republished.

This repeal is adopted in order to promulgate new sections governing the Housing Trust Fund, to coordinate the adoption of new Housing Trust Fund rules with new rules being adopted as part of the 2008 rule cycle and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Public hearings concerning the proposed repeal of the rules were held in El Paso (September 24, 2007), Lubbock (September 28, 2007), Brownsville (October 3, 2007), Houston (September 26, 2007), Dallas (October 1, 2007), and Austin (October 4, 2007). Additionally, written comments on the repeal of the rules were accepted by mail, e-mail, and facsimile through October 10, 2007.

No comments were received regarding adoption of the repeal.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 51. HOUSING TRUST FUND RULE

10 TAC §§51.1 - 51.17

The Texas Department of Housing and Community Affairs (the Department) adopts new Chapter 51, §§51.1 - 51.17, concerning the Housing Trust Fund Rule. Section 51.2 is adopted with changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5932). Sections 51.1 and 51.3 - 51.17 are adopted without changes and will not be republished.

The new chapter is adopted to coordinate current Housing Trust Fund rules with the new rules being adopted as part of the 2008 rule cycle and to implement changes enacted during the 80th regular session of the Texas Legislature.

Public hearings on the new rules were held in El Paso (September 24, 2007), Lubbock (September 28, 2007), Brownsville (October 3, 2007), Houston (September 26, 2007), Dallas (October 1, 2007), and Austin (October 4, 2007). Additionally, written comments on the new rules were accepted by mail, e-mail, and facsimile through October 10, 2007.

JUSTIFICATION FOR RULE ACTION

The new rules ensures compliance with statutory requirements as per changes in Chapter 2306, Texas Government Code during the 80th legislative session. In order to offer consistency and uniformity among housing programs, changes were made to the rule in the areas of definition. One change since the September 7th publication in the *Texas Register,* based on public comment on other housing program rules, was incorporated into this rule to maintain uniformity across housing program definitions. To provide clarity regarding administrative processes, additional sections were added to assist in formalizing those program processes. Finally, to streamline and update certain processes, some sections were removed or collapsed with other relevant sections.

SUMMARY OF RULE COMMENTS:

Public comments on the proposed rule were received by the City of El Paso.

COMMENT: There are pressing housing needs in the City of El Paso and the City would like to leverage existing funds and identify opportunities to work with the State of Texas Housing Trust Fund to make housing opportunities available for residents in the state including urban areas.

STAFF RESPONSE: Items not referring to or addressing a specific section of the Housing Trust Fund Rule have not been directly addressed by changes in this rule. Staff welcomes general comments regarding the Housing Trust Fund. As always, the Department values working with local communities on their specific housing needs.

STAFF CORRECTION: Section 51.2(45) was corrected to read as follows:

(45) Persons with Disabilities--A Household composed of one or more persons, at least one of whom is a Person, who has a disability that is a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such an impairment as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15002).

The Board approved the final order adopting these sections on November 8, 2007.

The new sections are adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically §2306.053 which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306, and §2306.203 which requires the Board to adopt rules to administer the Housing Trust Fund.

§51.2. Definitions.

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

(1) Administrative Deficiencies--The absence of information or a document from the application as required in this rule or applicable NOFA.

(2) Administrator--The Person responsible for performing under a Contract with the Department.

(3) Affiliate--An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, Controls, is Controlled by, or is under common Control with any other Person, and specifically shall include parents or subsidiaries. Affiliates also include all General Partners, Special Limited Partners and Principals with an ownership interest.

(4) Affiliated Party--A Person in a relationship with the Administrator on a Contract with the Department.

(5) Applicant--A person who has submitted an Application for Department funds or other assistance.

(6) Application--A request for funds submitted to the Department in a form prescribed by the Department, including any exhibits or other supporting material.

(7) Application Acceptance Period--The period of time that Applications may be submitted to the Department as more fully described in the applicable NOFA.

(8) Application Submission Procedures Manual ("ASPM")--The manual which sets forth the procedures, forms and instructions for the completion and submission of an Application to the Department.

(9) Area Median Family Income ("AMFI")--The income estimated and determined by HUD as the median family income with adjustments for family size and geographic locations.

(10) Articles of Incorporation--The document that sets forth the basic terms for a corporation's existence and is the official recognition of the corporation's existence.

(11) Board--The governing board of the Texas Department of Housing and Community Affairs.

(12) Capacity Building--Educational and organizational support assistance to promote the ability of community housing development organizations and nonprofit organizations to maintain,

rehabilitate and construct housing for low, very low, and extremely low-income persons and families. This activity may include:

(A) organizational support to cover expenses for housing development or management related training, technical and other assistance to the board of directors, staff, and members of the nonprofit organizations or community housing development organizations;

(B) technical assistance and training related to housing development, housing management, or other subjects related to the provision of housing or housing services; or

(C) studies and analyses of housing needs.

(13) Chapter 2306--The enabling statute for the Department found in Texas Government Code, Chapter 2306.

(14) Colonia--A geographic area that is located in a county some part of which is within 150 miles of the international border of this state that consists of 11 or more dwellings that are located in close proximity to each other in an area that may be described as a community or neighborhood, and that:

(A) has a majority population composed of individuals and families of low income and very low income, based on the federal Office of Management and Budget poverty index, and meets the qualifications of an economically distressed area under §17.921, Water Code; or

(B) has the physical and economic characteristics of a colonia, as determined by the Texas Water Development Board.

(15) Colonia Housing Standards--The Department's HUD approved housing standards that allows Colonia residents with the opportunity to rehabilitate their homes when located in a designated Colonia.

(16) Competitive Application Cycle--A defined period of time that Applications may be submitted according to a published Notice of Funding Availability (NOFA). Applications will be reviewed in accordance with the rules for application review published in the NOFA, and the ASPM.

(17) Control--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership or voting securities, by contract or otherwise, including specifically ownership of more than 50% of the General Partner interest in a limited partnership, or designation as a managing General Partner of a limited liability company.

(18) Contract--The executed written agreement between the Department and an Administrator performing an activity related to a program that outlines performance requirements and responsibilities assigned by the document.

(19) Deobligated Funds--The funds released by an Administrator or Contractor or recovered by the Department canceling a contract or award involving some or all of a contractual financial obligation between the Department and an Administrator or contractor.

(20) Department--The Texas Department of Housing and Community Affairs.

(21) Developer--Any Person entering into a contract with the Development Owner to provide development services with respect to the Development and receiving a fee for such services and any other Person receiving any portion of such fee, whether by subcontract or otherwise.

(22) Development--A Project that has a construction component, either in the form of new construction or the rehabilitation of multi-unit or single family residential housing that meet the affordability requirements.

(23) Development Funding--

(A) a loan or grant; or

(B) an in-kind contribution, including a donation of real property, a fee waiver for a building permit or for water or sewer service, or a similar contribution that:

(i) provides an economic benefit; and

(ii) results in a quantifiable cost reduction for the applicable development.

(24) Development Owner--Any Person, General Partner, or Affiliate of a Person who owns or proposes a Development or expects to acquire Control of a Development under a purchase contract approved by the Department.

(25) Development Site--The area, or if scattered site areas, for which the Development is proposed to be located and is to be under the Development Owner's Control.

(26) Executive Award and Review Advisory Committee ("The Committee")--The Department committee that will develop funding priorities and make funding and allocation recommendations to the Board based upon the evaluation of an Application in accordance with the housing priorities as set forth in Chapter 2306, Texas Government Code, and as set forth herein, and the ability of an Applicant to meet those priorities.

(27) General Contractor--One who contracts for the construction or Rehabilitation of an entire Development, rather than a portion of the work. The General Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the subcontractors.

(28) General Partner--The partner, or collective of partners, identified as the general partner of the partnership that is the Development Owner and that has general liability for the partnership. In addition, unless the context shall clearly indicate the contrary, if the Development Owner in question is a limited liability company, the term "General Partner" shall also mean the managing member or other party with management responsibility for the limited liability company.

(29) Grant--Financial assistance that is awarded in the form of money to a housing sponsor for a specific purpose and that is not required to be repaid. For purposes of this chapter, a Grant includes a forgivable loan.

(30) Household--One or more persons occupying a housing unit.

(31) Housing Development Costs--The total of all costs incurred, or to be incurred, by the Development Owner in acquiring, constructing, rehabilitating and financing a Development as determined by the Department based on the information contained in the Application. Such costs include reserves and any expenses attributable to commercial areas.

(32) HUD--The United States Department of Housing and Urban Development, or its successor.

(33) Intergenerational Housing--Housing that includes specific units that are restricted to the age requirements of a Qualified Elderly Development and specific units that are not age restricted in the same Development that:

(A) have separate and specific buildings exclusively for the age restricted units;

(B) have separate and specific leasing offices and leasing personnel exclusively for the age restricted units;

(C) have separate and specific entrances, and other appropriate security measures for the age restricted units;

(D) provide shared social service programs that encourage intergenerational activities but also provide separate amenities for each age group;

(E) share the same Development site;

(F) are developed and financed under a common plan and owned by the same Person for federal tax purposes; and

(G) meet the requirements of the federal Fair Housing Act.

(34) Income Eligible Households--

(A) Low-Income Households--Households whose annual incomes do not exceed 80% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(B) Very Low-Income Households--Households whose annual incomes do not exceed 60% of the median family income for the area, as determined by HUD and published by the Department, with adjustments for family size.

(C) Extremely Low Income Households--Households whose annual incomes do not exceed 30% of the median income of the area, as determined by HUD and published by the Department, with adjustments for family size.

(35) Land Use Restriction Agreement ("LURA")--A Land Use Restriction Agreement that has been executed by the Department and a Person related to a specific property or properties and filed with the responsible recording authority.

(36) Loan Agreement--An agreement between the Department and a Person regarding the terms and conditions of a loan provided to the Person from the Department.

(37) Material Noncompliance--As is defined in Title 10 Texas Administrative Code, Chapter 60, Subchapter A.

(38) Memorandum of Understanding (MOU)--A written agreement detailing the understanding between the parties.

(39) Mortgagor ("Borrower")--The Person who borrows money and uses his or her real property as collateral and security for the payment of the debt.

(40) New construction--Any Development not meeting the definition of Rehabilitation or Reconstruction.

(41) NOFA--Notice of Funding Availability, published in the *Texas Register.*

(42) Nonprofit Organization--A public or private organization that:

(A) is organized under state or local laws;

(B) has no part of its net earnings inuring to the benefit of any member, founder, contributor, or individual;

(C) has a current tax exemption ruling from the Internal Revenue Service (IRS) under §501(c)(3), a charitable, nonprofit corporation, or §501(c)(4), a community or civic organization, of the Internal Revenue Code of 1986, as evidenced by a certificate from the IRS that is dated 1986 or later. The exemption ruling must be effective on the date of the application and must continue to be effective throughout the length of any contract agreements; or classification as a subordinate of a central organization non-profit under the Internal Revenue Code, as evidenced by a current group exemption letter, that is dated 1986 or later, from the IRS that includes the Applicant. The group exemption letter must specifically list the Applicant; and

(D) A private nonprofit organization's pending application for §501(c)(3) or (c)(4) status cannot be used to comply with the tax status requirement.

(43) Open Application Cycle--A defined period during which applications may be submitted according to a published NOFA and which will be reviewed on a first come-first served basis until all funds available are committed, or until the NOFA is closed.

(44) Person--Any individual, partnership, corporation, association, unit of government, community action agency, or public or private organization of any character.

(45) Persons with Disabilities--A Household composed of one or more persons, at least one of whom is a Person, who has a disability that is a physical or mental impairment that substantially limits one or more major life activities; has a record of such impairment; or is regarded as having such an impairment as defined in the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. §15002).

(46) Person with Special Needs--Individuals or categories of individuals determined by the Department to have unmet housing needs:

(A) consistent with 42 USC §12701 et seq. and as provided in the Consolidated Plan and may include any households composed of one or more persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, victims of domestic violence, persons with HIV/AIDS, homeless populations and migrant farm workers.

(B) Housing Trust Funds may also be awarded through Persons legally responsible for caring for a Person with Special Needs, pursuant to §2306.511, Texas Government Code.

(47) Predevelopment Costs--Reimbursable costs related to a specific eligible housing project including:

(A) Predevelopment housing project costs that the Department determines to be customary and reasonable, including but not limited to consulting fees, architectural fees, engineering fees, engagement of a development team, site control, and title clearance;

(B) Pre-construction housing project costs that the Department determines to be customary and reasonable, including but not limited to, the costs of obtaining architectural plans and specifications, zoning approvals, engineering studies and legal fees; and

(C) Predevelopment costs do not include general operational or administrative costs.

(48) Principal--Any Person that does or will exercise Control over a partnership, corporation, limited liability company, trust or any other private entity. In the case of:

(A) Partnerships, Principals include all General Partners, Special Limited Partners and Principals with ownership interest;

(B) Corporations, Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer and all other executive officers, and each stock holder having a ten percent or more interest in the corporation; and

(C) Limited liability companies, Principals include all managing members, members having a ten percent or more interest in

the limited liability company or any officer authorized to act on behalf of the limited liability company.

(49) Project--A site or an entire building (including a manufactured housing unit), or two or more buildings, together with the site or sites on which the building or buildings are located, that are under common ownership, management, and financing.

(50) Property--The real estate and all improvements thereon which are the subject of the Application whether currently existing or proposed to be built thereon in connection with the Application.

(51) Public Housing Authority--A housing authority established under the Texas Local Government Code, Chapter 392.

(52) Received Date--The date and time at which an Application is actually received by the Department.

(53) Rehabilitation--The improvement or modification of an existing residential development through an alteration, addition, or enhancement. The term includes the demolition of an existing residential development and the reconstruction of any development units, but does not include the improvement or modification of an existing residential development for the purpose of an adaptive reuse of the development.

(54) Resolution--Formal action by a corporate board of directors or other corporate body authorizing a particular act, transaction, or appointment. Resolutions must be in writing and state the specific action that was approved and adopted, the date the action was approved and adopted, and the signature of Person or Persons authorized to sign resolutions. Resolutions must be approved and adopted in accordance with the corporate Bylaws.

(55) Rural Area--An area that is located:

(A) outside the boundaries of a primary metropolitan statistical area or a metropolitan statistical area;

(B) within the boundaries of a primary metropolitan statistical area or a metropolitan statistical area, if the statistical area has a population of 25,000 or less and does not share a boundary with an urban area; or

(C) in an area that is eligible for funding by the Texas Rural Development Office of the United States Department of Agriculture, other than an area that is located in a municipality with a population of more than 50,000.

(56) Rural Development--A development or proposed development that is located in a Rural Area, other than rural new construction Developments with more than 80 units.

(57) TAC--Texas Administrative Code.

(58) Third Party--A Person who is not:

(A) Applicant, General Partner, Developer, or General Contractor, or

(B) An Affiliate or a Related Party to the Applicant, General Partner, Developer or General Contractor, or

(C) Person(s) receiving any portion of the contractor fee or developer fee.

(59) Unit of General Local Government--A city, town, county, or other general purpose political subdivision of the State.

(60) Urban Area--The area that is located within the boundaries of a primary metropolitan statistical area other than an area described by §2306.004(28-a)(B), Texas Government Code, or eligible for funding as described by §2306.004(28-a)(C).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 60. COMPLIANCE ADMINISTRATION

SUBCHAPTER A. COMPLIANCE MONITORING

10 TAC §§60.1 - 60.22

The Texas Department of Housing and Community Affairs (Department) adopts the repeal of Chapter 60, §§60.1 - 60.22, concerning Compliance Administration. The repeal is adopted without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5943) and will not be republished.

The sections are adopted for repeal in order to promulgate new sections that will conform to other Department rules that are also being revised in the 2008 rule cycle and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Public hearings concerning the adopted repeal were held in El Paso (September 24, 2007); Lubbock (September 28, 2007); Brownsville (October 3, 2007); Houston (September 26, 2007); Dallas (October 1, 2007); and Austin (October 4, 2007). Additionally, written comments on the repeal of the rule were accepted by mail, e-mail, and facsimile through October 10, 2007.

No comments were received regarding this adopted repeal.

The repeal is adopted pursuant to the authority of the Texas Government Code, Chapter 2306 and the Internal Revenue Code of 1986, §42, as amended, which provide the Department with the authority to adopt rules governing the administration of the Department and its programs.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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10 TAC §§60.101 - 60.126

The Texas Department of Housing and Community Affairs (the Department) adopts new Chapter 60, Subchapter A, §§60.101 - 60.126, concerning Compliance Monitoring. Sections 60.102, 60.109, and 60.121 are adopted with changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5943). Sections 60.101, 60.103 - 60.108, 60.110 - 60.120, and 60.122 - 60.126 are adopted without changes to the proposed text and will not be republished.

The new subchapter ensures that the compliance monitoring rules conform to other Department rules that are being revised in the 2008 rule cycle and to implement changes enacted during the 80th Regular Session of the Texas Legislature.

Public hearings on the new rule were held in El Paso (September 24, 2007), Lubbock (September 28, 2007), Brownsville (October 3, 2007), Houston (September 26, 2007), Dallas (October 1, 2007), and Austin (October 4, 2007). Additionally, written comments on the new rule were accepted by mail, e-mail, and facsimile through October 10, 2007.

SUMMARY OF COMMENTS, STAFF RESPONSE AND BOARD ACTION

Public comments and the Department's responses are presented in the order in which the sections appear in new Subchapter A, starting with general comments for Subchapter A as a whole and ending with comments on §60.118. Following the section number is the title of the section as it appears in the rule. Following the title is a parenthetical containing a number or series of numbers. Each number corresponds to a person who commented on the particular rule section. Following the identification of the section and related commenters is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new sections.

Public comments on the new rule were received by (3) S. Anderson Consulting; (7) Texas Rio Grande Legal Aid, Inc.; (8) Texas Affiliation of Affordable Housing Providers; (15) Locke Lord Bissell & Liddell LLP; (23) Leslie Holeman & Associates; (24). Hance Financial; (26) Kelly Hunt & Associates; (27) Individual; (31) Texas Legal Services Center; (33) Tropicana Building Corporation; (35) Harris Co. UD 71; (50) Capstone Real Estate Services (Comment Withdrawn.); and, (59) Hamilton Valley.

REASONED RESPONSE TO PUBLIC COMMENT ON THE COMPLIANCE MONITORING RULES

GENERAL COMMENT (35): Comment was received about a specific property that was on the July 30, 2007 Board Agenda. The commenter did not provide any suggested changes to the Compliance Monitoring Rules.

STAFF RESPONSE: No change is recommended.

COMMENT (15):

§60.102(19). Definition of Material Noncompliance.

Comment was made that material noncompliance score thresholds should be increased to 40 for developments in years 10 through 15 of the compliance period and to 50 for developments in the extended use period since additional issues related to property condition arise as projects age.

STAFF RESPONSE: Staff does not recommend a change to accommodate aging developments. The purpose of conducting Uniform Physical Condition Standards inspections and basing material noncompliance scoring (in part) on the result of the inspections, is to ensure developments are maintained in good physical condition and offer safe, decent, and sanitary housing. UPCS inspections are designed to measure the overall condition of a development as a reflection of the maintenance provided. Raising the scoring threshold or otherwise modifying the inspection criteria for older developments would restrict the Department's ability to ensure owners maintain developments in good physical condition.

COMMENT (3, 8, 15, 23, 24, 26 and 27):

§60.102(21). Definition of Substantial Construction.

Comment was received suggesting different definitions of substantial construction to better and more accurately reflect the point of construction that should be achieved by December 1st of the year following the award.

STAFF RESPONSE: Based on the comments received, staff concurs that change and clarification is needed. These rules set a high standard for the commencement of substantial construction to allow for some delays such as weather. If a property meets the TDHCA definition of Substantial Construction by December 1 of the year following the award, the property is well positioned to Place in Service timely even in the event of unforeseen delays such as weather. In addition, if a property meets the TDHCA definition of Substantial construction by December 1 of the year following the award, construction may be completed in time for the spring, which is the peak leasing season. The most significant change is a reduction in the required percent of framing from 80% to 50%. Staff recommends the following language:

(21) Substantial Construction--

(A) The minimum activity necessary to meet the requirements of substantial construction for new Developments will be defined as:

(1) having building permits;

(2) the foundation of all residential buildings and the clubhouse in place;

(3) 50% of the framing is completed; and,

(4) at least 20% of the construction contract amount for the Development is expended, adjusted for any change orders, as certified by the inspecting architect.

(B) The minimum activity necessary to meet the requirement of Commencement of Substantial Construction for rehabilitation Developments will be defined as having:

1) building permits issued or a clearance from the City stating that building permits are not required;

2) a certification that there are no reasonably foreseeable issues or circumstances which may prevent or delay the start and progress of construction or the timely successful completion of rehabilitation; and,

3) at least 20% of the construction budget expended as documented by the inspecting architect.

COMMENT (31):

§60.105. Reporting Requirements.

Comment was received suggesting that owners should be required through the Annual Owner's Compliance Report to state the methodology that was used to calculate the property's utility allowance, the effect of their calculations on the allowances and any adjustments made to the tenant paid rent to ensure that the rents remain restricted.

STAFF RESPONSE: Staff does not recommend a change because the Annual Owner's Compliance Report already has several questions related to this issue. Owners are required to certify to the following questions which address utility allowances and rent restrictions:

"Has documentation been maintained to support the utility allowance applicable to each unit during this reporting period?"

"During this reporting period was each low income unit in the Development rent-restricted as required under the Land Use Restriction Agreement / Regulatory Agreement and applicable program regulations?"

"During this reporting period, did any resident have increases in gross rent with respect to a low-income unit not other wise permitted under program guidelines?"

COMMENT (31):

§60.105. Reporting Requirements.

Comment was received suggesting that the Department should presume that if the Annual Owner's Compliance Report is not received that the utility allowance has not been properly calculated.

STAFF RESPONSE: Staff does not recommend a change. Owners that do not submit the required annual report are cited under the noncompliance event "Failure to submit part or all of the AOCR or failure to submit any other annual, monthly, or quarterly report required by the Department". See Figure 10 TAC 60.121(k).

COMMENT (15):

§60.105(c). Reporting Requirements.

Comment was received stating that financial audits are not always completed during the first quarter of the year, which makes it difficult to submit audited financial reports with part D of the Annual Owner's Compliance Report.

STAFF RESPONSE: Staff does not recommend a change. An audited financial statement provides a more verified reflection of the year's financial status than an internally generated statement by the owner. Audited financial statements are typically required by tax credit investors as a prudent business practice. The existing rule allows for them to be provided on the last day of April or 120 days after the year end and after the April 15 tax return deadline. The Department uses the information in the audited financial statements to develop the operating expense database, to measure performance of other comparable developments, and to predict the operating performance of proposed developments.

COMMENT (33):

§60.109. Utility Allowances (General).

Comment was received stating that this section of the proposed rule is a reasonable change that will benefit tenants and the tax credit program in general. This section of the Rule also offers an excellent solution to an existing problem with utility allowances.

STAFF RESPONSE: Staff appreciates the support expressed for this section of the Rule.

COMMENT (7):

§60.109. Utility Allowances (General).

Comment was received pointing out that the Internal Revenue Service has issued proposed changes to Treasury Regulation 1.42-10 and that in light of their proposed revisions; the Department should take no action.

STAFF RESPONSE: Staff does not agree. It is not certain when the IRS will release final revisions to Treasury Regulation 1.42-10 or when the changes might be effective. In addition, this section of the Rule conforms to the proposed changes. Furthermore, if upon final adoption of Treasury Regulation 1.42-10, an amendment to §60.109 is needed the Department can make those changes accordingly.

COMMENT (7):

§60.109. Utility Allowances (General).

Comment was received that elderly and disabled tenants requiring special high energy consumptive equipment should be allowed to request a higher utility allowance. The commenter referenced 24CFR §982.517(e) which addresses the requirement of a Public Housing Authority to approve a utility allowance schedule if needed as a reasonable accommodation to make the program accessible to and usable by a family member with a disability.

STAFF RESPONSE: Staff does not recommend a change. Tenants already have the right to request reasonable accommodations to make a program accessible to a family member with a disability. This includes asking for a higher utility allowance to allow the use of specialized equipment.

COMMENT (7):

§60.109. Utility Allowances (General).

Comment was received suggesting that owners should be required to maintain and make available to residents documentation showing the data on which the utility allowance is based.

STAFF RESPONSE: Staff agrees that this is a reasonable requirement and proposes the following new paragraph to §60.109:

(h) The owner shall maintain and make available for inspection by the tenant the data upon which the utility allowance schedule is calculated. Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling unit of the tenant at the convenience of both the apartment owner and tenant.

COMMENT (7):

§60.109. Utility Allowances (General).

Comment was received that owners should be required to provide 30 days notice of the initial allowance for new properties or a change in a proposed allowance that exceeds 10% and give tenants access to supporting information and an opportunity to comment with a duty to fairly consider the comments.

STAFF RESPONSE: Other than the addition of §60.109(h) which allows tenants to inspect the utility allowance documentation, staff does not recommend a change. The commenter did not specify who the notice would go to for new properties. Any change to the tenant rent caused by a change in the utility allowance will be dictated by the legally binding lease agreement entered into by the resident and owner. The owner does not have the ability to change the utility allowance based on comments made by the residents, therefore staff does not see justification for providing tenants with the opportunity to comment on the allowance. However, the current Treasury Regulation 1.42-10 allows any interested party, including the tenants of the development, to obtain a written local estimate from the utility provider. If the buildings are not regulated by FmHA or HUD, the written local estimate would become the applicable allowance.

COMMENT (31):

§60.109(e). Utility Allowances.

Comment was received suggesting that owners opting to use the Public Housing Authority (PHA) methodology for calculating utility allowances should be required to provide the Department with documentation that validates that the PHA has updated the allowance within the preceding 12 months to reflect current utility prices.

STAFF RESPONSE: Staff does not recommend a change. It is the Department's understanding that PHAs are required to annually review the allowance, but are only required to update the allowance if there has been a change of more than 10%. It's therefore possible that the PHA may not update the allowance because the change was not 10% or more. The Department of Housing and Urban Development monitors Public Housing Authorities for compliance with these requirements.

COMMENT (15):

§60.109(e)(2)(B) and (C). Utility Allowances.

Comment was received pointing out that data regarding utility bills may not always come directly from a utility provider. There are circumstances when a third party may be handling the billing and collection of the amounts due for utilities. The Rule needs to reflect that income from the third party billing entity is an acceptable source of documentation to be used in computing an allowance under the Actual Use methodology.

STAFF RESPONSE: Staff Agrees and proposes the following language:

(e) For a development owner to use the Actual Use Method they must:

(1) provide a minimum sample size of usage data for at least 5 continuously occupied units of each Unit Type or 20% of each Unit Type whichever is greater. *Example 109(1):* A property has 20 three bedroom one bath Units and 80 three bedroom two bath Units, data must be supplied for at least 5 of the three bedroom one bath Units and 16 of the three bedroom two bath Units. If there are less than 5 units of any Unit Type, data for 100% of the Unit Type must be provided.

(2) the following information must be scanned onto a CD and submitted to the Department within 45 days of receipt of the data from the utility provider:

(A) An Excel spreadsheet listing every unit on the property, the number of bedrooms, bathrooms and square footage for each Unit, and the billing history by month for each unit for which data was obtained.

(B) A copy of the request to the utility provider (or billing entity for the utility provider) to provide usage data.

(C) All documentation obtained from the utility provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider.

COMMENT (31):

§60.109(e)(4). Utility Allowances.

Comment was received noting that the rule does not address how to handle the Department contesting an owner's calculation of the allowance.

STAFF RESPONSE: Staff does not recommend a change. The Department will be calculating the allowance, not the owner. Therefore, there is no need to address how the Department would contest and owner's calculation.

COMMENT (31):

§60.109(f). Utility Allowances.

Comment was received suggesting that if an owner opts to combine different methodologies for calculating the total allowance that the Department should require the owner to chose the methodology that provides the highest allowance for the tenant.

STAFF RESPONSE: Staff does not recommend a change. Treasury Regulation 1.42-10, lists acceptable methods for establishing an allowance. The Treasury Regulations specify that buildings regulated by HUD or FmHA must use a specific allowance. However, for other buildings, the regulation does not require one methodology over another. Nor does the Regulation specify that the State Housing Finance Agency may require the owner of non HUD or FmHA building to use one option over another. Since the Treasury Regulation does not allow State Housing Finance Agencies to dictate one allowance over another, the Department is not able to incorporate this suggestion.

COMMENT (7):

§60.109(g). Utility Allowances.

Comment was received suggesting that utility allowance increases must be implemented immediately rather than within the 90 day period allowed by Treasury Regulation 1.42-10.

STAFF RESPONSE: Staff does not recommend a change. The Treasury Regulations allow 90 days to implement changes. The Federal Regulations would need to be amended in order for the Department to effectively adopt this suggestion.

COMMENT (7):

§60.110. Lease Requirements (HTC and HOME Properties).

Comment was received suggesting that §60.110 should be revised to reflect requirements of SB 1733 to state that landlords may not non-renew a lease unless they have good cause.

STAFF RESPONSE: Staff does not recommend a change. The requirements of SB 1733 have been incorporated into Texas Government Code Chapter 2306.6735 which reads:

Sec. 2306.6735. REQUIRED LEASE AGREEMENT PROVISIONS. A lease agreement with a tenant in a development supported with a housing tax credit allocation must:

(1) include any applicable federal or state standards identified by department rule that relate to the termination or nonrenewal of the lease agreement; and

(2) be consistent with state and federal law.

§60.110 does exactly and only what the Texas Government Code requires. Internal Revenue Service Revenue Ruling 2004-82 does not address non renewals of leases, only evictions and terminations of tenancy. The HOME Final Rule specifically addresses renewals and lease terms. Therefore, §60.110 as proposed is consistent with state and federal law.

COMMENT (7):

§60.110. Lease Requirements (HTC and HOME Properties).

Comment was received that §60.110 should be revised to reflect requirements of SB 1733 to add language to require the lease or an addendum to the lease state that "non-renewal of the tenancy at the end of the lease term" for other than good cause are prohibited.

STAFF RESPONSE: Staff does not recommend a change. The requirements of SB 1733 were incorporated into Texas Government Code Chapter 2306.6735 which does not require this language, only that the lease agreement. . . "include any applicable federal or state standards identified by department rule that relate to the termination or nonrenewal of the lease agreement; and be consistent with state and federal law." The Department fully complies with this section of the Texas Government Code.

COMMENT (7):

§60.110. Lease Requirements (HTC and HOME Properties).

Comment was received that §60.110 should be revised to include language to require landlords be prohibited from terminating tenancy in retaliation for a tenant's action in engaging in protected behavior.

STAFF RESPONSE: Staff does not recommend a change. The determination of "good cause" is a function of the appropriate court. The Compliance Rule does not attempt to define any action by any party as good cause. Additionally, as pointed out by the commenter, the Texas Property Code already provides protection for tenants from retaliatory evictions and nonrenewals.

COMMENT (7):

§60.110. Lease Requirements (HTC and HOME Properties).

Comment was made that §60.110 does not specifically state TDHCA will monitor for compliance with the section.

STAFF RESPONSE: Staff does not recommend a change. §60.121, Material Noncompliance Methodology, specifically lists scoring for failure to include provisions required in §60.110. Developments are monitored for compliance with all applicable provisions listed in §60.121. Other sections of the Compliance Rule address document retention and inspection provisions.

COMMENT (7):

§60.110. Lease Requirements (HTC and HOME Properties).

Comment was made that the Rule should require owners of tax credit properties to give written notice specifying grounds for termination or non-renewal of a lease prior to filing an eviction suit.

STAFF RESPONSE: Staff does not recommend a change. This is not required by the IRS. Eviction procedure and notice of eviction is addressed in other sections of State law.

COMMENT (7):

§60.110. Lease Requirements (HTC and HOME Properties).

Comment was made that §60.110 should be effective immediately and should apply to leases signed before the effective date, even if those leases do not contain the specific prohibitions against termination for other than good cause.

STAFF RESPONSE: For Housing Tax Credit developments, all Land Use Restriction Agreements (LURAs) require compliance with all applicable IRS rulings and since 2005, all amended or new LURAs contain specific language prohibiting owners from evicting or terminating tenancy for other than good cause. The HOME Final Rule has similar language. No additional language is required.

COMMENT (59):

§60.111. Income at Recertification (Housing Tax Credit Properties).

Comment was received that this section of the Rule is a good change.

STAFF RESPONSE: Staff appreciates support for this section of the Rule.

COMMENT (31):

§60.118. Special Rules Regarding Rents and Rent Limit Violations.

Comment was received suggesting that TDHCA should require owners to refund any excess rent collected by a Housing Tax Credit owner.

STAFF RESPONSE: The refunding of overcharged rent is not a requirement of the Internal Revenue Service (IRS) under the Housing Tax Credit program. The Department has adopted the IRS Guide for Completing Form 8823 and will monitor for compliance with the Housing Tax Credit program consistent with the Guide. Should the IRS change the required corrective action for this violation, TDHCA would adopt that requirement.

STAFF CORRECTION: Correction made to Figure: §60.121(k) by adding the phrase "or HUB" in the Noncompliance Event column.

BOARD RESPONSE: The Board approved the final order adopting these amendments to the new section on November 8, 2007.

The new sections are adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically §2306.053 which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306; and §2306.185 which authorizes the Department to adopt policies and procedures to ensure that owners of Department-funded multifamily rental housing keep rents affordable for low income tenants for the longest period that is economically feasible, and provide regular maintenance to keep the development sanitary, decent, and safe.

§60.102. Definitions.

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

(1) Affordability Period--The Affordability Period commences as specified in the Land Use Restriction Agreement (LURA), or federal regulation or commences on the first day of the Compliance Period as defined by §42(i)(1) of the Internal Revenue Code

(IRC) and continues through the appropriate program's affordability requirements or termination of the LURA, whichever is later. The term of the Affordability Period shall be imposed by LURA or other deed restriction and may be terminated upon foreclosure. During this period the Department shall monitor to ensure compliance with programmatic rules, regulations, and Application representations.

(2) Application--An Application, in the form prescribed by the Department, filed with the Department by an Applicant, including any exhibits or other supporting material. (§2306.6702)

(3) Architect of Record--The architect licensed in the jurisdiction that the project is located in, who prepares, stamps and signs the construction documents, and is legally recorded as the architect for the project.

(4) Board--The governing Board of the Texas Department of Housing and Community Affairs.

(5) Code--The U.S. Internal Revenue Code of 1986, as amended from time-to-time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued by the United States Department of the Treasury or the Internal Revenue Service.

(6) Compliance Period--With respect to a Housing Tax Credit building, the period of 15 taxable years, beginning with the first year of the Credit Period, pursuant to the Code §42(i)(1).

(7) Continuously Occupied--The same household has resided in the Unit for at least 12 months.

(8) Credit Period--With respect to a Housing Tax Credit building, the period of 10 taxable years, beginning with the taxable year the building is placed in service or at the election of the Development Owner, the succeeding taxable year, as more fully defined in the Code §42(f)(1).

(9) Department--The Texas Department of Housing and Community Affairs, an official and public agency of the State of Texas pursuant to Chapter 2306, Texas Government Code.

(10) Development--A property or work or a project, building, structure, facility, or undertaking, whether existing, new construction, remodeling, improvement, or rehabilitation, that meets or is designed to meet minimum property standards required by the Department and that is financed under the provisions of Chapter 2306, Texas Government Code.

(11) Extended Use Period--With respect to a Housing Tax Credit building, the period beginning on the first day of the Compliance Period and ending the later of:

(A) the date specified in the Land Use Restriction Agreement, or

(B) the date which is 15 years after the close of the Compliance Period.

(12) Historically Underutilized Business (HUB)--Any entity defined as a historically underutilized business with its principal place of business in the State of Texas in accordance with Chapter 2161, Texas Government Code.

(13) Housing Quality Standards--The property condition standards described in 24 Code of Federal Regulations §982.401.

(14) Housing Sponsor--Sometimes referred to as "Development Owner." An individual, joint venture, partnership, limited partnership, trust, firm, corporation, limited liability company, other form of business organization or cooperative that is approved by the Department as qualified to own, construct, acquire, rehabilitate, operate, manage, or maintain a housing Development, subject to the regulatory powers of the Department and other terms and conditions.

(15) HTC Development--Sometimes referred to as "HTC Property." A Development using Housing Tax Credits allocated by the Department.

(16) HUD-regulated Building--The rents and utility allowances of the building are reviewed by HUD on an annual basis.

(17) Low Income Unit--A Unit that is intended for occupancy by an income eligible household, as defined by the Department or the Code.

(18) Land Use Restriction Agreement or LURA--An agreement between the Department and the Development Owner which is a binding covenant upon the Development Owner's successors in interest that encumbers the Development with respect to the requirements of Chapter 2306, Texas Government Code; the Code; and the requirements of the various programs administered or funded by the Department.

(19) Material Noncompliance--

(A) A Housing Tax Credit Development located within the state of Texas will be classified by the Department as being in Material Noncompliance status if the noncompliance score for such Development is equal to or exceeds a threshold of 30 points in accordance with the Material Noncompliance provisions, methodology, and point system of this title.

(B) Non HTC Developments monitored by the Department with 1 to 50 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 30 points. Non HTC Developments monitored by the Department with 51 to 200 Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 50 points. Non HTC Developments monitored by the Department with 201 or more Low Income Units will be classified as being in Material Noncompliance status if the noncompliance score is equal to or exceeds a threshold of 80 points.

(C) For all programs, a Development will be in Material Noncompliance if the noncompliance is stated in §60.121 of this chapter to be Material Noncompliance.

(20) Non HTC Development--Sometimes referred to as Non HTC Property. Any Development not utilizing Housing Tax Credits.

(21) Substantial Construction--

(A) The minimum activity necessary to meet the requirements of substantial construction for new construction Developments will be defined as 1) having building permits, 2) the foundation of all residential buildings and the clubhouse in place 3) 50% of the framing completed and 4) at least 20% of the construction contract amount for the Development expended, adjusted for any change orders, as certified by the inspecting architect.

(B) The minimum activity necessary to meet the requirement of Commencement of Substantial Construction for rehabilitation Developments will be defined as having 1) building permits issued or a clearance from the City stating that building permits are not required, 2) a certification that there are no reasonably foreseeable issues or circumstances which may prevent or delay the start and progress of construction or the timely successful completion of rehabilitaiton and 3) at least 20% of the construction budget expended as documented by the inspecting architect.

(22) Unit--Any residential rental Unit in a Development consisting of an accommodation, including a single room used as an accommodation on a non-transient basis that contains complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation.

(23) Unit Type--Units will be considered different Unit Types if there is any variation in the number of bedroom, bathrooms or square footage. For example, a two bedroom one bath Unit is considered a different Unit Type than a two bedroom two bath Unit. A three bedroom two bath Unit with 1,000 square feet is considered a different Unit Type than a three bedroom two bath Unit with 1,200 square feet.

§60.109. Utility Allowances.

(a) The Department will monitor to determine if HTC, Bond, CDBG and HTF properties comply with published rent limits which include an allowance for utilities. Where residents are responsible for some, or all, of the utilities--other than telephone and cable--Development Owners must use a utility allowance that complies with both this section and the applicable program regulation. An owner may not change utility allowance methods without the written approval from the Department.

(b) Farmer's Home Administration (FmHA) Buildings or buildings with FmHA assisted tenants layered with any Department program. The applicable utility allowance will be determined under the method prescribed by the Farmer's Home Administration (or successor agency).

(c) HUD-Regulated buildings layered with any Department program. If neither the building nor any tenant in the building receives FmHA rental assistance payment, and the rents and the utility allowances of the building are reviewed by HUD on an annual basis (HUD-regulated building), the applicable utility allowance for all rent restricted units in the building is the applicable HUD utility allowance.

(d) Other Buildings. For all other rent-restricted Units, Development Owners must use one of the following methods:

(1) The utility allowance established by the applicable Public Housing Authority. If the applicable PHA allowance lists flat fees for any utility, those flat fees must be included in the calculation of the utility allowance if the resident is responsible for that utility.

(2) A written estimate from a local utility provider, or

(3) An allowance based upon an average of the actual use of similarly constructed and sized units in the building using actual utility usage data and rates, provided that the Development Owner has the written permission of the Department. This methodology is referred to as the "Actual Use Method."

(e) For a development owner to use the Actual Use Method they must:

(1) provide a minimum sample size of usage data for at least 5 continuously occupied units of each Unit Type or 20% of each Unit Type whichever is greater. *Example 109(1):* A property has 20 three bedroom one bath Units and 80 three bedroom two bath Units, data must be supplied for at least 5 of the three bedroom one bath Units and 16 of the three bedroom two bath Units. If there are less than 5 units of any Unit Type, data for 100% of the Unit Type must be provided.

(2) the following information must be scanned onto a CD and submitted to the Department within 45 days of receipt of the data from the utility provider:

(A) An Excel spreadsheet listing every unit on the property, the number of bedrooms, bathrooms and square footage for each Unit, and the billing history by month for each unit for which data was obtained.

(B) A copy of the request to the utility provider (or billing entity for the utility provider) to provide usage data.

(C) All documentation obtained from the utility provider (or billing entity for the utility provider) and/or copies of actual utility bills gathered from the residents, including all usage data not needed to meet the minimum sample size requirement and any written correspondence from the utility provider.

(D) The rent roll showing occupancy as of the end of the month for the month in which the data was requested from the utility provider.

(E) Documentation of the current utility allowance used by the Development.

(3) Upon receipt of the required information, the Department will determine if the Development Owner has provided the minimum information necessary to calculate an allowance using the Actual Use Method. If so, the Department shall calculate the utility allowance for each bedroom size using the following guidelines:

(A) If data is obtained for more than 20% or 5 of each Unit Type, all data will be used to calculate the allowance.

(B) If more than 12 months of data is provided for any unit, only the data for the most current 12 months will be averaged.

(C) The allowance will be calculated by averaging the utility costs for all Unit Types within that bedroom size. For example, if sufficient data is supplied for 18 two bedroom one baths and 12 two bedroom two baths, the data for all 30 units will be averaged to calculate the allowance for all two bedroom Units.

(D) The allowance will be rounded up to the next whole dollar amount.

(4) The Department will complete its evaluation and calculation within 30 days of receipt of all the information requested in paragraph (2) of this subsection. If the allowance increases, owners must implement the allowance for all rent restricted Units within 90 days of the effective date. The effective date of the new utility allowances is the date of the notice to the owner establishing the new utility allowances computed under this subsection. The allowance calculated using the Actual Use Method will be valid for twelve months.

(5) Once the Actual Use Method is approved for use by the Department, the Development Owner must continue to provide the data listed in paragraph (2) of this subsection on an annual basis. The data must be supplied to the Department within 60 days of the expiration of the previous years' allowance. If the owner is unable to obtain the necessary billing histories from the utility provider in subsequent years, the owner must request permission to change utility allowance methods.

(f) Combining Methodologies. With the exception of HUD regulated buildings and FmHA buildings, Owners may combine any methodology described in this section for each utility service type (electric, water gas etc.). For example, if residents are responsible for electricity and water, an owner may use the appropriate PHA allowance to determine the water portion of the allowance and use the Actual Use Method to determine the electric portion of the allowance.

(g) Increases in Utility Allowances because the HOME final rule does not provide a grace period for implementing increased utility allowances, changes in utility allowances must be implemented on the published effective date. All other properties shall implement increases in utility allowances within 90 days of the effective date of the change.

(h) The owner shall maintain and make available for inspection by the tenant the data upon which the utility allowance schedule is calculated. Records shall be made available at the resident manager's office during reasonable business hours or, if there is no resident manager, at the dwelling unit of the tenant at the convenience of both the apartment owner and tenant.

§60.121. Material Noncompliance Methodology.

(a) The Department maintains a compliance history of each monitored Development in the Department's Compliance Status System. Developments with more than one program administered by the Department are scored by program. The Development will be considered in Material Noncompliance if the score for any single program exceeds the noncompliance limit for that program.

(b) A Development will not be assigned the scores noted in this section until after the owner has been provided a written notice of the noncompliance and provided a corrective action deadline to show that either the property never was in noncompliance or that the noncompliance event has been corrected.

(c) This section identifies all possible noncompliance events for all programs monitored by the Department. However, not all issues listed in this section pertain to all Developments. In addition, only certain noncompliance events are reportable on form 8823. Those events that are reportable under the Housing Tax Credit program on form 8823 are so indicated in subsections (k) and (j) of this section.

(d) For Housing Tax Credit Developments, all forms 8823 issued by the Department will be entered into the Department's Compliance Status System. However, forms 8823 issued prior to the development of January 1, 1998 will not be considered in determining Material Noncompliance.

(e) For all programs, a Development will be in Material Noncompliance if the noncompliance event is stated in this section to be Material Noncompliance. The Department may take into consideration the representations of the Applicant regarding noncompliance events; however, the compliance records of the Department shall be presumed to be correct.

(f) All Developments, regardless of status, that are or have been administered, funded, or monitored by the Department are scored even if the Development no longer actively participates in the program.

(g) A Development's score will be reduced by the number of points needed to be one point under the Material Noncompliance threshold under the following circumstances:

(1) The Development has no uncorrected noncompliance events, and

(2) All noncompliance events were corrected during the corrective action period, and

(3) All corrective action documentation was provided to the Department during the corrective action period.

(h) Noncompliance events are categorized as either "Development events" or "Unit/building events." Development events of noncompliance affect some or all the buildings in the Development; however, the Development will receive only one score for the noncompliance event rather than a score for each building. Other noncompliance events are identified individually by Unit and will receive the appropriate score for each Unit cited with an event. The Unit scores and the Development scores accumulate towards the total score of the Development. Violations under the HTC program are identified by Unit; however, the building is scored rather than the Unit and the building will receive the noncompliance score if one or more of the Units are in noncompliance.

(i) Uncorrected noncompliance events, if applicable to the Development, will carry the maximum number of points until the noncompliance event has been reported corrected by the Department. Once reported corrected by the Department, the score will be reduced to the "corrected value." Corrected noncompliance will no longer be included in the Development score three years after the date the noncompliance was reported corrected by the Department.

(j) Each noncompliance event is assigned a point value. The possible events of noncompliance and associated "corrected" and "uncorrected" points are listed in subsection (k) of this section.

(k) Figure: 10 TAC §60.121(k) lists events of noncompliance that affect the entire development rather than an individual unit. The first column of the chart identifies the noncompliance event. The second column identifies the number of points assigned this event while the issue is uncorrected. Material Noncompliance for a HTC property is 30 points. Material noncompliance for a non HTC property with 51 to 200 Low Income Units is 50 points. Material Noncompliance for Non HTC properties with 201 or more low income units is 80 points. The third column lists the number of points assigned this event when the issue is corrected until three years after correction. The fourth column indicates what programs the noncompliance event applies to. The last column indicates if the issue is reportable on form 8823 for Housing Tax Credit properties.
Figure: 10 TAC §60.121(k)

(l) Figure: 10 TAC §60.121(l) lists 10 events of noncompliance associated with individual units. The first column of the chart identifies the noncompliance event. The second column identifies the number of points assigned this event while the issue is uncorrected. Material Noncompliance for a HTC property is 30 points. Material noncompliance for a non HTC property with 51 to 200 Low Income Units is 50 points. Material Noncompliance for Non HTC properties with 201 or more low income units is 80 points. The third column lists the number of points assigned this event when the issue is corrected until three years after the event is corrected. The fourth column indicates what programs the noncompliance event applies to. The last column indicates if the issue is reportable on form 8823 for Housing Tax Credit properties.
Figure: 10 TAC §60.121(l)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

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Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
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Proposal publication date: September 7, 2007
For further information, please call: (512) 475-3916

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SUBCHAPTER C. ADMINISTRATIVE PENALTIES

10 TAC §§60.301 - 60.309

The Texas Department of Housing and Community Affairs (the Department) adopts new Chapter 60, Subchapter C (§§60.301 - 60.309), concerning Administrative Penalties. Sections 60.302

- 60.304 and 60.307 - 60.309 are adopted with changes to the proposed text as published in the September 7, 2007 issue of the *Texas Register* (32 TexReg 5953). Sections 60.301, 60.305, and 60.306 are adopted without changes and will not be republished.

New Subchapter C implements §§2306.041 - 2306.0503 of the Texas Government Code, as amended by S.B. 1908 in the 80th Regular Session of the Texas Legislature, and provides the procedures and guidelines for implementing the Department's administrative penalty authority.

Public hearings on the new rule were held in El Paso (September 24, 2007); Lubbock (September 28, 2007); Brownsville (October 3, 2007); Houston (September 26, 2007); Dallas (October 1, 2007); and Austin (October 4, 2007). Additionally, written comments on the new rule were accepted by mail, e-mail, and facsimile through October 10, 2007.

SUMMARY OF COMMENTS, STAFF RESPONSE AND BOARD ACTION

Public comments and the Department's responses are presented in the order in which the sections appear in new Subchapter C, starting with general comments for Subchapter C as a whole and ending with comments on §60.309. Following the section number is the title of the section as it appears in the rule. Following the identification of the section and related commenters is a summary of the comment and staff's response, including the reasons why the agency agreed or disagreed with the comment and a statement of the factual basis for the new sections.

Public comments on the proposed sections were received by (15) Locke, Lord, Bissell & Liddell LLP (LLBL) and (35) Harris Co. MUD 71.

COMMENT (15): Section 60.301(a). Thought that the language was too broadly worded and should be more limited in scope to reflect Land Use Restriction Agreements and Compliance Rules.

STAFF RESPONSE: No change is necessary.

While most of the discussion has been around the two items listed, the purpose of the statute is broadly worded but the Penalty Table makes clear what violations may receive an administrative penalty.

COMMENT (15): Section 60.302 and General Comment, suggest clarifying who would be considered a responsible party and would bear the financial burden.

STAFF RESPONSE: In keeping with another suggestion discussed later in this summary, staff agrees with the later comment and has removed the language relating to "Responsible Party" and, therefore, makes it clear that the Owner is the responsible party for all actions at the Development. In questions of whom among ownership structures will be responsible, that would be an internal matter of the partnership.

The term Responsible Party is deleted throughout the document, as is the definition for Responsible Party.

COMMENT (15): Section 60.302(15). Sought clarification of who would serve on and chair the Enforcement Committee.

STAFF RECOMMENDATION: Staff agrees with the comment and proposed the following change:

(15) Enforcement Committee--A committee of not more than five staff members, with a designated chairman from its members selected by the Executive Director to make recommendations on Enforcement including Administrative Penalties.

The decision as to who would chair would be left up to the Executive Director.

COMMENT (15): Section 303(a). Suggested we use the more encompassing definition terms instead of specific documents.

STAFF RECOMMENDATION: Staff agrees with this recommendation and suggests the following language:

(a) Owners are required to follow Terms.

COMMENT (15): Section 60.304(c). Suggested to be changed to provide clearer direction on frequency and types of penalties.

STAFF RECOMMENDATION: Staff believes that the terms are clear within the Penalty Table but will add the following language to clarify that the Penalty Table will be followed:

(c) An Owner who violates any provision of the Terms or order of the Board is subject to an Administrative Penalty of up to $1,000 per day per violation as allowed under these rules, the Penalty Table and Texas Government Code §2306.042. Penalties will be assessed according to the Penalty Table found within this rule.

COMMENT (15): Section 60.307(d) (actually refers to §60.308(d)). Was suggested to be changed to provide a response date for filing exceptions to a PFD.

STAFF RECOMMENDATION: Staff agrees with this suggestion and has placed a fifteen day period for filing exceptions to be consistent with the State Office of Administrative Hearing rules. The new paragraph will read:

(d) Any party may file exceptions to the Proposal for Decision within fifteen days if they believe it misstates the law. The exceptions must state a legally reasoned response for the basis of the misstatement.

COMMENT (15): Section 60.308(d). Suggested that the rules should cover penalty calculations if an Owner requests a hearing and asks the rule to cover a stay of penalty if the penalty is challenged in court.

STAFF RECOMMENDATION. No change suggested. Section 60.309 gives the factors for penalty calculation. The rules governing the process for a court challenge are clearly detailed in the statute as Texas Government Code, §2306.048, and would be repetitive in the rule.

COMMENT (15): Section 60.309. Suggests that the penalty be determined as a per unit or per violation.

STAFF RECOMMENDATION: No change. Covered under §60.304(c). Each penalty is per violation and per unit if applicable. The table demonstrates the potential penalty, and the notice of violation required in statute will outline the violation.

COMMENT (15): Section 60.309. Suggest that we clarify the language of the penalties and make them more narrow.

STAFF RECOMMENDATION: We believe the penalties use language that is common in the industry and appears on Form 8823. The terms will be more narrowly defined when notice is received.

GENERAL COMMENT (15): Suggests that the term penalty appears in lower case and without its preface of Administrative in the rule.

STAFF RECOMMENDATION: We agree and added the term penalty to the definition of Administrative Penalty and capitalized the term throughout the rule.

GENERAL COMMENT (15): Suggests that more clarification is needed for notice and opportunity to be heard prior to an administrative penalty.

STAFF RECOMMENDATION: Staff agrees in principle and has added the statutory language in 60.304(d) as follows:

(d) The Executive Director shall provide notice of violation as is required under Texas Government Code §2306.043.

Staff also believes that the informal conference could clear up any potential inconsistency of application as the Enforcement Committee will review similar cases in the course of its operation.

GENERAL COMMENT (15): Suggests that there could be a potential conflict between the adherence to obligations penalties in the Qualified Allocation Plan and the Enforcement Rules.

STAFF RECOMMENDATION: This argument is not persuasive since the time periods are likely to be very different. If the issue arises, then the Executive Director will need to utilize discretion in assessing penalties.

GENERAL COMMENT (15): Suggests that portions covered in the statute but not in the rules make the rules incomplete. Further, it suggests that a reiteration in the rules of direct statutory language is not particularly beneficial.

STAFF RECOMMENDATION: The statutory sections included within the rules are placed there to help understand the implementation of the administrative penalty process. Challenges to the penalties and similar actions are left in the statute as there is no benefit to repeating them in the rule since they are mandatory actions that must be followed. This is similar to the process used in a contested case hearing within the Administrative Procedures Act.

The Board approved the final order adopting the amendments to the new sections on November 8, 2007.

The new sections are adopted pursuant to authority granted in Chapter 2306, Texas Government Code; specifically, §2306.053 which grants the Department general rulemaking authority to carry out the powers expressly granted or necessarily implied by Chapter 2306; and §2306.041 which authorizes the Board to impose an Administrative Penalty on a Person who violates Chapter 2306 of the Texas Government Code, or a rule or order adopted pursuant thereto.

§60.302. Definitions.

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

(1) Act--The Cranston-Gonzalez National Affordable Housing Act codified at 42 U.S.C. §12704 et seq.

(2) Administrative Penalty (or Penalty)--A monetary Penalty per the Penalty Table assessed for failure to comply with the Act, a LURA, restrictive covenant, the rules found in Subchapters A and B of this chapter, or other federal or state law or rule identified in the Penalty Table as allowed under Texas Government Code §§2306.041 - 2306.042.

(3) Affiliated Party--A Person in a relationship with an Owner. Does not apply to an Affiliated Party for Application purposes.

(4) Asset--A property covered by the Act, a LURA, Contract, grant agreement, or Commitment or any other property acquired, improved, or subsidized, directly or indirectly, in whole or in part with funds provided by any program(s) administered by the Department or purchased by a Subsequent Purchaser.

(5) Audit--An audit required to be performed by a third party or performed by the Department relating to a Contract.

(6) Board--The Governing Board of the Department.

(7) Chapter 2306--The enabling statute for the Department found in Texas Government Code Chapter 2306.

(8) Compliance Monitoring Fees--The fees identified in a LURA or other Contract payable by Project Owner related to an Asset.

(9) Compliance Rules--The rules found in Subchapters A and B of this chapter.

(10) Contract--Any executed written agreement between the Department and an Administrator, Home Owner, Mortgagor, Project Owner, Subrecipient, Subrecipient Organization, or other beneficiary of a Department program.

(11) Department--The Texas Department of Housing and Community Affairs.

(12) Development--Any Project that has a construction component, either in the form of new construction or the rehabilitation of residential housing with funds or credits supplied by the Department and subject to a LURA or other restrictive covenant.

(13) Director of Compliance--The Person designated by the Executive Director with directing the activities of the division responsible for compliance or their designee, including subcontractors of the Department.

(14) Eligible Household--A household that meets the requirements associated with a Department Contract or LURA and applicable law, as in effect from time to time.

(15) Enforcement Committee--A committee of not more than five staff members, with a designated chairman from its members selected by the Executive Director to make recommendations on Enforcement including Administrative Penalties.

(16) Executive Director--As defined under Texas Government Code §2306.036 and/or §2306.038.

(17) Federal Laws and Rules--Treasury Regulations, United States Code and/or the Code of Federal Regulations, including but not limited to the current version of the Guide for Completing Form 8823 Low Income Housing Credit Agencies Report of Non-Compliance or Building Disposition promulgated by the Internal Revenue Service.

(18) LURA--Land Use Restriction Agreement that has been executed by the Department and a Person related to a specific property or properties and filed with required recording authorities.

(19) Owner--The Person who has the beneficial ownership of a Development whether through award of the Department or as a Subsequent Purchaser.

(20) Penalty Table--The table adopted by the Board detailing a schedule of proposed penalties for violations of identified actions commonly found in LURAs, other restrictive covenants, state and federal rules.

(21) Person--Any individual, partnership, corporation, association, trust, unit of government, community action agency, or public or private organization of any character, however organized.

(22) Proposal for Decision--A document issued by an administrative law judge that provides a statement of facts and conclusions of law for the Board to make a final determination on the Administrative Penalty.

(23) Subsequent Purchaser--A Person who is not the original awardee but purchases a Development or Asset subject to a valid LURA, other restrictive covenant or state and federal rules associated with Chapter 2306.

(24) Terms--Any condition placed on the property through a LURA, restrictive covenant, loan document, application, or Federal Laws and Rules or rules promulgated by the Department as allowed by the laws of the State of Texas.

(25) Treasury Department--The U.S. Department of the Treasury, the Internal Revenue Service or related federal departments.

§60.303. Standards of Conduct.

(a) Owners are required to follow Terms.

(b) Owners are responsible for knowing the terms and conditions placed on their Assets and the application of Federal Laws and Rules and rules promulgated by the Department relevant to their Development.

§60.304. Violations of Standards and Rules.

(a) The Board may issues administrative penalties as specified in this chapter to persons who violate Terms.

(b) A violation occurs when either by action or failure to act, an Owner does not Comply with the Terms of an Asset.

(c) An Owner who violates any provision of the Terms or order of the Board is subject to a Penalty of up to $1,000 per day per violation as allowed under these rules, the Penalty Table and Texas Government Code §2306.042. Penalties will be assessed according to the Penalty Table found within this rule.

(d) The Executive Director shall provide notice of violation as is required under Texas Government Code §2306.043.

§60.307. Administrative Penalty.

(a) If the Executive Director decides to pursue an Administrative Penalty under the Penalty Schedule adopted by the Board he shall provided Notice to the Board, or their designee, that briefly states the facts of the alleged violation, includes his recommendation of a Penalty and the amount of the Penalty.

(b) Within 14 days of notifying the Board under subsection (a) of this section, the Executive Director shall issue a Notice of Alleged Violation to the Owner which must include a brief summary of the alleged violation, state the amount of the Penalty pursued and inform the Owner of their right to a Hearing before the Administrative Law Judge appointed by the Board to hear contested cases on the occurrence of the violation, the amount of the Penalty, or both.

(c) If the Owner chooses within 20 days after receipt of Notice to enter an agreed order either accepting the Executive Director's recommendation or agrees to corrective action with or without a Penalty, without a formal hearing before the Board or their designated Administrative Law Judge, The Executive Director shall prepare a Board Order affirming the agreed order.

(d) The Owner must pay the Penalty within sixty (60) days following the Board Order and complete any corrective action within the agreed time period or be subject to penalties for violation of the Board Order affirming the agreed order.

(e) The Executive Director shall set a hearing with the Board or their Designated Administrative Law Judge if:

(1) the Respondent requests a formal hearing not later than the 20th day after the Notice of Alleged Violation is received by the Owner;

(2) the Owner fails to respond in writing to the Notice of Alleged Violation not later than the 20th day after the Notice of Alleged Violation is received by the Owner; or

(3) the Owner fails to pay the Penalty or complete the corrective action agreed to in the agreed order.

(f) The Executive Director may recommend for Debarment according to this title any Owner who fails to:

(1) respond in writing to the Notice of Alleged Violation not later that the 20th day after the notice was received by the Owner;

(2) perform according to the agreed settlement; or

(3) fails to pay the Penalty assessed by the Board Order.

§60.308. Administrative Hearing Process.

(a) The Board shall request the Executive Director to provide the Board with access to an administrative law judge hired through the appropriate procurement process to hold hearings for the purpose of developing a Proposal For Decision. The administrative law judge shall serve at the pleasure of the Board, but administratively be employed as a subcontractor through the Executive Director. The administrative law judge shall not be a full time employee of the Department.

(b) If the Owner has formally requested a hearing before the Board within the appropriate time frame, the administrative law judge shall conduct a formal hearing in accordance with this subchapter and based on the record created by the Executive Director and the Owner or their counsel, issue a Proposal for Decision determining the findings of fact and conclusions of law in accordance with the rules and statutes governing the agency. The Proposal for Decision shall clearly indicate why any changes to the recommended Penalty were made.

(c) The administrative law judge will provide the Board, the Executive Director and the Owner or their counsel with a copy of the Proposal For Decision.

(d) Any party may file exceptions to the Proposal for Decision within fifteen days if they believe it misstates the law. The exceptions must state a legally reasoned response for the basis of the misstatement.

(e) The Board shall, based on the findings of fact and conclusions of law within the Proposal for Decision, and any exceptions properly filed, issue an order that finds:

(1) that a violation occurred and impose a Penalty including a statement of the right of the subject of the order to seek judicial review of the order; or

(2) find that a violation did not occur.

(f) Not later than the 30th day after the date the Board's decision becomes final, the Person subject to the order shall:

(1) pay the Penalty; or

(2) file a petition for judicial review contesting the occurrence of the violation, the amount of the Penalty, or both.

(g) The Penalty may be stayed under the terms of §2306.048 of the Texas Government Code.

(h) If timely filed, a decision will be made by the district court in Travis County under a de novo review.

(i) If the court sustains the finding that a violation occurred, the court may uphold or reduce the amount of the Penalty and order the Person to pay the full or reduced amount of the Penalty. If the court

does not sustain the finding that a violation occurred, the court shall order that a Penalty is not owed and may award the Person reasonable attorney fees.

(j) The party filing the court action shall include in their prayer for relief that if the court finds in their favor that the order include a remittance of Penalty and interest or release of the Bond.

(k) If the Penalty is sustained, and the enforcement of the Penalty is not stayed, the Department may collect the Penalty. The Attorney General may sue to collect the Penalty. This proceeding shall be a contested case under Chapter 2001 of the Texas Government Code.

§60.309. Penalty Table.

(a) The Department has developed penalties based on the following factors:

(1) the seriousness of the violation, including:

(A) the nature, circumstance, extent, and gravity of any prohibited act; and

(B) the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(2) the history of previous violations;

(3) the amount necessary to deter a future violation;

(4) efforts made to correct the violation.

(b) The amount of the Penalty may be lowered based on presentation of information that would indicate that justice requires the downward adjustment of the Penalty. Solely economic harm will not be considered as a factor for downward adjustment.
Figure: 10 TAC §60.309(b)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

TRD-200705542
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Effective date: December 2, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 475-3916

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §§3.1, 3.58, 3.73, 3.78

The Railroad Commission of Texas (Commission) adopts amendments to §3.1, relating to Organization Report; Retention of Records; Notice Requirements; §3.58, relating to Oil, Gas, or Geothermal Resource Producer's Reports; §3.73, relating to Pipeline Connection; Cancellation of Certificate of Compliance; Severance; and §3.78, relating to Fees and Financial Security Requirements. Section 3.58 and §3.78 are adopted without changes and §3.1 and §3.73 are adopted with changes from the versions published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5580). The Commission adopts the amendments to implement Senate Bill 1670, 80th Legislature (2007), Regular Session, and to make conforming changes.

The adopted amendments to §§3.1, 3.58, 3.73, and 3.78 are necessary to implement Senate Bill 1670, 80th Legislature, Regular Session (2007). In general, the amendments clarify that any well under the Commission's jurisdiction, including an injection or disposal well, for which the Commission has canceled the certificate of compliance cannot be used until the Commission has reissued the certificate of compliance. These are simply clarifying amendments to conform to existing Commission practice. The amendments also provide that, where an operator uses a well, or reports such use, after the certificate of compliance for the well has been canceled, the Commission may refuse to renew the operator's organization report until the operator has paid any reconnect fee or fees and the Commission reissues the certificate of compliance. These amendments are necessary to accelerate compliance with Commission rules and assist collection of unpaid reconnect fees at the time of organization report renewal.

The adopted amendment to §3.58(a)(1) providing that the Commission may require an operator who files a Form P-4 for the purpose of changing the designation of an operator for a lease or well to provide to the Commission evidence that the transferee has the right to operate the lease or well also is a clarifying amendment to reflect current Commission practice. This amendment is necessary to clarify that the Commission has the authority to ensure that certificates of compliance authorizing the production and transportation of oil or gas or use of an injection or disposal well are issued only to those operators having a right to engage in such activities. The adopted amendments also are necessary to update statutory references and to conform to the requirements of Senate Bill 1670.

The Commission received comments on the proposed amendments from the Texas Oil and Gas Association (TXOGA), the Texas Independent Producers and Royalty Owners Association (TIPRO), and Crosstex Energy Services, LP (Crosstex). TIPRO supports the proposed amendments, but neither TXOGA nor Crosstex expressly stated either support or opposition. All comments suggested changes in the proposed wording.

Crosstex, whose subsidiaries own and operate natural gas pipelines that provide gas gathering and gas transmission services, filed comments recommending that proposed §3.73(h) be changed to provide that notices to pipeline operators of pipeline severances shall be sent to the contact person listed on the pipeline operator's organization report. The Commission declines to make this change because existing Commission practice addresses the Crosstex concern. The Commission routinely sends severance notices to oil gatherers only, not to gas gatherers. Gas gatherer liability for failure to disconnect cannot arise under §3.73(h) in the absence of notice from the Commission to the gas gatherer of a severance. In the case of oil gatherers, severance notices are currently sent to the gatherer's specialty gatherer address, either company wide or by district, if specified on the gatherer's organization report, otherwise to the gatherer's master address shown on the gatherer's organization report.

TIPRO's only comment supported the proposed changes, but requested that the Commission clarify its reasoning for proposing

to delete language in §3.1(f) because it was not part of Senate Bill 1670. TIPRO recommended that the Commission not delete the final sentence of §3.1(f), which reads "A tax dispute with the Comptroller of Public Accounts shall not be a basis for disapproving an organization report" because the sentence does not refer specifically to the obsolete procedure and is a protection for multiple situations, some of which may be routine "true-up" procedures and not actual "disputes."

The Commission notes that the franchise tax compliance requirement in Article 2.45 of the Texas Business Corporation Act, was repealed in Section 94(1) of House Bill 2914 in the 77th Legislature, effective June 15, 2001. The Commission agrees with the commenter with respect to the last sentence in §3.1(f) and adopts the rule with this sentence retained.

TXOGA requested that the Commission review and modify its procedures for enforcement through seals and severances to address the specific well or wells that are out of compliance and to elevate the enforcement action to the entire lease only when satisfactory progress on the violation has not occurred; to eliminate automatic P-5 enforcement that is without case-by-case review and evaluation by Commission staff; and to "stop the clock" when an operator is taking appropriate actions to correct violations.

The Commission finds that the requested changes are beyond the scope of the notice given in the published proposal. The Commission did not propose to make such extensive amendments. In response to TXOGA's recommendations, the Commission has made some changes (*e.g.,* eliminating severances of leases for production reporting violations) and has explained the statutory, Commission staffing, and Commission electronic limitations that are the reason for disagreeing with some of TXOGA's comments.

TXOGA recommended that the Commission revise §3.58 to delete references to "transporter authority" consistent with TXOGA's recommendation to have the P-4 be simply a Certificate of Compliance, and to revise the name of the Form P-4 in the rule to delete "and Transportation Authority" and delete the references to gatherers and purchasers. The Commission finds that the requested change is beyond the scope of the notice given in the published proposal. The Commission did not propose such amendments to the rule, nor did it propose any changes to Form P-4 or 16 TAC §3.80, relating to Commission Oil and Gas Forms, and Filing Requirements, in this rulemaking.

TXOGA commented on the Commission's proposed change in §3.73(h) to delete the words "transport any oil or gas produced from" and substitute the words "reconnect to." TXOGA does not think this change should be made because product is transported from leases by both pipelines and trucks. The desire is to stop the transport of product from a lease when the P-4 has been cancelled, and the existing wording is the preferred way to achieve this objective. If the Commission continues to believe this change is necessary, TXOGA recommends that the substitute language be "reconnect to or resume service to" which will address transport by both pipeline and truck. The Commission agrees with this comment and has made the suggested change in the adopted rule.

TXOGA recommended that the Commission amend §3.78(b)(9) to read as follows: "(9) If a certificate of compliance for an oil well or wells, an oil lease, or a gas well has been canceled for violation of one or more Commission rules, the operator shall submit to the Commission a nonrefundable fee of $300 for each severance or seal order issued for the well(s) or lease before the Commission may reissue the certificate pursuant to §3.58 of this title (relating to Certificate of Compliance and Operator Reports) (Statewide Rule 58)."

The Commission declines to make the change at this time because the Commission's computer tracking systems associated with cancellation of a certificate of compliance operate on an oil lease basis rather than an oil well basis. Reconfiguration of the computer systems to cancel a certificate of compliance for an individual well rather than a lease would be extensive and very costly.

The Commission amends §3.1(a)(3) to add Texas Health and Safety Code, Chapter 401; Texas Utilities Code, §121.201; and Texas Water Code, Chapter 26, to the list of statutes pursuant to which each organization performing activities subject to the Commission's jurisdiction must maintain a current organization report with the Commission until all duties, obligations, and liabilities incurred pursuant to Texas Health and Safety Code, Chapter 401 (relating to Oil and Gas Naturally Occurring Radioactive Material); Texas Utilities Code, §121.201 (relating to Safety Rules; Railroad Commission Power); and Texas Water Code, Chapter 26 (relating to Water Quality Control) as well as Commission rules, Texas Natural Resources Code, Title 3 (Subtitles A, B, C, and Chapter 111 of Subtitle D) and Title 5, and Texas Water Code, Chapters 27 and 29, are fulfilled.

The Commission amends §3.1(f) to delete the wording "and the taxation requirements of the Comptroller of Public Accounts" but will retain the sentence "A tax dispute with the Comptroller of Public Accounts shall not be a basis for disapproving an organization report" as discussed previously in this preamble.

The Commission adds new §3.1(g), to state, that if an operator uses or reports use of a well for production, injection, or disposal for which the operator's certificate of compliance has been canceled, the Commission may refuse to renew the operator's organization report until the operator pays the required reconnect fee or fees and the Commission issues the certificate of compliance required for that well.

The Commission amends the title of §3.58 to "Certificate of Compliance and Transportation Authority; Operator Reports" and to clarify that a P-4 (certificate of compliance and transportation authority) is required to operate "any well subject to the jurisdiction of the Commission." The Commission also amends §3.58(a)(1) to add references to Texas Natural Resources Code, Title 3; Texas Water Code, §26.131; and Texas Water Code, Chapter 27, and to clarify that the Commission has the authority to require an operator to provide evidence of a good faith claim to operate a lease or well. In general, the Commission's existing practice for handling the two-signature Form P-4s will not change; however, there may be special circumstances where the Commission would need some evidence of a transferee's right to operate a lease or well when a Form P-4 is filed to change the designation of operator.

The Commission amends §3.73(a), to add "or other carrier" and "subject to the jurisdiction of the Commission" to conform the rule wording to the new statutory language enacted by Senate Bill 1670.

The Commission amends §3.73(h), with a change from the proposal, to replace the reference to Texas Natural Resources Code, §85.165, with a reference to Texas Natural Resources Code, §91.705, and to clarify that, upon notice from the Commission that the certificate of compliance has been canceled, the pipeline or other carrier connected to any well "subject

to the jurisdiction of the Commission" must disconnect from or suspend service to the well and shall not "reconnect to or resume service to" the well until the Commission issues a new certificate of compliance. The words "or resume service to" are adopted as a change from the proposal.

The Commission amends §3.73(i) to replace the reference to Texas Natural Resources Code, §85.165, with Texas Natural Resources Code, §91.706(a), and to clarify that an operator of any well for which the Commission has canceled the certificate of compliance may not use that well "for production, injection, or disposal" until the Commission issues a new certificate of compliance for the well.

The Commission adds new §3.73(j) to state that, if an operator uses or reports use of a well for production, injection, or disposal for which the operator's certificate of compliance has been canceled, the Commission may refuse to renew the operator's organization report until the operator pays the fee required and the Commission issues the certificate of compliance for the well. The Commission redesignates current subsection (j) as subsection (k).

The Commission adopts the amendments to §§3.1, 3.58, 3.73, and 3.78 pursuant to Texas Natural Resources Code, §§91.701 - 91.707, as amended by Senate Bill 1670, 80th Legislature, Regular Session (2007), effective September 1, 2007, which authorize the Commission to require a certificate of compliance for all wells subject to the Commission's jurisdiction; prohibit a pipeline or other carrier connection with a well for which no certificate of compliance has been issued; authorize the Commission to cancel a certificate of compliance for a well if the operator has violated Texas Natural Resources Code, Title 3; Texas Water Code, §26.131; or Texas Water Code, Chapter 27, Subchapter C, or any Commission rule, order, license, permit, or certificate issued pursuant to those statutes; require a pipeline or other carrier, upon notice, to disconnect from a well for which the certificate of compliance has been canceled; prohibit use of a well for production, injection, or disposal for which the certificate of compliance has been canceled; authorize the Commission to collect a fee for re-issuance of a certificate of compliance that has been canceled; and provide that, where an operator uses a well or reports such use, after the certificate of compliance for the well has been canceled, the Commission may refuse to renew the operator's organization report until the operator has paid the reconnect fee or fees and the certificate of compliance has been reissued. The Commission adopts the amendments pursuant also to Texas Natural Resources Code, §91.142, which requires the filing of annual organization reports by every person or entity subject to the Commission's jurisdiction; Texas Natural Resources Code, §81.051 and §81.052, which authorize the Commission to adopt rules governing oil and gas well and pipeline operators; Texas Natural Resources Code, §§141.011 - 141.012, which authorize the Commission to adopt rules governing geothermal resource wells; Texas Water Code, §§27.031, 27.032, and 27.034; and Texas Natural Resources Code, §91.101, which authorize the Commission to adopt rules governing injection wells; Texas Health and Safety Code, §401.415, which authorizes the Commission to adopt rules governing the disposal of oil and gas NORM waste; and Texas Utilities Code, §121.201, which authorizes the Commission to adopt rules governing transportation of gas and gas pipeline facilities.

Texas Health and Safety Code, §401.415; Texas Natural Resources Code §§81.051, 81.052, 85.202, 86.042, 91.101, 91.142, 91.701 - 91.707, 141.011, and 141.012; Texas Utilities Code, §121.201; and Texas Water Code, §§26.131 and 27.031 - 27.034, are affected by the adopted amendments.

Statutory Authority: Texas Health and Safety Code, §401.415; Texas Natural Resources Code, §§81.051, 81.052, 85.202, 86.042, 91.101, 91.142, 91.701 - 91.707, 141.011, and 141.012; Texas Utilities Code, §121.201; and Texas Water Code, §§26.131 and 27.031 - 27.034.

Cross-reference to statutes: Texas Health and Safety Code, Chapter 401; Texas Natural Resources Code, Chapters 81, 85, 86, 91, and 141; Texas Utilities Code, Chapter 121; and Texas Water Code, Chapters 26 and 27.

Issued in Austin, Texas, on November 6, 2007.

§3.1. Organization Report; Retention of Records; Notice Requirements.

(a) Filing requirements.

(1) Except as provided under subsection (d) of this section, no organization, including any person, firm, partnership, joint stock association, corporation, or other organization, domestic or foreign, operating wholly or partially within this state, acting as principal or agent for another, for the purpose of performing operations within the jurisdiction of the commission shall perform such operations without having on file with the commission an approved organization report and financial security as required by Texas Natural Resources Code §§91.103 - 91.1091. Operations within the jurisdiction of the commission include, but are not limited to, the following:

(A) drilling, operating, or producing any oil, gas, geothermal resource, brine mining injection, fluid injection, or oil and gas waste disposal well;

(B) transporting, reclaiming, treating, processing, or refining crude oil, gas and products, or geothermal resources and associated minerals;

(C) discharging, storing, handling, transporting, reclaiming, or disposing of oil and gas waste, including hauling salt water for hire by any method other than pipeline;

(D) operating gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance or repressurizing plants, or recycling plants;

(E) recovering skim oil from a salt water disposal site;

(F) nominating crude oil;

(G) operating a directional survey company;

(H) cleaning a reserve pit;

(I) operating a pipeline;

(J) operating as a cementer approved for plugging wells; or

(K) operating an underground hydrocarbon or natural gas storage facility.

(2) The Commission shall notify organizations that perform operations not included in paragraph (1)(A) - (K) of this subsection of any additional activities subject to the jurisdiction of the Commission which require the filing of the organization report. Such notification shall make the provisions of this section applicable to such activities.

(3) Each organization performing activities subject to the jurisdiction of the Commission shall maintain a current organization report with the Commission until all duties, obligations, and liabilities

incurred pursuant to Commission rules, the Natural Resources Code, Titles 3 (Subtitles A, B, C, and Chapter 111 of Subtitle D) and 5, Texas Health and Safety Code, Chapter 401; Texas Utilities Code, §121.201, and the Water Code, Chapters 26, 27, and 29, are fulfilled.

(4) The organization report shall contain the following information:

(A) the name, street address, mailing address, telephone number, and emergency after-hours telephone number of the organization;

(B) the plan of the business organization;

(C) for each officer, director, general partner, owner of more than 25% ownership interest, or trustee (hereinafter controlling entity) of the organization:

(i) that entity's or individual's full legal name, the name(s) under which such entity or individual conducts business in the State of Texas, and all assumed names;

(ii) the following:

(I) if the entity is an individual, his or her social security number. Any individual who does not have a valid social security number shall submit, at that person's option, either his or her valid driver's license or Texas State Identification number;

(II) if the entity is not an individual, the name and, at that person's option, either the valid driver's license, social security, or Texas Identification number of each officer, director, or other person, who, under Texas Natural Resources Code, §91.114, holds a position of ownership or control of the organization, or an active P-5 number for that entity. All controlling entities connected to an organization which are not individuals shall provide the identification of the individuals in ownership or control of those entities.

(iii) a street address different than that of the organization; and

(iv) if different from the mailing address of the organization, a mailing address;

(D) if a foreign or nonresident organization, the name and street address of a resident agent.

(E) the name of any non-employee agent that the organization authorizes to act for the organization in signing Oil and Gas Division certificates of compliance which initially designate the operator or change the designation of the operator. Organizations may designate non-employee agents to execute subsequent organization reports. That designation shall be authorized by the organization and not by a non-employee agent.

(5) Any organization may designate a resident agent with a street address different than that of the organization in place of submitting the street addresses of the three (if applicable) primary controlling entities of the organization. Any foreign or nonresident organization identified in paragraph (1) of this subsection shall designate and maintain a resident agent upon whom may be served any process, notice, or demand required or permitted by law to be served upon such entity by or on behalf of the Commission. Failure of such organization to designate and maintain a resident agent shall render the organization report invalid. (Reference Order Number 20-60,617, effective January 1, 1971.)

(6) Failure by any organization identified in paragraph (1) of this subsection to answer any subpoena, commission to take deposition, or directive to appear at a hearing served upon such organization by or on behalf of the Commission shall render the organization report invalid.

(7) An organization shall refile an organization report annually according to the schedule assigned by the commission. Prior to the filing date, the commission shall mail notification and information to each organization for update of the organization report file. An organization shall file an amended organization report within 15 days after a change in any information required to be reported in the organization report. Only address changes may be made by letter.

(8) The commission shall meet any requirement under statute or commission rule for an order to be sent or notice to be given by the commission to an organization by mailing the item to the organization's mailing address shown on the most recently filed organization report or the most recently filed letter notification of change of address. Notices sent by regular first-class mail shall be presumed to have been received if, upon arrival of the deadline for any response to the notice, the wrapper containing the notice has not been returned to the commission. Any commission action or proceeding for which notice is required shall go forward on the basis of the notice provided under this subsection, whether or not actual notice has been received. Service of notices and orders sent by certified mail is effective upon:

(A) acceptance of the item by any person at the address;

(B) initial failure to claim or refusal to accept the item by any person at the address prior to its eventual return to the commission by the United States Postal Service; or

(C) return of the item to the commission by the United States Postal Service bearing a notation such as "addressee unknown," "no forwarding address," "forwarding order expired," or any similar notation indicating that the organization's mailing address shown on the most recently filed organization report or address change notification letter is incorrect.

(9) An organization may also designate to the commission in writing a specified address for all commission correspondence relating to a particular district. If designated by an operator, this specified address shall be used in lieu of the organization address for any notices, other than hearing notices, pertaining to that district.

(10) The commission may return, unapproved, to the organization address an organization report which is submitted to the commission not fully completed according to the report's written instructions and not timely corrected. In the event that the commission returns an organization report, all submitted financial assurances shall remain non-refundable. If an organization report approved by the commission is found to contain information that was materially false at the time it was submitted for approval, the commission may suspend or revoke the organization report after notice and opportunity for hearing.

(b) Record requirements. All entities who perform operations which are within the jurisdiction of the commission shall keep books showing accurate records of the drilling, redrilling, or deepening of wells, the volumes of crude oil on hand at the end of each month, the volumes of oil, gas, and geothermal resources produced and disposed of, together with records of such information on leases or property sold or transferred, and other information as required by commission rules and regulations in connection with the performance of such operations, which books shall be kept open for the inspection of the commission or its representatives, and shall report such information as required by the commission to do so.

(c) Time frame. All organizations shall keep copies of records, forms, and documents which are required to be filed with the commission, along with the supporting documents referred to in subsection (b) of this section, for a period of three years, or longer if required by an-

other commission rule, and any such copies may be disposed of at the discretion of such entities after the original records, forms, and documents have been on file with the commission for the required period, except that particular documents shall be retained beyond the required period and until the resolution of pending commission regulatory enforcement proceedings if the documents contain information material to the determination of any issues therein. All records, forms, and documents required to be filed with the commission shall be filed in the same name, exactly as it appears on the organization report.

(d) Issuance of permits to organizations without active organization reports.

(1) Notwithstanding contrary provisions of this section, the commission or its delegate may issue a permit to an organization or individual that does not have an active organization report or does not ordinarily conduct oil and gas activities when the issuance of such a permit is determined to be necessary to implement a compliance schedule, or to remedy circumstances or a violation of a commission rule, order, license, permit, or certificate of compliance relating to safety or the prevention of pollution. For permits issued under this subsection, the commission may impose special conditions or terms not found in like permits issued pursuant to other commission rules. Any organization or individual who requests such a permit shall file an organization report and any other required forms for record-keeping purposes only. The report or form shall contain all information ordinarily required to be submitted to the commission.

(2) This section shall not limit the commission's authority to plug or to replug wells or to clean up pollution or unpermitted discharges of oil and gas waste.

(e) Each organization required to file an organization report under subsection (a) of this section or an affiliate of such an organization that performs operations within the jurisdiction of the Commission that files for federal bankruptcy protection shall provide written notice to the Commission of that action not later than the 30th day after the date the organization or the affiliate files for bankruptcy protection by submitting the notice to the Enforcement Section of the Office of General Counsel. All bankruptcy-related notices sent to the Commission shall be submitted in writing to that section. For the purpose of this section, affiliate means an organization that is effectively controlled by another.

(f) Organization reports shall not be approved unless the organization has complied with the state registration requirements of the Secretary of State. A tax dispute with the Comptroller of Public Accounts shall not be a basis for disapproving an organization report.

(g) Pursuant to Texas Natural Resources Code, §91.706(b), if an operator uses or reports use of a well for production, injection, or disposal for which the operator's certificate of compliance has been canceled, the Commission may refuse to renew the operator's organization report required by Texas Natural Resources Code, §91.142, until the operator pays the fee required by §3.78(b)(9) of this title (relating to Fees and Financial Security Requirements) and the Commission issues the certificate of compliance required for that well.

§3.73. Pipeline Connection; Cancellation of Certificate of Compliance; Severance.

(a) No pipeline or other carrier shall be connected with any well subject to the jurisdiction of the Commission until the operator of the well provides the pipeline or other carrier with a certificate from the Commission that the rules in this title have been complied with. This section shall not prevent a temporary connection with any well in order to take care of production and prevent waste until the operator has a reasonable time, not to exceed 30 days from the date of such connection, within which to obtain such certificate. For purposes of this section, the term "Commission" means the Railroad Commission of Texas, the Director of the Oil and Gas Division, or the Director's delegate.

(b) No pipeline operator shall physically disconnect its facilities from or cease providing pipeline services to any well or lease without first obtaining:

(1) written consent of the well or lease operator for the proposed disconnect or termination; or

(2) written permission from the Commission. This section does not apply to temporary suspensions of service authorized under other rules in this title or attributable to maintenance, safety, or product quality issues.

(c) If the pipeline operator is unable to obtain the written consent of the well or lease operator to physically disconnect from or cease providing service to the well or lease, or the well or lease operator objects to the proposed physical disconnect or termination of service, and the pipeline operator still desires to physically disconnect from or cease providing service to the well or lease, the pipeline operator shall file an application with the Commission requesting permission to physically disconnect its facilities from or cease providing service to the well or lease. An affected well or lease operator may object to physical disconnection or cessation of service and file a complaint with the Commission under this subsection.

(1) The pipeline operator shall file its application with the Commission at least 30 days prior to the date on which the pipeline operator desires to make the physical disconnection or cease providing service. On the same date as the pipeline operator files its application with the Commission, the pipeline operator shall send a copy of the application to the operator of the well or lease affected by the application by certified mail, return receipt requested. The application shall identify the well operator and pipeline operator, identify each lease or well involved, and provide sufficient information to allow the Commission to make a determination pursuant to paragraph (4) of this subsection.

(2) If the operator of the well or lease does not file with the Commission a written objection to the application within 28 days following the filing of the application, the Commission shall administratively approve or deny the application and shall notify the pipeline operator and the well or lease operator of the decision by certified mail, return receipt requested. Following such notification, either party shall have 21 days to file a written request for hearing. If neither party files a timely request for hearing, the administrative approval or denial shall be deemed final.

(3) If either party files a timely request for hearing, the Commission shall refer the application to the Office of General Counsel docket services to be set for hearing within 60 days following the date of referral.

(4) In determining whether or not to approve a request to physically disconnect from or cease providing service to a well or lease, the Commission may consider relevant factors, including but not limited to:

(A) operational integrity of the pipeline facilities;

(B) operational integrity of the equipment on the well or lease;

(C) cost of continued operation of the physical connection or service;

(D) risk to public safety, human health and the environment;

(E) availability of alternative transportation;

(F) protection of correlative rights; and

(G) prevention of waste.

(d) The Commission may shut in and seal any well, and cancel any certificate of compliance if it appears that the operator of a well has violated or is violating, in connection with the operation of the well, any statutes, rules in this title, permits, or orders of the Commission. Upon receipt of information that indicates operations are being conducted in violation of statutes, rules in this title, or a Commission permit or order, the Commission shall send a notice letter to the operator directing the operator to correct the violation. The letter shall state the facts or conduct alleged to warrant the shut-in and sealing of the well, and cancellation of the certificate of compliance. The letter shall give the operator an opportunity to show compliance with the statutes, rules in this title, or Commission permits or orders. The letter shall be sent by registered or certified mail, and shall indicate the time within which compliance shall be demonstrated or achieved. The time period allowed for the operator to achieve compliance shall not be less than 10 days from the date the notice letter is sent.

(e) Within the time period set out in the notice letter, the operator shall either demonstrate compliance or correct the violation, and notify the Commission of its action.

(f) If the violation is not corrected within the time period set out in the notice letter, the Commission may shut in and seal the well, and cancel the certificate of compliance.

(g) If a certificate of compliance has been cancelled, the Commission may not issue a new certificate of compliance until the owner or operator of the property covered by the certificate of compliance submits to the Commission a reissuance fee as required by §3.78 of this title (relating to Fees and Financial Security Requirements) (Statewide Rule 78); and

(1) the property covered by the certificate is brought into compliance with the statutes, rules in this title, and Commission permits and orders; or

(2) the Commission determines that there are just and equitable grounds for reissuing the certificate.

(h) Pursuant to Texas Natural Resources Code, §91.705, upon notice from the Commission to any operator of a pipeline or other carrier connected to any well subject to the jurisdiction of the Commission that the certificate of compliance applicable to the well has been canceled by the Commission, the operator of the pipeline or other carrier shall disconnect from or suspend service to the well and shall not reconnect to or resume service to that well until a new certificate of compliance has been issued by the Commission. Pursuant to Texas Natural Resources Code, §85.3855, failure to comply with this subsection may subject a person to a penalty of up to $10,000 per violation.

(i) Pursuant to Texas Natural Resources Code, §91.706(a), upon notice from the Commission that a certificate of compliance as to any well has been canceled as provided in this section, the operator of such well shall not use that well for production, injection, or disposal until a new certificate of compliance with respect to the well has been issued by the Commission as provided in this section. Pursuant to Texas Natural Resources Code, §85.3855, failure to comply with this subsection may subject a person to a penalty of up to $10,000 per violation.

(j) Pursuant to Texas Natural Resources Code, §91.706(b), if an operator uses or reports use of a well for production, injection, or disposal for which the operator's certificate of compliance has been canceled, the Commission may refuse to renew the operator's organization report required by Texas Natural Resources Code, §91.142, until the operator pays the fee required pursuant to §3.78(b)(9) of this title (relating to Fees and Financial Security Requirements) and the Commission issues the certificate of compliance required for that well.

(k) The provisions of this section shall be cumulative of other Commission actions and procedures relating to violations of state statutes or Commission permits, rules, and orders, including the authority of the Commission to immediately shut in a well or lease, or to direct the operator to shut in a well or lease, when an emergency exists due to pollution or an imminent threat of harm to people or property.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705356
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
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Proposal publication date: August 31, 2007
For further information, please call: (512) 475-1295

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PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.507

The Public Utility Commission of Texas (commission) adopts an amendment to §25.507, relating to ERCOT Emergency Interruptible Load Service, with changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 3712). The amendment revises a demand response program as a resource for the Electric Reliability Council of Texas (ERCOT) to employ during an Emergency Electric Curtailment Plan (EECP) event that may reduce the risk of interruption of firm load customers' electricity. Under a demand response program, voluntary reductions in the consumption of specific customers participating in the program are used to help the system operator meet shortages of supply or other emergency situations. The commission adopted §25.507 in early 2007, but due to some limitations of the rule, demand resources have not been acquired. This amendment will remove certain restrictions in the current rule and make more likely that demand resources can be acquired. This amendment is adopted under Project Number 34706.

The commission received comments on the proposed amendment from BP Energy Company (BP), CenterPoint Energy (CenterPoint), Chaparral Steel Company (Chaparral), Cirro Energy Services (Cirro), City Public Service of San Antonio Energy, Austin Energy and Lower Colorado River Authority (LCRA subsequently withdrew its participation in the comments)

(CPS and Austin), CMC Texas (CMC), Competitive ERCOT Market Participants (CEMT), Comverge, EnerNOC, ERCOT, Exelon Generation (Exelon), Frontier Associates (Frontier), Fox Smolen and Associates (Fox Smolen), Good Company Associates (Good Company), Guadalupe Valley Electric Cooperative (GVEC), Luminant Energy (Luminant), Nucor Steel Texas (Nucor), Occidental Chemical Corporation (Oxy), Office of the Mayor of the City of Houston (Mayor White), Site Controls, Strategic Energy (Strategic), Texas Industrial Energy Customers (TIEC), Texas Retail Energy LLC (TRE), and Xtend Energy (Xtend).

General Comments on the value of the EILS program

EnerNOC, Site Controls, Comverge, Good Company, GVEC, Nucor, Chaparral, and Strategic generally supported the EILS program and amendments that would result in the acquisition of demand resources. Good Company, Site Controls, and Comverge commented that the value of this program was to establish the role of demand-response in providing reliability services in ERCOT by enlisting numerous market participants and other customer classes as providers of demand-response. Chaparral and Nucor believed that ensuring a successful EILS market would bring untapped demand resources to the market and assist in improving reliability and moderating operational costs for the benefit of all customers. EnerNOC stated that ERCOT was behind other markets in terms of demand-response penetration and this program could help improve the penetration of this resource. Strategic noted that Load Acting as Resource (LaaR) is the only viable demand-response program in ERCOT, and the LaaR program is limited to certain industrial customers. Strategic believed that it is in the public interest for the commission to expand the scope of demand-response through the implementation of EILS. Nucor pointed out that there has not been a demand-response program that the steel mills could participate in and that this program will make it possible for steel mills to participate. GVEC believed this program was a good insurance policy for all loads, including Non-Opt-In Entity loads.

Nucor noted that the ERCOT market has at most, 1,150 MW of identifiable demand response at anytime compared to almost 68,000 MW of operational generation resources, which, in its opinion, is hardly equal footing or a full utilization of potential demand response. Nucor supported the development of the "widest possible array" of demand response programs and other effective means of offsetting declining reserve margins and increasing energy prices. Nucor opined that making EILS work will give the market another option to work with and develop.

Exelon, CPS, Austin, CEMP, Reliant, and TIEC generally did not endorse the EILS rule. CPS, Austin, and CEMP stated that, based on the fact that the EILS program has never cleared and is highly unlikely to effectively prevent firm load shedding if implemented as amended, it is important to investigate whether any other value is created by the program. TIEC did not believe that the EILS program with or without the proposed revisions is likely to operate as intended and will potentially cost ERCOT market participants hundreds of millions of dollars in payments to procure EILS services and may cause increased costs for other ancillary services. EnerNOC disagreed with the comments of TIEC and CEMP that the EILS program will add little value to the market. EnerNOC again cited ERCOT's shrinking reserve margin as the rationale for the need for the EILS program.

Exelon emphasized that this program is counter to the energy-only market design that the commission strongly endorses and that all market resources, both supply and demand side, should be treated consistently and this rule does not accomplish that goal. Nucor and Chaparral disagreed with the notion that EILS is contrary to the energy-only market design. Chaparral pointed out that many programs: Black Start Service, Replacement Reserve Service, Responsive Reserves Service (RRS), Non-Spinning Reserves Service, and Reliability Must-Run Service, among others, are all capacity-based services that require capacity/reservation payments.

Reliant suggested that ERCOT should be encouraged to develop a report of all of the operational changes that have occurred since April 17, 2006 and to evaluate the overall impact of how the changes work in concert. Reliant added that ERCOT should conduct engineering studies required to determine the appropriate ancillary service reserve level.

Mayor White stated that he was an elected representative of one-tenth of the people in the state and the chief executive of the largest power consumer in this region. Mayor White urged the commission to provide appropriate market-based incentives to treat avoided demand as a resource, because in some ways it can be more valuable than the incremental cost of power generation.

Commission response

The commission continues to believe that there is value in the EILS service. The commission agrees with Good Company, Site Controls, Comverge and others that one of the important values of this program is to establish the role of demand-response in providing reliability services in ERCOT by enlisting numerous customers as providers of demand-response, particularly customers in classes that have not participated in the LaaR program. The commission also finds value in having resources that have not participated in demand response programs being enabled to do so by this program. The commission encourages ERCOT to make an effort to attract such customers to the program. The commission further agrees with Strategic that it is in the public interest for the commission to expand the scope of demand-response through the implementation of EILS. While industrial customers whose loads are on under-frequency relays (UFRs) have some limited ability to participate in ancillary services, the commission would like to see this participation broadened to other customer classes and expanded to other products. One of the goals of the commission in the restructured market has been developing additional demand-response resources. In Docket 23220, *Petition of the Electric Reliability Council of Texas for Approval of the ERCOT Protocols*, the commission expressed its desire for greater load response opportunities and stated that "The commission is concerned that designing the markets for generation resources and requiring load resources to generally adhere to Protocols that were designed for generation resources, may unreasonably limit load resources' participation in the ERCOT ancillary services markets." The commission believes that in the many years that the ERCOT stakeholders have been working on this issue, little has been done to improve load participation in the ERCOT market. While the commission is adopting these amendments, with the objective of improving load participation in the market, it does not believe that the EILS should be the only new opportunity for loads to participate and will continue to work on programs to improve load participation.

The commission posed the following question in its proposed rule: Giving ERCOT some flexibility in setting the duration of the contract periods or in seeking resources in addition to the resources acquired for the periods established in the rule might

help ERCOT deal with unexpected events, such as an extended outage of a large generating unit. Should the rule give ERCOT this flexibility?

TIEC opined that the EILS was unsuitable for anything other than a short-term "emergency" load reduction and therefore not appropriate for dealing with "an extended outage of a large generating unit." TIEC commented that enlarging the scope of the service in this manner would likely make it more difficult to fully subscribe the program as it would add to the opportunity cost to those loads that would be needed to participate. TIEC also took exception to the rule giving ERCOT license to procure undefined resources that "might help deal with unexpected events." TIEC and Reliant believed that the existing rules and protocols provide ERCOT with sufficient flexibility to procure ancillary services and resources to deal with unexpected contingencies as well as processes to address needed changes to the protocols, should that be required.

TRE commented that because ERCOT was in the unique position to know what it needs in an emergency situation, it should be given the flexibility to implement EILS accordingly. EnerNOC agreed that ERCOT staff should have the flexibility imparted by the rule's amendments. TRE also noted that EILS loads need sufficient certainty to determine the duration of the contract periods, the payments for those contract periods, and information on how to bid into the program so the customer can appropriately evaluate its investment to comply with EILS requirements.

Nucor stated that it preferred not to give ERCOT the flexibility to change the contract periods. Nucor opined that it contemplates contract periods of four-month duration because that would keep initial commitments within a reasonable time frame yet short enough to terminate participation without long-term difficulty. Nucor did, however, support giving authority to acquire EILS resources in addition to the resources acquired for the periods established in the rule on an emergency basis, as long as the rule makes it clear that these resources are not counted against the $50 million annual cost cap contemplated by amended Substantive Rule §25.507(b)(3), because this could undermine continuing participation of current EILS loads.

CEMP explained that the market already has effective ways to deal with generator outages. CEMP listed many of the tools the generator and ERCOT have to deal with the outages: the bilateral market, replacement reserves, real time prices, non-spinning reserves, RRS, and out-of-merit capacity. CEMP went on to state that the least effective and most costly approach to dealing with a generator outage would be to purchase additional EILS resources.

Austin and CPS stated that while their preference is to allow the TAC's decision to purchase an additional 500 MW of RRS to replace the EILS, should the commission choose to keep the service, giving ERCOT the flexibility may help the program be more responsive to unexpected events. CPS and Austin cautioned that giving ERCOT this flexibility could create a program offering less certainty for participants and put more responsibility on ERCOT regarding pricing decisions. Austin and CPS also noted that this might make it more difficult for self-providers to offer into the market in a way that will cover their costs of providing EILS.

ERCOT answered the questioned by noting that feedback from the first three contract periods indicated that more flexibility could make the program more attractive to certain loads that are currently unable to participate because of seasonal maintenance schedules or the seasonal nature of the loads themselves. ERCOT, therefore, stated that they would be in favor of having the additional flexibility. ERCOT also pledged that given the flexibility, it would publish the annual contract period schedule at least ninety days in advance, to facilitate adequate planning on the part of prospective EILS resources.

In reply comments, Reliant disagreed with the comments of Nucor, EnerNOC, ERCOT, and TRE that ERCOT needed additional flexibility in reviewing offers to supply EILS and with the structure of the EILS program itself. Specifically, Reliant disagreed that giving ERCOT the flexibility to acquire additional resource during an emergency was justified on reliability grounds; Reliant contended that a reliability need for EILS has not been demonstrated. Further, Reliant objected to the additional costs to the market that are likely to result from such non-standard acquisition of resources. Reliant stated that the market Protocols provide ERCOT with the authority to procure additional ancillary services during the adjustment period, and this is sufficient to respond to changing system needs. Reliant reiterated in response to TRE's comments that ERCOT was in a unique position to determine what flexibility it might need in an emergency situation and that the Protocols provide ERCOT with a framework for taking actions to preserve system integrity.

EnerNOC specifically disagreed with TIEC with respect to the ability of demand response to deal with generation outages and generally reiterated its belief that demand response could be a useful tool dealing with operational problems. EnerNOC disagreed with stakeholders that commented on any alleged "lack of value" in the existing EILS program design, but it agreed with Austin and CPS "that giving ERCOT more flexibility may help the program be more responsive to unexpected events."

Commission response

The commission finds that the EILS program does have reliability benefits for the ERCOT system. To that end, giving additional contracting flexibility to the ERCOT operator enhances ERCOT's ability to optimize those benefits to address system anomalies. However, the commission notes that it is not authorizing ERCOT to exceed the $50 million cap nor to exceed the 1,000 MW ceiling; but it is allowing ERCOT to allocate the resources as it deems necessary to address system needs. The commission further notes that ERCOT has pledged to publish the annual contract period schedule at least 90 days in advance. The commission is comfortable that this pledge will give parties adequate notice regarding the contracting periods and alleviate uncertainty.

Subsection (a)(1)

Exelon noted that the Reliability Operations Subcommittee found that this service does not improve the reliability of the grid. Therefore, Exelon proposed that if this service is truly an ancillary reserve service, comparable to those already existing in the market then it should be paid only in the hours ERCOT believes it is needed and only a day in advance. Exelon stated that all market participants would like a guaranteed payment stream to increase their participation in the market and encouraged the commission to consider the long term needs of the grid rather than the short term desires of the few loads that would get special benefits through this program.

EnerNOC addressed the concern of the lack of value in the program by stating that this program could be thought of as an insurance policy that can help prevent blackouts similar to the April 17, 2006 event by providing ERCOT's system operators additional capacity that can be called upon in an emergency. EnerNOC

added that if the concern is that this program does not provide sufficient protection given the cost of the program, then the "coverage" could be extended and the EILS could be called earlier in the process rather than later.

ERCOT suggested a change to indicate that it would publicly announce any changes to the contract period schedule prior to the next contract period starting date.

Commission response

The commission concludes that the EILS program, if it results in the acquisition of additional demand resources, will have value to the market by reducing the likelihood of an interruption of firm load. As previously addressed in response to the question above, the commission finds it appropriate to give ERCOT the additional flexibility to choose the appropriate contract periods. The commission agrees with the changes suggested by ERCOT and makes the changes to the rule accordingly.

Subsection (a)(2)

CEMP noted that the proposed amendment does not provide guidelines as to how a bid will be deemed unreasonable or how acceptable parameters are defined. Based on the response from previous solicitations, CEMP assumed that the 1,000-MW cap proposed in subsection (a)(3) will not be reached and concluded that this will place ERCOT in the position of selecting all bids, unless ERCOT deems any of these bids to be unreasonable. If ERCOT decides to adopt a certain price level as "reasonable" all potential suppliers will know their bid will be accepted as long as their bid is at or below that level and that price level will then become the standard offer for suppliers-not illustrative of a properly functioning market. CEMP added that ERCOT is supposed to clear prices based on market forces, but it is highly unlikely that a true market will exist under this scenario. Conversely, if ERCOT does not pre-determine a price level then it is possible for EILS providers to have market power. EnerNOC countered by stating that bids are confidential market data and other participants bidding in would have no knowledge about other bids. Specifically, EnerNOC opposed CEMP's statement that allowing ERCOT this flexibility would result in ERCOT's ability to set the bid price.

Commission response

The rule contemplates that ERCOT will determine the reasonable maximum price for this service and that it will not announce the maximum price at which it will procure the resource. The commission also agrees with EnerNOC that bids are likely to be treated as confidential, and market participants should not have knowledge of bids from other providers. The commission expects that ERCOT will acquire resources offered at reasonable prices, recognizing the value of the service, the cost and value of other reliability services, and the limits in the rule. In this context, the commission concludes that ERCOT is not under any obligation to procure EILS at a cost that it concludes is unreasonable, and that there are thus no market power concerns with respect to the service. The commission renumbers this subsection as (a)(3).

Subsection (a)(3), formerly (a)(5)

Strategic, Chaparral, GVEC, Nucor, ERCOT, EnerNOC, Xtend, Cirro, and Good Company generally supported the removal of the 500 MW floor for EILS. ERCOT believed that this is the single most important proposed amendment. ERCOT added that although it has consistently stated that less than 500 MW is not an optimal operational amount, a substantial number of potential participants have reported that they have not bid into the program because of uncertainty about whether EILS would reach the 500 MW floor. EnerNOC believed that the 500 MW threshold created a vicious cycle in which failure to meet the threshold in one bidding period has caused potential providers to believe the program is not viable and therefore, not to participate in subsequent bidding rounds. Chaparral noted that it is painfully apparent from the bid quantities received during the last three contract terms that the threshold requirement must be eliminated. Nucor stated that it has attempted to participate by submitting bids in every prior EILS contract period but that each time total bids have failed to reach the threshold of 500 MW. Good Company stated it believes that the higher price cap will elicit sufficient bids to surpass the 500 MW but that it may take multiple auctions to reach that level.

Nucor believed that, over time, subscription to EILS is likely to exceed 500 MW once the program gets off the ground with the improved incentive for participation provided by a higher cap. Nucor also pointed out that the current RRS program is oversubscribed by about 650 MW of LaaR. Consequently, some or all of the 650 MW could shift to EILS and be added to total demand response resources available in ERCOT in a given hour, rather than "sitting on the sidelines" as it currently does, Nucor argued.

TIEC, CEMP, Austin and CPS, and Reliant opposed the removal of the 500 MW floor. CEMP stated that the level was determined based on the amount of interruptible load necessary to produce a 0.1 Hz change in system frequency. If the minimum is reduced or eliminated, CEMP opined, the necessary effect on system frequency cannot be assured and the system operator will not be able to expect a sustainable correction in frequency decay through the deployment of EILS. Therefore, CEMP concluded that the system operator will be forced to shed firm load even as the signal is being sent to operate the loads subscribed in the program and as a result the goal of preventing a broader service interruption cannot be achieved. Austin and CPS stated that if an amount below 500 MW were procured, that the program would probably be ineffective.

Reliant agreed with these comments, and recalled that ERCOT stressed that 500 MW was the minimum effective requirement for the program to be useful, but it noted that some amendments might be beneficial in jump-starting the service. Reliant questioned why ERCOT seemed intent on "jump starting" this program. TIEC also opposed removing the 500 MW floor. TIEC argued that if the floor is to be removed for the limited purpose of attempting to get the program off the ground, then the removal should be temporary and the floor reinstituted after a stated period of time (one year at the most) with no further action by the commission. EnerNOC opposed this suggestion and stated that adding any other uncertainty about the future of the program would only continue to stifle participation.

EnerNOC, in its reply comments, stressed the importance of eliminating the 500 MW floor in an attempt to reduce the barriers to participation by commercial demand, including those that would potentially be included in EnerNOC's portfolio. EnerNOC asserted that the comments filed by Austin, CPS and CEMP failed to recognize the significant impediment the 500 MW floor has created for potential participants in the EILS program.

Commission response

The commission finds that this program provides an opportunity for many different types of loads to participate in demand re-

sponse. The commission concludes that the 500 MW floor has created significant uncertainty and has deterred companies from bidding into the program. The commission agrees with Strategic, Chaparral, GVEC, Nucor, ERCOT, EnerNOC, and Good Company that the 500 MW floor should be removed to facilitate the program. Therefore, the commission makes no changes to this section.

Subsection (a)(6), Long-term solution

Chaparral, EnerNOC, Good Company, and Nucor supported the elimination of the provisions relating to a long-term solution. Chaparral reasoned that loads cannot be expected to participate in EILS without assurance that the program will be in place for some reasonable amount of time. Nucor stated that discarding this section provides two important positive signals to participants: a long-term commitment exists to encourage customers to provide demand-response services and a range of demand-response programs should be made available by ERCOT. Nucor also strongly supported elimination of this language suggesting that EILS is not part of a long-term effort to fully utilize demand-response resources in the ERCOT system. In its view, the existing language virtually invites ERCOT stakeholders to engage in a continuing squabble over EILS. Nucor added that such unnecessary activities waste all parties' resources that could be better spent designing new demand-side programs and result in the unintended consequence of further concentration by ERCOT on responsive reserve as a solution to all problems.

EnerNOC agreed that a major disincentive to participation in the program has been the uncertainty caused by the provision that would allow the ERCOT stakeholders to substitute another resource in place of the EILS program; because of this uncertainty, customers are unwilling to invest their time to sign up for a program that could be cancelled in a matter of months. EnerNOC added that it does not see a viable cost-effective alternative solution to EILS emerging from the stakeholder process. Good Company opined that because a long-term solution will impact both the market and the self-interest of market participants, it should be the product of a PUC process, where all parties can participate and provide input and an impartial arbiter whose primary concern is the public interest can make the final decisions.

TIEC urged the commission not to delete subsection (a)(6) from the rule, as EILS was proposed as a temporary solution. It argued that ERCOT should continue to have the option to terminate the EILS program if and when an alternative long-term solution is implemented that renders EILS unnecessary.

CEMP was disheartened that references to any long term solution are proposed to be stricken from the rule. CEMP believed that the stakeholder process has made significant progress and should be viewed as a far more effective and less expensive alternative to EILS.

Nucor responded to CEMPs concern by arguing that the long-term solution language in the original rule gave impetus for RRS supporters in ERCOT to proceed along the same tired course of putting all of their demand-response eggs in the LaaR portion of the RRS basket. Therefore, Nucor argued that demand response in ERCOT has been one-dimensional.

Commission response

The commission disagrees that the long-term solution provisions should remain in subsection (a) or (h) and makes no changes to the proposed amendment to remove them. The commission agrees with the comments that indicated the possibility of eliminating EILS if a long-term solution is developed has created significant uncertainty for companies that might have been interested in participating in EILS. The commission appreciates the work that has gone into developing a long-term solution to satisfy the requirements of this rule. However, recent events indicate that the ERCOT stakeholder process is unlikely to produce a long-term solution that provides meaningful demand response opportunities for all customer classes of load, and therefore removes the long-term solution options from this rule. The proposal considered by the ERCOT Board of Directors in its October 2007 meeting would have increased the level of responsive reserves acquired by ERCOT, without any immediate increase in load participation in RRS and little likelihood that commercial customers would be able to participate in RRS or other existing ancillary service markets.

Subsection (b)(3)

TIEC, Reliant, Oxy, Luminant and CEMP opposed the proposed increase of the cap to $50 million. TIEC believed the increase will have the effect of increasing charges to the market to procure a smaller amount of capacity for a program that is unlikely to provide the expected benefits if it is called upon to prevent firm load shedding. TIEC added that as it presently exists there is a highly unfavorable cost-benefit ratio and the proposed changes make it much worse. TIEC expressed concern that if enough money is offered, EILS will cannibalize load participation in other services, such as RRS and there will be an increase in the cost of RRS as ERCOT moves higher up the bid stack to obtain the desired capacity amount. Reliant stated that there is no evidence that the program is cost-effective at the current level, therefore there is no reason to raise the cost cap. CEMP noted that planning guidelines state that outages of the nature contemplated by EILS are likely to occur only once in a ten-year time period. CEMP calculated that with ERCOT procuring 200 MW, for a once per ten-year period for four hours that the value of lost load would be $625,000/MWh. CEMP argued this was excessive and pointed out that most studies do not place the value of load lost in a forced outage above $20,000 per MWh. Nucor disagreed with CEMP, and argued that the "rather excessive" calculation as quoted by CEMP is based on a number of faulty assumptions: (1) subscription would be only 200 MW despite high prices, (2) all $50 million will be paid out each year to the 200 MW, and (3) EILS will be used only once in 10 years for four hours. Nucor added that parties claimed that a portion of LaaR may leave RRS for EILS. Nucor argued that given that the LaaR participation in RRS is oversubscribed by 650 MW, this is likely the case if priced correctly. Nucor opined that deploying EILS only once every 10 years for only four hours is highly unlikely, given declining reserve margins.

Luminant calculated the capacity at a cost of $250,000 per MW-year (for 200 MW) and pointed out that ERCOT calculated the value of RRS at $130,000 per MW-year. Luminant also noted that the RRS capacity is a more valuable product to ERCOT and questioned whether EILS provided good value for its likely cost.

Good Company, EnerNOC, GVEC, Nucor, Xtend, Cirro, and Chaparral supported the increase in the cap. Good Company commented that it was not surprised at the failure of three EILS auctions, and pointed out that traditional load management programs in ERCOT paid around $50/kW-year and a payment closer to $20 per kW-yr would neither entice former load-management participants nor encourage new sources of load response to make the necessary investment in time and equipment to come forth in large numbers. EnerNOC believed

that the commercial demand-response resources can be much more cost-effective than ERCOT's current LaaR which is roughly $140 kW-year while programs with high penetration levels in other areas of the country range from $40-80/kW-year. Xtend commented that in discussion with a wide variety of potential customers, very few of them we were interested in a program with a cap of $20 million but many more were interested in a program with a cap of $40-50 million, as the lower limit simply does not pay enough to make it worth the trouble for most loads. Xtend also noted that it is easier to retain customers than to obtain customers, and lowering the cap in a succeeding program was better than to raise the cap on a succeeding program. Cirro believed the cap should be higher than $50 million based on an avoided cost of installing peaking generation.

Nucor preferred a bid-driven market clearing price-based EILS procurement with no cost cap but acknowledged that the elimination of minimum capacity and the cap increase go a long way towards eliminating the shortcomings of the existing rule.

EnerNOC, in its reply comments, reemphasized the importance of increasing the cap for the program to $50 million. Evidence cited includes the fact that ERCOT was unable to attract the necessary amount of load for the program to be implemented in the previous contract periods and that industrial customers were not willing to make the investment in the necessary equipment to participate in the program at the current cap of $20 million. EnerNOC remained optimistic about being able to attract commercial loads to the program if the new price cap is implemented. Further, EnerNOC argued that the any proposal to either change the price cap or eliminate the 500-MW floor was illogical and would only accomplish the goal of making it more difficult to attract participants to the program.

Strategic did not oppose increasing the cap beyond $20 million if the commission deems an increase is appropriate, but to Strategic $50 million seemed excessive without first attempting to improve the program through other modifications. Strategic stated that it was a load serving entity (LSE) that will help fund the program, and it does believe that the cost must correspond with the benefit. Strategic opined but that the other changes in the rule will improve the likelihood of success of the program and concluded that the cap increase may not be necessary.

Commission response

The commission agrees with many parties that the previous $20 million cap and with the 500-MW procurement floor were key factors that resulted in not procuring resources under the EILS program in 2007. The commission agrees with Good Company, Cirro, Xtend, EnerNOC, GVEC, Nucor and Chaparral that the cap should be increased. The commission concludes that ERCOT should have the flexibility to use up to $50 million annually for this program if it deems it necessary.

Subsection (c)(1)(B)

Nucor, Fox Smolen, Strategic, Cirro and Chaparral stated that the elimination of the 500-kW aggregation restriction is a real improvement and will offer an opportunity for more customers to participate in EILS and as a result offer more sources of demand-response to the ERCOT system.

Commission response

The commission agrees that removal of the 500-kW aggregation restriction for EILS resources will result in opportunities for smaller customers to participate in EILS and adopts the proposed amendment on this issue.

Subsection (c)(2)(B)

CMC Texas stated that it is a large industrial electricity customer located in ERCOT that is served by a Non-Opt-In Entity (NOIE). CMC noted that the rule expressly permits loads served by NOIEs to participate in the program and this allows CMC to fully capitalize on its demand side capabilities. It supported the changes to the rule.

Nucor believed the expansion to permit QSEs to aggregate resources without IDR meters sets forth an additional opportunity for small loads to participate in EILS. Chaparral noted that EILS was never intended to attract residential load, but it can and will make available to ERCOT additional small commercial, large commercial and industrial load resources for use as an operating tool, provided the proposed rule amendments are adopted.

Good Company, Site Controls and Comverge agreed and suggested that this language could be used as the template for loads to participate in all ERCOT ancillary services. ERCOT requested a clarification that a customer's meter and its use are subject to ERCOT approval.

Commission response

The commission agrees that all customer classes should be provided the opportunity to participate in EILS and agrees to include changes to that effect in the rule. The commission also makes ERCOT's requested clarification to this section.

Subsection (c)(2)(C)

ERCOT suggested a clarification to eliminate potential ambiguity relative to resources assigned to the alternate baseline.

In its reply comments, Good Company agreed with ERCOT's proposal to allow participants to use the equivalent of an IDR meter but cautioned that ERCOT should use reasonable standards and should develop an alternative baseline methodology if load data is inadequate for developing a default baseline.

Commission response

The commission agrees with the changes suggested by ERCOT and changes the rule accordingly.

Subsection (c)(2)(F)

ERCOT suggested a modification to avoid confusion over how EILS Resources are registered with ERCOT.

Commission response

The commission agrees with the changes suggested by ERCOT and changes the rule accordingly.

Subsection (c)(3)(A)

ERCOT proposed to modify this section to conform with earlier suggested changes relating to IDR meter equivalents and to provide clarification of the alternative baseline.

Commission response

The commission agrees with the changes suggested by ERCOT and changes the rule accordingly.

Subsection (c)(4)

Nucor endorsed the additional language in this section, which strengthens ERCOT's deployment of EILS by ensuring that EILS resources, while interrupted, cannot return to service. ERCOT requested a language clarification to clarify that a single Verbal Dispatch Instruction (VDI) will be issued to deploy EILS. TRE

stated that the requirements require a Level 4 QSE relationship and most customers do not have access to a Level 4 QSE, and suggested ERCOT simultaneously send e-mail messages and post messages on a secure website. Reliant thought the language was confusing and proposed a clarification to this section to clarify its view that EILS was contracting for a total of eight hours rather than eight hours per deployment.

Commission response

At the public hearing in Project Number 33457, *PUC Rulemaking Concerning a Demand-Response Program for ERCOT Emergency Conditions*, Kent Saathoff, the Vice President of Systems Operations stated, "We would prefer the actual dispatch to be solely by verbal dispatch instruction. We don't feel like e-mail is reliable enough to depend on operationally." Therefore, the commission does not amend the rule in accordance with TRE's suggestion. ERCOT may choose to send a courtesy e-mail, but this would not change the level of QSE required to communicate with ERCOT.

The commission agrees with Reliant that changes are necessary to improve clarity and amends the rule accordingly.

Subsection (d)

Reliant proposed modifying the payment structure to eliminate the capacity payment and provide a side payment equal to 50% of the Balancing Energy Service (BES) Market Clearing Price for Energy (MCPE) during the period of ERCOT deployment. Reliant also proposed a clarification to state that ERCOT may develop penalties to reduce payments for underperformance. Reliant also suggested eliminating public access to the methodology used to develop baseline formulas.

Chaparral pointed out that many programs: Black Start Service, Replacement Reserve Service, Responsive Reserves Service (RRS), Non-Spinning Reserves Service, and Reliability Must-Run Service, among others, are all capacity-based services that require capacity/reservation payments.

Commission response

The commission agrees with Chaparral that many ERCOT ancillary services allow reservation payments or capacity payments and is not convinced that these services should not allow a capacity payment. Reserve services, in particular, are compensated for primarily with capacity payments, so that the supplier is paid to be available to supply energy (or a load reduction) when called upon. The use of capacity payments for EILS providers is consistent with this approach. Additionally, the commission finds that Reliant has not provided a clear methodology in its proposal, has not furnished the analysis supporting the 50% of BES MCPE payment level, and does not explain how the 50% side payment will encourage enough resources to participate in the program. Therefore, the commission does not adopt Reliant's suggestions.

Subsection (f)

Nucor believed that the additional reporting requirements added a welcome symmetry to ERCOT reporting of EILS.

Commission response

The commission agrees that the additional market reporting requirements add value and adopts them in this rule. The commission finds that the additional market reporting requirements diminish the need for reporting to the commission. Accordingly, the commission reduces the reporting requirement to the commission to once per year.

Subsection (h)

Chaparral stated that loads have had absolutely no assurance that the program, if successfully launched, would extend beyond a single contract term. If loads are to be encouraged to participate, Chaparral believed, there needs to be concrete assurance that if they make the substantial investment in management time, personnel training and new equipment that the program will not be abruptly terminated without adequate payback opportunity. Nucor agreed that language suggesting that a long-term solution would terminate EILS sends wrong signals to prospective EILS participants.

CenterPoint proposed leaving the provision relating to a long-term solution in place and proposed a requirement that any long-term solution must consider the price-responsive customer behavior that might be achieved once advanced metering and the corresponding necessary retail and ERCOT programs are sufficiently implemented.

Chaparral opined that the provision of an "alternative solution" in the original EILS rule has encouraged the majority of stakeholders who oppose the entire concept of EILS, to attempt to develop various proposals, none of which do what EILS is designed to do, and should not be viewed as "alternative solutions." Chaparral noted that this has resulted in a "Sword of Damocles" hanging over the EILS program and has greatly impeded the program's ability to achieve a successful launch.

Chaparral also argued that EILS offers benefits to ERCOT beyond those resulting from LaaR-provided Responsive Reserves. According to Chaparral, the LaaR program is hugely oversubscribed, and it is infinitely more flexible and far more profitable for the providers than is EILS.

TAC recommendation, is it the long-term solution?

The Technical Advisory Committee (TAC) asked the Wholesale Market Subcommittee (WMS) to work on a long-term solution that would satisfy the rule requirements in subsections (a) and (h). The WMS created a Long-Term Solution Task Force to address the issues. Many stakeholders participated in the process. Simultaneously, the Qualified Scheduling Entity Managers Working Group (QSE Managers) was working on a solution to a separate market problem. At its October meeting, TAC passed a resolution to increase the procurement of RRS in the hours ending six through twenty-two from 2,300 MW to 2,800 MW. Subsequently, the ERCOT Board of Directors (Board) remanded the issue back to TAC to address a number of issues with the proposal; the Board has asked to have a response from TAC by its December 2007 meeting.

TIEC, Oxy, CPS, Austin, Luminant, and CEMP generally supported the TAC resolution. CEMP asked that the increase in RRS be allowed to work and stated that the EILS should be permitted a timely demise. Oxy supported the TAC proposal for several reasons, most importantly because RRS is procured from the market with prices established by using a market clearing price, and it is market based and can be provided from either load or generation. Oxy added that other benefits include reducing implementation costs by utilizing existing ancillary service systems, reducing alerts regarding shortages, increasing the number of units providing RRS, increasing the quantity of balancing energy available in the bid stack and increasing the amount of governor response and inertia on the system, and potentially re-

ducing the number of North American Electric Reliability Corporation (NERC) reportable events. CPS and Austin stated that adding 500 MW of RRS guarantees ERCOT will have additional reserves ready to be deployed as needed to avoid rolling blackouts or brownouts and also has the added benefit of correcting a significant problem in the ERCOT market. CPS and Austin also noted that the addition of 500 MW works in harmony with the energy-only resource adequacy mechanism.

ERCOT commented that the TAC resolution would enhance reliable operation of the system and that 500 MW of additional RRS would meet ERCOT's objective of acquiring additional operating tools to reduce the likelihood of firm load shedding. ERCOT believed that it would be an acceptable stakeholder-developed long-term alternative to EILS as provided for in §25.507(a)(6)(A). However, this conclusion is based on a grid-reliability perspective only. ERCOT recognized that other issues exist such as the cost effectiveness of additional RRS and the value of any demand-side management tools that EILS might bring. ERCOT pointed out that the TAC recommendation, unlike the EILS rule, covers only seventeen hours a day rather than twenty-four but noted there are both less risk of firm load shedding and less societal cost in the hours not covered by the TAC resolution. ERCOT added that to the extent the commission intends that EILS serve as a load-participation recruitment tool, TAC's proposal is not a substitute.

EnerNOC and Good Company argued that the suggestion by ERCOT and its stakeholders to replace EILS with 500 MW of responsive reserves would not address the pressing reliability concerns because of the shrinking reserve margin and does not meet the requirements for a long-term solution, as set forth in the subsections (a)(6) and (h). EnerNOC went on to state that the amended rule provides ERCOT with the necessary "tools" to avoid rolling blackouts in an EECP event.

Chaparral argued that the proposed increase in RRS provides a margin of error with which to smooth over current market price inequities, rather than attempting to directly address the underlying market design flaws. Chaparral went on to state that under the TAC proposal, the financial impacts of the current market flaws are effectively shifted from generators to all consumers.

TRE pointed out that absent further study by ERCOT, there is no way to confirm what the costs of the expansion of the RRS are, and the costs may exceed $100 million. Luminant stated and Reliant agreed that a comprehensive approach to addressing ERCOT's supply and demand needs is the best way to efficiently operate the market. Reliant added that the only way to ensure a comprehensive approach is to evaluate all of the actual and proposed changes that have been implemented since April 17, 2006 and determine how they work together and the reliability benefits that they afford.

Good Company and EnerNOC expressed concern that the stakeholder process is not the optimal setting to arrive at a comprehensive solution that will redistribute potentially billions of dollars between generators and consumers. EnerNOC pointed out that there are two linked proposals (the increase in RRS and PRR 739, which will administratively set prices during alerts and EECP steps) currently being considered by the ERCOT stakeholder process. Neither proposal has been approved by the ERCOT Board or shown to meet the commission's cost-benefit standards under PUC SUBST. R. §25.362(c)(2). Chaparral added that a successful EILS program does not mean that ERCOT should forego an increase in Responsible Reserves if such is found to be warranted. Chaparral continued that EILS and Responsive Reserves are designed for different purposes and provide separate sets of benefits.

TIEC expressed its belief that because of both the ERCOT staff's support and the support of the independent market monitor, the increase in RRS will garner the Board's support at the December Board meeting. TIEC stated that ERCOT staff has supported the TAC resolution as a replacement for EILS. An increase in RRS and implementation of EILS will both increase costs in the market. TIEC members oppose having to pay for both EILS and the increase in RRS procurement. TIEC added that it believes additional RRS is preferable to EILS as a way to add operating reserves to the market because it reduces the likelihood of system-wide capacity shortfalls and it reduces the needs for ERCOT to dispatch resources out-of-merit, thereby distorting balancing energy prices.

In its reply comments, Good Company summarized the events leading up to the ERCOT Board of Directors' vote on October 16, 2007. Good Company concluded that stakeholders had not presented a protocol revision request (PRR) or a cost study for the proposal to increase responsive reserves, nor did they present any studies on alternative options. Good Company noted several criticisms that were made at the Board meeting concerning the RRS proposal, including the proponents' inability to estimate the cost for the additional 500 MW of responsive reserves and the impact the additional responsive reserves would have on the balancing energy market. The proposal was remanded back to TAC to consider a number of issues, including those stated above, and to provide a report to the Board at the December 2007 Board meeting.

Oxy, BP, Luminant and others requested that the commission wait to take action until after the December Board meeting. Oxy concluded that it is unnecessary for the commission to take action on EILS, as Oxy believes that the adoption of the long-term solution will eliminate the need to continue EILS. Luminant and BP urged the commission to wait on the ERCOT decision-making process before adopting a rule. BP added that given the events at the Board meeting, the commission should postpone the adoption of the proposed rule in this proceeding until at least December when the Board will have reviewed a set of optimized proposals that TAC is currently developing. BP believed that it was likely that the ERCOT stakeholders can develop workable and cost effective proposals for increasing operating reserves procurement that would address the reliability concerns of ERCOT operators and the market concerns of the IMM. In view of the Board's actions and direction to the TAC, TIEC asked the commission to defer any decision on the amendments to the EILS rule until after the December 7 Board meeting so that the commission would be in a better position to determine whether EILS would still be needed.

Nucor further stated that it supports development and implementation of an EILS program that works, regardless of where RRS and other programs end up.

Are Administrative Pricing and better price signals the solution?

BP stated that this rule is a response to the April 17, 2007, event and that a key cause of that event was that ERCOT operators had insufficient generation and load resources available in real time to respond to ERCOT's reliability needs despite the fact that the peak demand for that day was far below typical summer peak demand. BP acknowledged that the tools that ERCOT currently has to respond to falling responsive reserves, replacement reserve services and out of merit deployment of online generation,

can access only the resources that are available for service on a very short notice. BP pointed out that when ERCOT uses these tools they have the unintended consequence of lowering prices in the real-time market, price signals that do not properly reinforce the reliability needs of the grid. BP concluded that the lack of functional scarcity pricing in the ERCOT market is the major reason why insufficient generation and load resources are available to ERCOT operators in real time. BP and Exelon believed that the lowest cost manner over time by which to address potential shortfalls of available generation resources in real time is to shift the reliability risk from a regulatory solution to a mechanism under which price risk can be more efficiently addressed in the real-time energy market (scarcity pricing) by competitive market participants. BP believed that if scarcity pricing is implemented, over time the marginal value of electric power, rather than just the marginal cost of generation will be reflected whenever scarcity conditions exist and market participants will have a significant incentive to develop the appropriate mix of generation and load resources to insure against unwanted exposure to potentially high prices, and ERCOT operators will have a more adequate and diverse set of resources. Exelon agreed that price-responsiveness must be married to price signals.

Chaparral commented that the current ERCOT market is highly price-inelastic. Chaparral believed that there are currently no price signals in the market to which most loads can respond. Further, most loads are incapable of receiving the price signals were they to be sent. Chaparral argued that this is one of the primary benefits of EILS in that it assures demand response during emergency events. Therefore Chaparral stated it opposes the implementation of administrative price floors during EECP events, at least for the present, because of the inability of the vast majority of consumers to receive price signals and alter consumption. Chaparral cautioned that administrative price floors would accomplish little more than the transference of wealth from loads to generation.

Nucor pointed out that *ex-post* pricing, sends absolutely no price signal to the market, and argued that the market simply pays more as the price is adjusted the next day, which "enriches generators who provide day-behind supply." Nucor further stated that if administrative scarcity pricing is ever to be imposed in ERCOT, it is absolutely critical that customers receive advanced price notice so that demand-response can actually occur. Reliant also disagreed with administrative pricing for ERCOT and expressed its belief that the only argument that can be made for administrative scarcity pricing is when all generators are ex-ante mitigated administratively as occurs in other markets.

Is Advanced Metering the long term solution?

CenterPoint recognized that the EILS is a program sanctioned by both ERCOT and the PUC as a means of preventing firm load interruptions. CenterPoint offered that the long-term alternative to EILS is the price responsiveness of customers that can be achieved once an advanced metering infrastructure (AMI) is implemented in ERCOT along with the relevant necessary retail and ERCOT programs. BP agreed that the best way to increase demand response is for the PUC to oversee the full implementation of advanced metering technology and the installation of computer, telecommunications, and data storage capacity across the ERCOT system sufficient in scope to allow all competitive loads to settle on fifteen-minute intervals during the waking hours of residential customers and the operating hours of small commercial customers. Reliant supported the advanced meter deployment as a solution to the problem and noted that deployment is not enough. Significant resources need to be directed toward development of settlement protocols, data transport and storage solutions, and market processes to provide for fifteen-minute settlement of mass market meters. In its reply comments, Good Company echoed Reliant's comments and stated that the implementation of necessary infrastructure and processes would allow REPs to offer demand-response products.

Chaparral commented that it has been and remains a strong proponent of residential advanced metering given its potential ability to moderate prices within the wholesale market and alleviate capacity shortages. Good Company also agreed that an advanced metering system may be able to achieve price-responsiveness on the part of customers, but this should not be viewed as a long-term substitute for EILS. Nucor stated that it strongly supports advanced metering, but argued that it has its limitations, and that it is not a "panacea" for all reliability and demand response issues and is likely to take a number of years to achieve its promise.

Exelon disagreed that advanced meters were needed for effective demand-response. Exelon pointed out in its comments in the Federal Energy Regulatory Commission Advanced Notice of Proposed Rulemaking that significant demand response can be effective without universal installation of high-tech meters and other expensive equipment. For example, Exelon offered, during a short-supply day in the Pennsylvania Jersey Maryland (PJM) market, as the supply margin shrank the locational marginal price (LMP) increased to $250-$400 in the PECO zone, PECO employees called and e-mailed demand-response customers to convey the price signal. Exelon stated that many of the customers volunteered to curtail usage for a share of the market value of energy before PJM called the involuntary load reduction event.

Nucor argued that the expansion of RRS, as well as administrative scarcity pricing and advanced metering, are not real substitutes for EILS, and none will produce the additional demand response that can be produced by EILS. Nucor believes that most of the opponents of EILS have substantial financial motives to prefer other alternatives to EILS. Nucor added that while RRS is a valuable but limited tool in a "range of tools" using demand response, it must not be the only demand response tool in the ERCOT arsenal.

Commission response

The commission appreciates the thought that has gone into developing a long-term solution to satisfy the requirements of this rule. The commission notes that to meet the requirements for a long-term solution, the current version of the rule requires an ERCOT Protocol revision that meets the requirements in subsection (h) to be implemented 30 days prior to the start of the next contract period. This solution must be implemented so that there is a solution continuously in place with no interruption in the protection offered by EILS. Putting aside the merits of each of the proposals that stakeholders have developed, none of the proposed long-term solutions meets the requirement of subsections (a)(6) and (h). The commission has initiated a proceeding for advanced metering implementation, but the infrastructure is not currently in place, nor will it be 30 days prior to the start of the next contract period. Advanced metering will require a number of infrastructure developments and broad deployment by the utilities before it could be considered an effective long-term solution. These elements are not likely to be implemented in the next year, much less in the next 30 days. PRR 739, relating to administrative pricing, has yet to be approved. Even if PRR 739

were approved, it likely would not be in place 30 days prior to the start of the next contract period. The TAC proposal relating to additional responsive reserves is still under investigation, and various refinements to the proposal are likely to be submitted to TAC, before it finalizes a proposal for Board review in December. There is no PRR proposed for this proposal, nor will it be adopted 30 days prior to the start of the next contract period. Additionally, subsection (h) required better price signals leading up to an EECP event, bringing more resources (both interruptible and generation) online through existing ancillary services. The TAC proposal does not meet these requirements. The purchase of additional RRS is intended to provide better price signals leading up to an EECP event, but it does not bring more interruptible resources online. (Further ancillary services studies would be required before LaaRs would be eligible to supply RRS at a level beyond the current limit.) Therefore, the conditions for terminating the EILS program under the current rule have not been met. The commission is interested in providing avenues for the participation of demand resources in the ERCOT market. Based on developments to date in the stakeholder process, it seems unlikely that the ERCOT stakeholder process will produce a long-term solution that provides meaningful demand response opportunities for all customer classes. The proposal considered by the ERCOT Board of Directors in its October 2007 meeting would have increased the level of responsive reserves acquired by ERCOT, without any immediate increase in load participation in RRS and little likelihood that commercial customers would be able to participate in RRS or other existing ancillary service markets.

This discussion does not suggest that the proposals that have been advanced in the stakeholder process are without merit. There has been broad support for increasing the level of RRS that ERCOT acquires, to provide enhanced reliability, without the negative market consequences of relying on out-of-merit generating resources. The October TAC proposal or a variation on it may be considered by the Board at the December meeting and may merit adoption. The commission concludes, however, that EILS has a value, even if a proposal involving acquisition of additional responsive reserves is adopted. Beyond the benefits pointed out by its proponents, EILS may provide a benefit that additional generating resources do not. In the period since ERCOT began competitively acquiring ancillary services, there have been several occasions in which generating resources have been severely tested in meeting customer needs. In February 2003, problems with the delivery of natural gas resulted in supply shortages and high wholesale electricity prices. In April 2006, high demand and unexpected generator outages resulted in the need to cut supply to firm-load customers. It appears that EILS would provide an enhancement of reliability for firm-service customers if events like these were to recur, and it might provide a better resource in such events than additional RRS.

Additional comments, Administrative Penalties

TRE believed that a factor that keeps many customers from participating in the EILS program is the possibility of failure to respond in a timely manner and the ambiguity of the penalties for such failure. TRE stated that because of the complexity and the highly manual nature of the process, the probability of failure is high and even with the best intentions a customer may expose itself or its QSE to commission-ordered administrative penalties. To the extent these penalties are not clearly defined, TRE concluded, the customer cannot make a coherent business decision as to whether to participate in the EILS program.

In its reply comments, Good Company remained undecided on TRE's proposal to set administrative penalties for non-compliance. Good Company argued that penalties may serve as a disincentive to some potential participants; however, if penalties for non-performance are to be set, they should be similar to those imposed upon generators performing reliability functions.

Commission response

The commission understands that not having administrative penalties set in the proceeding causes uncertainty for some participants. However, the commission does not generally set administrative penalties by rule, as each situation of non-compliance is different and the commission allows itself flexibility to look at the circumstances of each situation before administering a penalty. Therefore, the commission does not make any changes to the rule to reflect the comments.

New AS study for LaaR

Oxy stated that currently the total amount of LaaR allowed to provide responsive reserves is limited to the lesser of 50% or the amount determined by ERCOT. Chaparral noted that a new LaaR responsive reserve study has been ordered because of the increased potential for frequency over-shoot. Chaparral pointed out that the last study was performed in 2002, when there was very little wind generation in place. Currently, there are thousands of additional MWs of uncontrollable wind generation on the ground, and thousands more MWs will be added year after year. Chaparral stated that the combination of increased uncontrollable wind generation and the necessary use of Under-Frequency Relays (UFR) by LaaRs providing RRS places very real limits on how much UFR load the ERCOT system can handle without encountering frequency overshoot problems.

Commission response

The commission is interested in having as much load response as possible without sacrificing reliability. The commission would encourage ERCOT to complete any studies necessary to facilitate this as quickly as possible.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2007) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §14.052.

§25.507. Electric Reliability Council of Texas (ERCOT) Emergency Interruptible Load Service (EILS).

(a) EILS procurement. ERCOT shall procure EILS, a special emergency service that is intended to be deployed by ERCOT in an Emergency Electric Curtailment Plan (EECP) event prior to or in conjunction with ERCOT instructing transmission and distribution service providers to interrupt firm load.

(1) EILS may be procured for one or more of three contract periods:

(A) February through May;

(B) June through September; and

(C) October through January.

(2) Notwithstanding the foregoing, ERCOT may restructure the contract periods to facilitate additional load participation in EILS. ERCOT must publicly announce any changes to the contract period schedule described above at least 90 days prior to the next contract period start date.

(3) ERCOT may determine cost limits for each EILS contract period in order to ensure that the EILS cost cap is not exceeded. To minimize the cost of EILS, ERCOT may reject any bid that ERCOT determines to be unreasonable or outside of the parameters of an acceptable bid.

(4) ERCOT may contract for any number of MW in an EILS contract period not to exceed 1,000 MW.

(b) Definitions.

(1) EILS--A special emergency service procured and used by ERCOT in accordance with this section.

(2) EILS contract period--As defined in subsection (a) of this section.

(3) EILS cost cap--The maximum amount ERCOT may spend on the EILS program in a year, February-January. The cost cap is set at $50 million.

(4) EILS resource--Load that is contracted to provide EILS.

(5) EILS time period--Sets of hours designated by ERCOT within an EILS contract period.

(6) ERCOT--The professional staff of the Electric Reliability Council of Texas, Inc.

(c) Participation in EILS. In addition to requirements established by ERCOT, the following requirements shall apply for the provision of EILS:

(1) EILS bids may be submitted to ERCOT by a qualified scheduling entity (QSE) on behalf of an EILS resource.

(A) Bids may be submitted for one or more time periods within a contract period.

(B) The minimum amount of EILS that may be offered in a bid to ERCOT is one MW. QSEs representing EILS resources may aggregate multiple resources to reach the one MW bid requirement. Such aggregated bids will be considered a single EILS resource.

(2) To qualify to participate in the EILS program, an EILS resource shall meet the technical requirements set out in this paragraph.

(A) Each EILS resource, including each EILS resource participating in an aggregated bid, shall have an ESI ID or unique service identifier, as defined by ERCOT.

(B) Each EILS resource shall have a dedicated installed Interval Data Recorder (IDR) meter or equivalent. If the IDR meter or equivalent is not used for settlement with ERCOT, then the meter and the method and format used to collect and transfer the meter data are subject to ERCOT approval. This subsection also applies to meters behind a Non-Opt-In Entity (NOIE) meter point, to meters behind a private network's settlement meter point, and to separately metered loads behind a single ESI ID. This requirement shall not apply to customers participating in aggregations of EILS resources if a statistically valid alternative to universal IDR metering for measurement and verification consistent with industry best practices can be developed and approved by ERCOT.

(C) An EILS resource shall be capable of reducing its load by its contracted capacity within ten minutes of an ERCOT verbal dispatch instruction (VDI) to its QSE and shall be capable of maintaining its performance at contracted levels for the entire period of the EILS deployment.

(D) EILS resources, once deployed, shall be able to return to their contracted operating level for providing EILS within ten hours following the recall instruction.

(E) EILS resources shall be subject to qualification, testing, and performance requirements as developed and administered by ERCOT.

(F) An EILS resource shall be registered as part of its QSE agreement with ERCOT.

(G) The QSE shall execute a standard form EILS agreement as developed by ERCOT.

(H) The EILS resource shall be served by a QSE qualified to provide ancillary services and capable of communicating with ERCOT and the EILS resource.

(I) An EILS resource shall not provide other ancillary services, including balancing energy services with the same capacity, while under an EILS Agreement.

(3) ERCOT shall establish an individual load baseline for each proposed EILS resource. If the EILS resource is an aggregation of ESI IDs, ERCOT shall take into account the load characteristics of each ESI ID represented by the EILS resource.

(A) ERCOT shall review IDR data or equivalent from the most recent available 12-month period to determine an EILS Resource's consumption. If 12 months of IDR data are not available, ERCOT may use reliable meter data for a shorter period or from a different source, at its reasonable discretion. If ERCOT does not possess sufficient data, the EILS Resource or its QSE must provide data to ERCOT according to ERCOT's specifications.

(B) ERCOT may establish an alternate baseline methodology to accommodate loads for which a sufficiently accurate default baseline cannot be established.

(C) Baselines shall be used to verify or establish an EILS Resource's maximum contract amount and to verify the EILS resource's performance as compared to its contracted capacity during an EILS deployment event.

(4) EILS shall be deployed by ERCOT by VDIs in a single phone call to all QSEs providing EILS.

(A) When ERCOT issues a VDI, 100% of the available contracted EILS resources shall be deployed.

(B) ERCOT may deploy EILS at any time during a settlement interval.

(C) An EILS resource shall be subject to a maximum of two deployments per EILS contract period, lasting no more than a total of eight hours per contract period, unless an EILS deployment is still in effect when the eighth hour lapses, in which case EILS deployment shall continue until ERCOT releases the EILS resource. EILS resources may return to service only after being released by ERCOT.

(D) ERCOT may conduct a load-shedding test of each EILS resource once a year unless the EILS resource has met its performance obligations during an EILS deployment during the preceding 12 months. ERCOT tests are not "deployments" under subparagraph (C) of this paragraph.

(d) EILS Payment and Charges.

(1) ERCOT shall pay a capacity payment to each QSE representing an EILS resource on an as-bid basis subject to modifications determined by ERCOT based on the EILS resource's availability during an EILS contract period, and the EILS resource's performance in a deployment event.

(2) ERCOT shall charge each QSE a capacity charge for EILS based upon its load ratio share during the relevant EILS time period and EILS contract period.

(3) There shall be no energy payments for providing EILS above and beyond typical load imbalance payments pursuant to the ERCOT protocols.

(4) ERCOT shall settle an EILS contract period through payments and charges on a settlement statement of a single operating day within 70 days following the completion of the EILS contract period.

(5) ERCOT shall make the following available to market participants through market notices and by posting on a publicly accessible section of the ERCOT web site:

(A) Methodology used to develop baseline formulas;

(B) Formulas used for wholesale market settlement; and

(C) Equations used to determine an EILS resource's compliance with its obligations in an EILS deployment.

(e) Compliance. QSEs representing EILS resources are subject to penalties for failure to meet their obligations under this section. ERCOT shall withhold all or part of an EILS resource's capacity payment for a contract period and suspend participation in EILS for six months if the EILS resource fails to make its committed load available during its committed hours, or fails to meet its load reduction obligations in an EILS deployment event. In order to be reinstated after the suspension the load must demonstrate its capability of performing the service by satisfactorily performing a test conducted by ERCOT.

(f) Reporting. Within 10 days of the EILS awards for a contract period, ERCOT shall report publicly the number of MW procured per time period, the number of resources providing the service, and the projected total cost of the service for that contract period. ERCOT shall review the effectiveness and benefits of the EILS and report its findings to the commission annually within 70 days of the completion of the EILS program year. The report shall contain, at a minimum, the number of MW procured in each period, the total dollar amount spent, the number and level of EECP events, and the number and duration of deployments.

(g) Implementation. ERCOT shall develop additional procedures, guides, and/or protocols that are consistent with this section and that ERCOT finds necessary to implement EILS, including but not limited to developing a standard form EILS Agreement and specific performance guidelines and grace periods for EILS Resources.

(h) Self Provision. ERCOT shall maintain procedures for self provision of EILS by any QSE.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2007.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS

The Public Utility Commission of Texas (the commission) adopts amendments to §26.54, relating to Service Objectives and Performance Benchmarks, §26.71, relating to General Procedures, Requirements, and Penalties, §26.121, relating to Privacy Issues, §26.130, relating to Selection of Telecommunications Utilities without changes to the proposed text as published, and §26.141, relating to Distance Learning, Information Sharing Programs and Interactive Multimedia Communications with changes to the proposed text as published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4703), pursuant to its conclusions in Project Number 33043, *Review of Chapter 26 Substantive Rules Applicable to Telecommunications Service Providers Pursuant to Texas Government Code*. Project Number 33952 has been assigned to this proceeding.

The commission received written comments on its published proposal for these amendments from Southwestern Bell Telephone, doing business as AT&T Texas, (AT&T Texas) on August 29, 2007. Reply comments were not received.

AT&T Texas Comments

AT&T Texas supported the commission's proposals for amendments. AT&T Texas agreed with the commission's determinations in Project Number 33043.

AT&T Texas agreed that language in §26.54(b)(3) and (4) was obsolete. AT&T Texas supported the removal of outdated cross references in §26.71(f), related to discontinued financial reports, and outdated citations in §26.121, replaced with current Chapter 26 citations. AT&T concurred in the §26.130(g)(3) and (m) amendments that corrected language adopted in error in Project Number 28324. Finally, AT&T Texas agreed that the amendments to §26.141(b), (d), (f) and (h) removed outdated reporting requirements and corrected citations.

AT&T Texas did note that a scrivener's error had occurred in §26.141(f), the citation to §23.211 should read as a citation to §26.211.

Commission response

The commission has corrected the §26.141(f) citation as noted by AT&T Texas. The commission believes that the amendments to these sections will eliminate unnecessary confusion and administrative efforts on its part and that of the affected telecommunications providers.

SUBCHAPTER C. QUALITY OF SERVICE

16 TAC §26.54

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Ann. §14.002 (Vernon 2007)(PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its

powers and jurisdiction; and specifically, pursuant to the general requirements of SB 408, Section 13, 79th Legislature, Regular Session (Tex. 2005) regarding the commission's ability to act upon those conclusions that do not require statutory review.

Cross Reference to Statutes: PURA §14.002 and SB 408, Section 13, 79th Legislature, Regular Session (Tex. 2005).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Adriana A. Gonzales
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SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

16 TAC §26.71

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Ann. §14.002 (Vernon 2007)(PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, pursuant to the general requirements of SB 408, Section 13, 79th Legislature, Regular Session (Tex. 2005) regarding the commission's ability to act upon those conclusions that do not require statutory review.

Cross Reference to Statutes: PURA §14.002 and SB 408, Section 13, 79th Legislature, Regular Session (Tex. 2005).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. REGULATION OF TELECOMMUNICATIONS SERVICE

16 TAC §26.121, §26.130

These amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Ann. §14.002 (Vernon 2007)(PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, pursuant to the general requirements of SB 408, Section 13, 79th Legislature, Regular Session (Tex. 2005) regarding the commission's ability to act upon those conclusions that do not require statutory review.

Cross Reference to Statutes: PURA §14.002 and SB 408, Section 13, 79th Legislature, Regular Session (Tex. 2005).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. ADVANCED SERVICES

16 TAC §26.141

This amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Ann. §14.002 (Vernon 2007)(PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, pursuant to the general requirements of SB 408, Section 13, 79th Legislature, Regular Session (Tex. 2005) regarding the commission's ability to act upon those conclusions that do not require statutory review.

Cross Reference to Statutes: PURA §14.002 and SB 408, Section 13, 79th Legislature, Regular Session (Tex. 2005).

§26.141. Distance Learning, Information Sharing Programs, and Interactive Multimedia Communications.

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

(1) Distance learning--Instruction, learning, and training that is transmitted from one site to one or more sites by telecommunications services that are used by an educational institution predominantly for such instruction, learning, or training, including video, data, voice, and electronic information.

(2) Educational institution--Accredited primary or secondary schools owned or operated by state and local government entities or by private entities; institutions of higher education as defined by the Education Code, §61.003(13); the Texas Education Agency, its successors and assigns; regional education service centers established and operated pursuant to the Education Code, Chapter 8; and the Texas Higher Education Coordinating Board, its successors and assigns.

(3) Information sharing program--Instruction, learning, and training that is transmitted from one site to one or more sites by telecommunications services that are used by a library predominantly for such instruction, learning, or training, including video, data, voice, and electronic information.

(4) Interactive multimedia communications--Real-time, two-way, interactive voice, video, and data communications conducted over networks that link geographically dispersed locations. This definition includes interactive communications within or between buildings on the same campus or library site.

(5) Library--Public library or regional library system as defined by Government Code, §441.122, or a library operated by an institution of higher education or a school district.

(b) Telecommunications services eligible for reduced rates.

(1) Any tariffed service, if used predominantly for distance learning purposes by an educational institution or information sharing program purposes by a library, is eligible for reduced rates, as set forth in this section.

(2) A service is used predominantly for distance learning purposes by an educational institution or information sharing program purposes by a library when over 50% of the traffic carried, whether in video, data, voice, and/or electronic information, is identified for such use pursuant to the requirements of subsection (d) of this section.

(c) Coordination with federal discounts.

(1) For any discount received pursuant to §23.107 of this title (relating to Educational Percentage Discount Rates (E-Rates)), an eligible school, library or consortia may apply such discount prior to any discount received under subsection (d) or (e) of this section. Any subsequent discount received under this section shall apply to the discounted E-Rate and not the tariffed rate.

(2) Any discount received under §23.107 of this title will be applied subsequent to the rate obtained for services offered pursuant to subsection (f) of this section. For purposes of determining the rate to which a discount pursuant to §23.107 of this title will apply, the rates offered under subsection (f) of this section qualify as the lowest corresponding price.

(d) Process by which an educational institution or library qualifies for reduced rates other than through a customer-specific contract. To qualify for a discounted rate, an educational institution or library, as defined in subsection (a) of this section, must provide a sworn affidavit to the dominant certificated telecommunications utility account representative or, if no account representative is assigned, to the business office of the utility.

(1) The affidavit shall:

(A) specify the requested service(s) to be discounted;

(B) quantify, if applicable, the requested service(s) to be discounted;

(C) state that the discounted service(s) will be used predominantly for distance learning purposes or information sharing program purposes; and

(D) specify the intended use(s) of the discounted service(s).

(2) The affidavit shall be signed by the administrative head of the institution (e.g., principal, president, chancellor) or library, or a designee given the task and authority to execute the affidavit on behalf of the educational institution or library requesting the discounted rates.

(3) No other special form needs to be provided as part of the application process.

(4) The educational institution or library shall provide an affidavit each time it orders services that will be used predominantly for distance learning purposes or information sharing program purposes.

(e) Interactive multimedia communications services. Any dominant certificated telecommunications utility that provides interactive multimedia communications services may file a tariff to establish rates at levels necessary, using sound rate-making principles, to recover costs associated with providing such services to educational institutions or libraries. Those interactive multimedia communications services used predominantly for distance learning or information sharing program purposes, however, shall qualify for a 25% discount pursuant to subsection (d) of this section.

(f) Customer-specific contracts. When a service is provided to an educational institution or library pursuant to §26.211 of this title (relating to Rate-Setting Flexibility for Services Subject to Significant Competitive Challenges), the dominant certificated telecommunications utility shall price those components of the service used predominantly for distance learning or an information sharing program no less than 105%, and no greater than 110%, of the customer-specific long-run incremental cost.

(g) Cost determination. Not withstanding subsections (d) and (e) of this section, once the commission develops cost determination rules for telecommunications services generally, a reduced rate approved under this section shall recover the service-specific long-run incremental costs. In the case of interactive multimedia communications services, however, the commission may allow a rate to be set lower than the long-run incremental cost of a specific service if such is determined to be in the public interest.

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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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 61. COMBATIVE SPORTS

16 TAC §§61.20 - 61.22, 61.40, 61.42, 61.43, 61.47, 61.80, 61.105, 61.111, 61.120

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 Texas Administrative Code ("TAC") Chapter 61, §§61.20 - 61.22, 61.42, 61.43, 61.47, 61.105, and 61.120, regarding the combative sports program, without changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5271) and will not be republished. Sections 61.40, 61.80, and 61.111 are adopted with changes from the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5271), and are republished. Based on comments received concerning the amendment to §61.48(e) that was published in the August 24, 2007, issue of the *Texas Register*, the Commis-

sion has postponed consideration of adoption of the proposed amendments to this section.

The amendments are necessary to implement changes in law enacted by House Bill 1293, 80th Legislature ("HB 1293"), and to make certain clean-up changes in the combative sports rules. HB 1293 became effective on September 1, 2007, and requires the Commission to adopt rules necessary to implement the new legislation by December 1, 2007. The proposed rule changes were recommended by the Medical Advisory Committee at its meeting on July 27, 2007.

Section 61.20(a) is amended to add event coordinators to the list of combative sports professionals that must be licensed by the department.

Section 61.21(b) is amended to reflect that referee licenses will be endorsed to show the class of bouts that the referee may officiate. Subsection (b) is further amended by changing the designations identified in subsection (b)(2) to "K" for kick-boxing and (b)(3) to "M" for mixed martial arts. Section 61.21(e) is amended to delete a reference to an effective date of the subsection, which has now passed. Section 61.21(f) is deleted in its entirety to remove the requirement that referees, in order to obtain or renew a license, provide the department with the results of a visual acuity test performed by an optometrist or ophthalmologist. This provision had been adopted inadvertently as the intent was to apply this requirement only to judges.

Section 61.22 is amended by adding a new subsection (b) to require that judges, in order to obtain or renew a license, provide the department with the results of a visual acuity test performed by an optometrist or ophthalmologist, in order to insure the visual acuity of judges.

Due to increased medical costs, §61.40(a)(2) is amended to increase the minimum insurance coverage that is required to be provided by an event promoter so that the coverage required for injuries sustained in an event is $50,000 and for payment in the event of death is $100,000. A change from proposed §61.40(b)(2) is made to clarify new language regarding fees in the event of multiple event cancellations or postponements. A provision is added that makes the fees paid by a promoter payable 21 days in advance of the events and non-refundable when a promoter has cancelled or postponed two successive events, in order to recoup department costs when a promoter has exhibited a pattern of event cancellations or postponements. Section 61.40(b)(14) is deleted to remove the requirement that a promoter file its contracts with contestants prior to advertising a championship or title contest as unnecessary and inefficient. To further implement the provisions of HB 1293, a new §61.40(b)(16) is added that requires a promoter to supervise its employees and the event coordinators to assure that the events are conducted in compliance with the departments rules and applicable statutes. Section 61.40(b)(17) is added to require a promoter to ensure the adequacy of the advertisements for an event, in order to reduce inaccuracy and the resulting consumer confusion.

Section 61.42(g) is amended to include eating as an activity in which judges may not engage during the course of an event in order to reduce distractions.

Section 61.43(i)(1) is amended to include electrolytes as one of the supplies that are allowed in a contestant's corner to reduce injuries resulting from dehydration. This amendment as proposed will require that a container must be brought to the ring in the manufacturer's sealed container and may only be opened in the presence of a department representative in order to prevent the use of ineligible products.

Section 61.47(a) is amended to allow optometrists to perform ophthalmologic medical examinations in addition to ophthalmologists, as is currently provided. Optometrists are qualified and authorized to perform all diagnostic procedures required for these examinations and optometrists are subject to the same standard of care as an ophthalmologist. This subsection is additionally amended to require that examining physicians, ophthalmologists or optometrists be licensed in a state, district or territory of the United States to insure the qualification of the medical examiners and the quality of medical examinations provided to contestants. Also, §61.47(a) is amended so that a contestant with the Hepatitis B virus may prove that they are not acutely or chronically infected by such virus by any medical testing procedure that establishes the absence of Hepatitis B infectivity. New subsection (d) is added to §61.47 to require that contestants report to the weigh in at the scheduled time. The remaining subsections are re-lettered appropriately.

Section 61.80(a) is amended to add a new paragraph (11) to provide an annual fee for event coordinator licensure of $200 to cover the costs of the department in administering the provisions of HB 1293. Also, this section is adopted with a change from the rule proposal to include the language of subsection (d) which was omitted from the published rules in error. The proposed published rules read: "(b)-(c) (No change.)" and it should have read: "(b)-(d) (No change.)".

Section 61.105(d) is amended by adding the punctuation mark "--" between the categories of weigh in weight differences and the weight difference allowance for such category for the purpose of consistency with other sections of the rules. Section 61.105 is also amended to include a new subsection (g)(1) - (15) to add weight divisions for boxing and kick boxing in order to be consistent with other rules. Also, this new subsection allows bouts between contestants of different weight classes so long as the weight differences are within the variances identified in subsection (d).

Section 61.111(s)(2) is amended to remove the prohibition on downward punching while the opponent's head is touching the mat. Section 61.111(s)(7) is deleted to remove the prohibition on kicking an opponent while down on the mat. A technical correction is made to §61.111(s)(20) in order to clarify that the prohibited blow is to the back of the head rather than the back and the head, since blows to the back are not otherwise intended to be prohibited. Section 61.111(s)(27) is amended to prohibit kicking to the kidney with the heel. These amendments will bring the rules in line with industry standards.

Currently §61.120(c)(1) - (4) requires that the medical advisory committee include a doctor in one of four areas of medical specialization. Due to the continuing difficulty of obtaining volunteers to serve on this committee with these specific specializations, this section is amended to require that the medical advisory committee include four medical doctors licensed in Texas.

The Department drafted and distributed the proposed amendments to persons internal and external to the agency. The proposal was published in the *Texas Register* on August 24, 2007. The comment period closed on September 24, 2007. Public comments were received from the Texas Optometric Association, the Texas Amateur Mixed Martial Arts Association and seven individuals in response to the rule proposal.

The Texas Optometric Association (TOA) and seven individuals commented in favor of the proposed change to §61.47(a) that will allow optometrists to perform ophthalmologic medical examinations in addition to ophthalmologists, as is currently provided. All commentators supported the change for the reason that optometrists are qualified and authorized to perform all diagnostic procedures required for these examinations and optometrists are subject to the same standard of care as an ophthalmologist.

The TOA and six of the individual commentators state that not allowing optometrists to perform the examinations is prohibited by state law and if the Commission fails to adopt this rule it will be in violation of this anti-discrimination law. These same commentators note that Texas Occupations Code §2052.052 requires only that a contestant must have an ophthalmologic examination but does not require that an ophthalmologist perform the examination. They also note that ophthalmologic examinations are considered 92000 codes by Medicare and all insurers, which is the examination that optometrists perform on a daily basis.

These commentators assert that contestants are being inconvenienced for no reason, that there are twice as many optometrists as ophthalmologists in Texas and increased access will make it easier and less expensive for contestants to receive ophthalmologic exams if both optometrists and ophthalmologists are allowed to perform the exam. Finally, these commentators state that the examination form that is currently used for the ophthalmic exam calls for data optometrists routinely diagnose regarding their patients.

TOA additionally provided documentation supporting the proposition that several branches of the military and Federal Aviation Administration regulations allow optometrists to perform these examinations. One commentator additionally states that optometrists have contributed and benefited from the advancement to these healing arts and the rules should be updated to reflect these advancements.

The Texas Amateur Mixed Martial Arts Association ("TAMMA") and one individual submitted comments opposing the adoption of the amendment to §61.48(e) which increases the minimum insurance coverage that is required to be provided by an amateur combative sports association so that the coverage required for injuries sustained in an event is $50,000 and for payment in the event of death is $100,000.

The comment from TAMMA states that its insurance company is unable to write insurance policies for amateur events above a $50,000 death benefit. Further, TAMMA asserts that the increased limits will effectively stop all amateur events in Texas; that TAMMA events have not had a single serious injury or claim in the last 10 months; and admission price increases will not be able to support the increased cost of the requirement. The individual commentator notes that such an increase is arbitrary and unduly burdensome especially since there have been no significant injuries to an amateur competitor in a sanctioned event. The commentator expresses the concern that this rule amendment will limit licensed and regulated events and therefore increase underground unlicensed and inherently dangerous competitions. The Commission has postponed consideration of adoption of the proposed amendments to §61.48.

The amendments are adopted under Texas Occupations Code, Chapters 51 and 2052, which authorize the Commission to adopt rules as necessary to implement these chapters. In particular, the amendments implement provisions of House Bill 1293, 80th Legislature.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 2052. No other statutes, articles, or codes are affected by the adoption.

§61.40. Responsibilities of the Promoter.

(a) Bond and Insurance Requirements for Promoters

(1) At the time of licensure and upon each renewal, a promoter applicant must submit to the Department proof of financial responsibility by:

(A) submitting a $10,000 surety bond written by a bonding company authorized to do business in the state of Texas guaranteeing payment of all obligations, except gross receipts taxes, arising out of events promoted by the applicant which shall remain in effect for four years after the effective cancellation date; and

(B) submitting a $15,000 surety bond, written by a bonding company authorized to do business in the State of Texas, guaranteeing payment of gross receipts taxes owed for promoted events, which shall remain in effect for four years after the effective cancellation date.

(2) The promoter shall provide insurance and pay all deductibles for contestants, to cover medical, surgical and hospital care with a minimum limit of $50,000 for injuries sustained while participating in a contest and $100,000 to a contestant's estate if he dies of injuries received while participating in a contest. The insurance premium and deductibles shall not be deducted from the contestant's purse. At least ten calendar days before an event the promoter shall provide to the Department for each event sponsored, a certificate of insurance showing proper coverage. The promoter shall supply to those participating in the event the proper information for filing a medical claim.

(b) A Promoter shall:

(1) Bear all financial responsibility for the event.

(2) Provide the Department written notice of all proposed event dates, ticket prices, and participants of the main event, at least 21 days before the proposed event date and obtain written approval from the Department to promote the event prior to advertising or selling tickets. Promoters who have cancelled or postponed two events in sequence after having obtained Departmental approval for the events will be required to pay the permit fee set out in §61.80(b) at the time the 21 day notice is filed. The fee will not be refunded.

(3) Obtain written departmental approval for the fight card at least 10 working days before the event date. The request shall contain the full legal name, address, date-of-birth, Texas contestant license number, Federal Identification number, weight, previous fight record (by supplying current results from the contestant's registry recognized by the Professional Boxing Safety Act of 1996, 15 USC §§6301-6313), and number of rounds to be fought for each contestant. In addition, the Department may require submission of certified birth certificates or other official evidence of identification.

(4) Provide written notice to the Department of any change in the card before the scheduled weigh-in. Notices announcing changes or substitutions in the card must also be conspicuously posted at the box office and announced from the ring before the opening contest.

(5) Provide to the Department, written notice of any change in the announced or advertised location, time or card cancellations before the scheduled weigh-in.

(6) Provide two ringside physicians, registered by the Department, for each event.

(7) Provide at least one registered physician to conduct prefight physicals. The Department may require additional physicians de-

pending on the event size. Provide a private area for the ringside physician to perform pre-fight examinations.

(8) Assure that beverages are only allowed in paper or plastic cups at the event.

(9) Immediately after the event, compensate the ringside physicians, timekeepers, judges, referees and contestants. Payment of percentage contracts shall be made when the amount can be determined. Payments that do not require additional accounting or auditing, shall be made in the presence of an authorized Department representative.

(10) Provide no less than two private dressing rooms of adequate size for the contestants and their licensed managers, and seconds, and separate dressing rooms for male and female contestants. Only working Commission employees, contract inspectors, media, physicians, licensed working ring officials, promoter, matchmaker, manager and seconds will be allowed in the dressing rooms.

(11) Ensure that no alcoholic beverages or illegal drugs are in the dressing room.

(12) Ensure the safety of the contestants, officials, and spectators.

(A) There shall be a pre-fight plan and route to remove an injured contestant from the ring and arena. Upon request, the promoter shall inform the Department of these plans. The plan shall include the name and location of a local hospital emergency room.

(B) A sufficient number of security personnel shall be retained to maintain order.

(13) Schedule no less than 24 or more than 60 rounds for each event. No event shall exceed 10 rounds, except a championship or title contest, which shall not exceed 12 rounds. A sparring or exhibition event shall not exceed three rounds.

(14) Ensure that the rules set forth below regarding equipment and gloves that apply to a particular type of event are followed and that each event is conducted in compliance with the following:

(A) The ring apron shall be kept clear at all times of objects including, but not limited to: cameras, microphones, and advertisements. A separate camera platform at a neutral corner of the ring for use by cameramen may be provided. Cameramen may be allowed on the ring apron during rest periods, between bouts, or at the discretion of the Executive Director. No seats may be sold at the ring apron.

(B) The Technical Zone shall be set up for the Department, according to the Executive Director's instructions.

(C) All emergency medical personnel and portable medical equipment shall be located within the Technical Zone during the event. There must be a resuscitator, oxygen, stretcher, a certified ambulance, and an emergency medical technician on site for all contests. The Executive Director may require additional medical personnel and equipment depending on the number of matches scheduled.

(D) The judges' chairs shall be high enough that their shoulders shall be no lower than the ring floor. Physician ringside seats shall be in the neutral corner(s).

(E) There shall be at least one, but no more than three, authorized promoter representative(s) at ringside at all times. Only the promoter's representative(s), Department officials, the press, physicians, representatives of sanctioning bodies, and judges shall sit at the ringside tables. For purposes of this rule, an event coordinator is a representative of the promoter.

(15) In the event that a person who is intended to be a Contestant is not licensed at the time of the weigh-in it is the promoter's responsibility to pay the licensing fee by check, or money order. No cash will be accepted.

(16) Supervise the activities of employees and event coordinators to assure that promoted events are conducted in compliance with these rules and applicable statutes.

(17) Ensure that all advertising concerning an event he promotes accurately describes the event and does not include the names of any person or entity, other than the promoter, as a presenter of the event.

(c) Contract requirements between Promoter and Contestant.

(1) The promoter for an event shall have contracts with contestants executed in triplicate on Department forms showing the amount of guarantee or percentage promised, the number and time limit of rounds, when and where the contestants are scheduled to appear, weight category, and other pertinent details governing the event. If applicable, the compensation section must include the specifics of television, radio and cable rights. The contract must define and provide for agreement on compensation if the opponent fails to appear at the weigh-in or bout. All contracts must state the dollar amount or percentage withheld for expenses, taxes, advances, sanctions or any other items the promoter seeks to subtract from a contestant's purse.

(2) The promoter shall furnish one executed copy of the contract to the contestants or their managers, retain one, and submit one to the Department.

(3) All required information must be typed or legibly printed, and the contestant and promoter shall initial any changes or addenda.

(d) Tickets

(1) All tickets shall have printed on each half, the price including any service surcharge or handling fee, and event date.

(2) Roll tickets with consecutive numbers shall be sold only at the box office on the day of the show.

(3) If there is no ticket manifest, tickets of different prices shall be printed on different colored ticket stock.

(4) The promoter shall submit a sworn inventory to the Department of tickets delivered to any outlet or event sponsor. The inventory shall account for any known overprints, changes, or extras.

(5) Tickets shall not be sold for more than the actual capacity of the location where the event is held.

(6) All tickets shall be torn in half and one half returned to the ticket holder at the entrance gate. The other half shall be immediately deposited in a sealed container, where it is to remain until the Department's representative witnesses the opening of the container. No one shall pass through the gate without having their ticket torn or shall occupy a seat unless holding a ticket half or have a working pass or credential with a specific seat assignment indicated on them. Passes and or credentials may not be sold or bartered.

(7) If a main event or special added attraction is postponed or cancelled for any reason, the promoter shall promptly refund ticket sales. A special added attraction is the appearance of any person or persons at any boxing event whose reputation or ability is calculated to increase attendance. Tickets in the hands of ticket services shall be returned to the promoter not later than when the box office at the boxing event site has closed.

(8) Promoters shall hold tickets of every description used for any event for at least 30 days after the event. The tickets shall be kept in separate packages for each event for audit purposes.

(9) When computing gross receipts, the face value of tickets, except deadwood, shall be included whether the tickets were sold for cash, given away, or bartered for services provided.

(10) Tickets shall be accounted for after the event and the Executive Director may review the process, and may check the number of gate ticket containers and their seals or padlocks.

(e) A promoter shall submit to the Department a tax report and a 3% gross receipts tax payment within three business days of an event.

§61.80. Fees.

(a) The annual fee shall accompany each license or registration application or renewal as follows.

(1) Promoter--$900

(2) Contestant--$30

(3) Manager--$200

(4) Second--$30

(5) Matchmaker--$175

(6) Referee--$250

(7) Judge--$ 200

(8) Timekeeper--$40

(9) Ringside Physician--$25

(10) Amateur Combative Sports Association--$50.

(11) Event Coordinator--$200

(b) Four year Federal Identification card--$20.

(c) Permit Fee--$500 per live professional event and the simultaneous telecast of a live contest on a closed circuit telecast in which fees are charged for admission.

(d) A fee submitted to obtain a license, permit or registration is nonrefundable.

§61.111. Mixed Martial Arts.

(a) All rules stated herein, except §§61.106 - 61.108, and 61.112 apply to mixed martial arts contests unless this section conflicts with another rule stated herein. If a conflict occurs, this section prevails.

(b) Contestants may wear fingerless gloves weighing not less than 4 ounces, which shall be supplied by the promoter and approved by the Executive Director.

(1) If both contestants wear gloves, closed fist punching and frontal palm/heel strikes are permitted.

(2) If both contestants are not wearing gloves, frontal palm/heel strikes and closed fist punches are not permitted, except to the body.

(c) Contestants may prevail by technical knockout, knockout, submission (either by physical or verbal tap out), disqualification or judges decision.

(d) Scoring Techniques.

(1) Using the 10-Point Must Scoring System, judges are required to determine a winner of a contest that ends after the scheduled number of rounds have been completed. Ten points must be awarded to the winner of each round and 9 points or less must be awarded to the loser, except for a rare even round, which is scored a 10-10.

(2) Judges must evaluate mixed martial arts techniques, such as effective striking, effective grappling, fighting area control, and effective aggressiveness/defense.

(e) Contestants may wear shorts, trunks, wrestling singlet, or traditional martial arts Gi, unless otherwise instructed by the Executive Director. Knee braces without metal are permissible. Contestants may not wear shoes of any kind during competition. A male contestant may not wear a shirt during competition.

(f) Each contestant must be clean and present a tidy appearance. The use of grease or any other foreign substance, including, without limitation, grooming creams, lotions or sprays, may not be used on the face, hair or body of a contestant. The referee or the Executive Director's representative shall cause any foreign substance to be removed.

(g) Contestants who wear gloves may wrap hands in a manner approved by the Executive Director. If contestants are not wearing gloves, it is not permissible to wrap hands, but wrists may be taped. Contestants who choose to wear gloves, may only compete with other contestants wearing gloves. Contestants choosing not to wear gloves, may only compete with other contestants who choose not to wear gloves.

(h) Weight Divisions. Except with the approval of the Executive Director, the classes for mixed martial arts contest or exhibitions and the weights for each class are shown in the following schedule:

(1) Flyweight--up to 125 lbs.

(2) Bantamweight--over 125 to 135 lbs.

(3) Featherweight--over 135 to 145 lbs.

(4) Lightweight--over 145 to 155 lbs.

(5) Welterweight--over 155 to 170 lbs.

(6) Middleweight--over 170 to 185 lbs.

(7) Light Heavyweight--over 185 to 205 lbs.

(8) Heavyweight--over 205 to 265 lbs.

(9) Super Heavyweight--over 265 lbs.

(i) Non-championship contests shall not exceed a total of 15 minutes per contest with no overtime allowed. Championship contests shall not exceed a total of 25 minutes of action. Rounds shall be a minimum of three minutes with a one-minute rest period between each round.

(j) A fitted mouthpiece shall be worn while competing.

(k) A male contestant must wear a plastic foul-proof groin protector (abdominal guard). A female contestant must wear a plastic pelvic guard and may wear a breast protector.

(l) Contestants may use the ropes once during a round. The second time a contestant grabs the ropes will be considered a submission.

(m) Intentionally escaping from the fighting area will result in a rope call.

(n) If both contestants wrestle into or under the ropes and the referee believes that the ropes are causing interference with the match, the referee may stop the action, and require both contestants to take a standing position in the middle of the fighting area before continuing the match.

(o) If both contestants are wrestling on the ground and the referee believes neither contestant will gain an advantage, the referee may stop the contest, and require both contestants to take a standing position in the middle of the fighting area before continuing the match.

(p) Mixed martial arts contests may be conducted either in an approved ring or in an enclosed fighting area. The following specifics apply:

(1) Rings:

(A) Must be no smaller than 16 feet square and no larger than 32 feet square within the ropes. The ring floor must extend at least 18 inches beyond the ropes;

(B) The ring floor must be padded with ensolite or another similar closed-cell foam, with at least 1 inch layer of foam padding. Padding must extend beyond the ring ropes and over the edge of the platform. Material that tends to gather in lumps or ridges may not be used;

(C) The ring platform must not be more than 4 feet above the floor of the venue and must have suitable steps or ramps for the use of the contestants and ring officials;

(D) Ring posts must be made of metal, not more than 3 inches in diameter, extending from the floor of the venue to a minimum height of 58 inches above the ring floor, and must be properly padded in a manner approved by the Executive Director. Ring posts must be at least 18 inches away from the ring ropes;

(E) There must be five ring ropes, not less than 1 inch in diameter and wrapped in soft material. The lowest rope must be 12 inches above the ring floor;

(F) There may not be any obstruction or object on the ring floor;

(2) Fighting Areas:

(A) May be circular or may be multi-sided having four or more sides that are equal in length. A circular fighting area must have a diameter of no less than 16 feet and of no more than 32 feet in length. For a multi-sided fighting area the shortest straight line distance between any two opposite sides must be no less than 16 feet and no more than 32 feet in length.

(B) The floor shall be constructed of material at least 3/4 inch thick, adequately supported, and padded with ensolite or similar closed-cell foam that is at least one inch thick.

(C) Padding shall extend beyond the fighting area and over the edge of the platform, and have a top covering of canvas, duck or similar material approved by the Executive Director.

(D) The covering shall be clean and tightly stretched and laced to the fighting area platform and may not have tears, holes or overlapping seams.

(E) The fighting area platform shall not be more than 4 feet above the floor of the building and shall have suitable steps or ramps for use by the participants.

(F) Posts shall be made of metal not more than 6 inches in diameter, extending from the floor of the venue to between 5 and 7 feet above the canvas of the fighting area and, if inside the fenced area, shall be properly padded in a manner approved by the Executive Director.

(G) The fighting area shall be enclosed by a fence made of material that will not allow a contestant to fall out or break through it onto the floor or spectators; including, without limitation, chain-link fence coated with vinyl. Any metal portion of the fenced area must be covered and padded in a manner approved by the Executive Director and must not be abrasive to the contestants.

(H) A fence area must have 2 gated entrances on opposite sides of the fenced area.

(I) There must not be any obstruction on the fence surrounding the area in which the contestants compete.

(q) The promoter of a mixed martial arts event shall hang at least 2 video screens that meet the approval of the Executive Director and which allow the patrons to view the action inside the enclosed fighting area or ring.

(r) If a laceration occurs, the referee may stop the contest and request the ring physician to examine the laceration. Either the physician or referee can stop the contest.

(s) The following tactics are fouls and may result in disqualification or point deduction at the discretion of the referee.

(1) Head butts.

(2) Kicks, punches or any strikes to the groin.

(3) Spitting or biting.

(4) Striking or grabbing the throat area.

(5) Grabbing the trachea.

(6) Kneeing to the head of a grounded opponent.

(7) Kicking to the head of a grounded opponent.

(8) Hair pulling.

(9) Engaging in any unsportsmanlike conduct that causes an injury to an opponent.

(10) Attacking on the break.

(11) Attacking after the bell has sounded.

(12) Intentionally pushing, shoving, wrestling, or throwing an opponent out of the fight area.

(13) Holding the fence or the ropes.

(14) Using abusive language in the fighting area.

(15) The use of any foreign substances on any contestant's hair, body or equipment

(16) Eye gouging of any kind.

(17) Fish hooking.

(18) Putting a finger into any orifice or into any cut or laceration on an opponent.

(19) Small joint manipulation.

(20) Striking to the spine or the back of the head.

(21) Striking downward using the point of the elbow.

(22) Clawing, pinching, or twisting the flesh.

(23) Grabbing the clavicle.

(24) Stomping a grounded opponent.

(25) Kicking to the kidney with the heel.

(26) Spiking an opponent to the canvas on his head or neck.

(27) Holding the shorts or gloves of an opponent.

(28) Flagrantly disregarding the instructions of the referee.

(29) Attacking an opponent who is under the care of the referee.

(30) Timidity, including without limitation, avoiding contact with an opponent, intentionally or consistently dropping the mouthpiece or faking an injury.

(31) Throwing in the towel during competition.

(32) Interference by the corner.

(t) The determination of the winner shall be as follows:

(1) by submission, either verbally or by tapping two or more times on the mat, ropes, ring corner or the opponents body;

(2) by knockout;

(3) by being down on the map for a ten count;

(4) by the referee disqualifying a contestant through a technical knockout;

(5) by the referee stopping a match based upon a ring physician's advice;

(6) by a contestant's corner stopping the bout;

(7) by the referee disqualifying a contestant for a violation of these rules; or

(8) by the judges decision based upon technique and aggressiveness minus the number of penalties.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2007.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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Proposal publication date: August 24, 2007
For further information, please call: (512) 463-7348

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CHAPTER 65. BOILERS

16 TAC §§65.10, 65.40, 65.70, 65.100

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 Texas Administrative Code ("TAC") Chapter 65, §§65.10, 65.70, and 65.100, and new §65.40, regarding definitions, a new metrication policy, responsibilities, and technical requirements of the boiler program without changes to the proposed text as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6501) and will not be republished.

The proposed amendments and new rule are necessary to establish a metrication policy for the boiler program, make technical requirements for boilers more consistent with the National Board Inspection Code (NBIC) and the ASME (American Society of Mechanical Engineers) Code, and update repair requirements for boilers. The Board of Boiler Rules at its meeting on April 19, 2007 recommended these rule changes.

Section 65.10, paragraphs (27) and (28) are added to define the terms used in new §65.40 regarding metrication.

New §65.40 is added to keep the Texas Boiler Law and Rules current with the format of the NBIC and the ASME Code. Manufacturers and repair facilities in countries other than the United States use these codes where metric (SI) units are the standard.

Section 65.70 is amended to conform to the current ASME Code, Section I. Currently the hydrostatic test pressure requirement is one and one-half times the allowable working pressure. Safety is an issue when conducting a hydrostatic pressure test on historical boilers. Decreasing the required pressure to one and one-quarter maintains a safety zone while still providing a pressure sufficient to test overall integrity.

Section 65.100 is amended to require that safety valves and safety relief valves be mounted properly. A failure of these devices can cause major failure of the complete boiler. ASME Code only allows certain types of mountings of these valves based on historical data on failures and operational malfunctions. To help ensure that public health and safety are protected, the Department believes it is necessary to address this item specifically in the rules to prevent failures of the safety valves and safety relief valves.

This section is also amended to no longer allow holders of ASME "Certificates of Authorization" to conduct repairs and alterations to boilers. The scope of the ASME certificate does not authorize the holder of such a certificate to conduct repairs or alterations. These certificates are used for new construction only. The National Board of Boiler and Pressure Vessel Inspectors provide "Certificates of Authorization" to conduct repairs and/or alterations. It is not the intent of this rule change to imply that holders of the ASME certificates are not proficient enough to make a sound repair, but rather the rule change recognizes that the repairs are not within the scope of such a certificate. Most holders of ASME certificates also hold the National Board certificate.

This section is also amended to limit the restriction of feedwater supply to miniature boilers. Requirements for miniature boilers fall under the Power Boiler section of the Boiler Law and Rules because they are built to ASME Code Section I. Many western hat stores and jewelry stores have these types of boilers, and the current requirement makes it difficult to modify the boilers to comply with the restriction on feeding the boiler while under pressure. There are safety hazards that are created by limiting this requirement, such as steam blowback while opening the fill valve and thermal shock when adding cold water to a hot boiler. The amended rule contains restrictions intended to minimize such hazards.

This section is also amended to ensure that non-welded replacement parts meet the original code of construction, as required for welded repairs and alterations. Traceability of the part ensures compliance with the ASME Code and to prevent parts from being installed onto boilers that were produced for non-ASME Code boilers.

The Department drafted and distributed the proposed amendments and new rule to persons internal and external to the agency. The proposal was published in the *Texas Register* on September 21, 2007. The comment period closed on October 22, 2007. No public comments were received in response to the rule proposal.

The amendments and new rule are adopted under Texas Health and Safety Code, Chapter 755 and Texas Occupations Code,

Chapter 51, which authorizes the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department. In particular, the rules are adopted under Texas Health and Safety Code, §755.032, which authorizes the Commission of Licensing and Regulation to adopt and enforce rules, in accordance with standard boiler usage, for the construction, inspection, installation, use, maintenance, repair, alteration, and operation of boilers.

The statutory provisions affected by the adoption are those set forth in Texas Health and Safety Code, Chapter 755 and Texas Occupations Code, Chapter 51. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 73. ELECTRICIANS

16 TAC §§73.10, 73.20 - 73.22, 73.24, 73.25, 73.40, 73.51, 73.52, 73.54, 73.80 73.90

The Texas Commission of Licensing and Regulation ("Commission") adopts amendments to 16 Texas Administrative Code ("TAC") Chapter 73, §§73.20 - 73.22, 73.24, 73.25, 73.40, 73.51, 73.52, 73.80 and 73.90; and new §73.54, regarding the electricians program without changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6229) and will not be republished. Section 73.10 is adopted with changes from the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6229) and will be republished.

Most of the changes are made to implement the provisions of Senate Bill 1222 adopted by the 80th Legislature providing for licensure of residential appliance installers and residential appliance installation contractors. Other changes were made to clarify the supervisory responsibilities of contractors and to set out the requirements for maintenance of records. Provisions of the rules adopted to implement grandfathering provisions of earlier versions of the statute have been deleted, as they no longer apply. These rule changes were recommended by the Electrical Safety and Licensing Advisory Board at its meeting on August 16, 2007. A description of each change is set out below along with an explanation of the rationale for the change. The Commission adopts, with a change, the rules as published in the *Texas Register* on September 14, 2007. The change to §73.10(25) is described below.

Section 73.10(6) is amended to add electrical sign contractors to the definition of general supervision to make it clear that a master electrician may serve as the required master for an electrical sign contractor. Section 73.10(17) is amended by deleting language referring to replacement of raceways, conductors, disconnecting means or service feeder components thereby broadening the scope of work a maintenance electrician may perform. Section 73.10(18) is amended by adding language to make it clear that sign electricians may work on pole lighting in parking lots. Section 73.10(19) is amended to add the phrase, "or authorized representatives" to the list of persons who may perform electrical work on an electrical equipment manufacturer's products without being licensed. This amendment will bring the rule into compliance with the provisions of Senate Bill 1222.

New §73.10(23) is added to describe the scope of work for residential appliance installers. New §73.10(24) is added to describe the scope of work for a residential appliance installation contractor. New §73.10(25) is added to clarify ambiguities in the statutory definition of residential appliance. The rule as published read, "(25) Residential Appliance--A unit of electrical equipment that is designed and installed in a dwelling by direct connection to an existing electrical circuit to perform a specific function such as water heating, for example. The term does not include general use equipment, such as an electric motor, for example, that is not designed for a specific function, nor does it include luminaries or suspended paddle fans. As adopted the rule reads, "(25) Residential Appliance--A unit of electrical equipment that is designed and installed in a dwelling by direct connection to an existing electrical circuit to perform a specific function such as water heating, for example. The term does not include general use equipment, such as an electric motor, for example, that is not designed for a specific function. The phrase, "nor does it include luminaries or suspended paddle fans" was removed to eliminate references to specific electrical equipment that is not considered to be residential appliances. These three new paragraphs are added to bring the rules into compliance with the provisions of Senate Bill 1222.

Section 73.20(a)(1) is amended to add residential appliance installers to the list of individual applicants who must pass an examination in order to become licensed. Section 73.20(e) is amended to add references to Occupations Code §§1305.1615, 1305.1617 and 1305.1618. The rule is amended to reference each statutory section that sets out minimum licensing requirements.

Section 73.21(b)(1) is deleted since it sets a deadline for applying for licensure of electricians by grandfathering that has already passed. New §73.21(b)(2) has been added to set out the requirements for licensure as an appliance installer without passing an examination as provided in Section 8 of Senate Bill 1222.

Section 73.22(d) is amended to add residential appliance installation contractors to the prohibition against contractors using a license number that is not assigned to them.

Section 73.24(a) is amended to add sign electricians and appliance installers to the list of individual licensees that are eligible for licensure by reciprocity if they are licensed in a state with which Texas has a reciprocity agreement. Section 73.24(b) is amended to slightly alter the focus of the section. As amended, it provides that the examination is waived if the Executive Director determines that an applicant has demonstrated that he meets the requirements of §73.21(b) rather than providing that the Executive Director may waive the examination if he determines that the provisions of §73.21 have been met. Section 73.24(c) is amended to more clearly set out what is required of applicants in subsection (c)(1) and (2). Subsection (c)(3) is deleted as it related to proof required to obtain licensure by a grandfather-

ing provision that no longer applies. Subsections (d) and (e) are deleted for the same reason that subsection (c)(3) is deleted.

Section 73.25(d) is amended by deleting the phrase, "for one renewal." Subsections (h) and (i) are deleted since they relate to timing provisions that are no longer effective.

Section 73.40(a) is amended to add a reference to residential appliance installation contractors to require that they have the same insurance coverage that electrical and electrical sign contractors must have.

Section 73.51(b) is amended to change a contractor's responsibility for electrical work it performs to responsibility for work performed on the contractor's behalf. New §73.51(d) is added to require a contractor to maintain its employment records and records of work performed on its behalf and to make them available to the Department. New §73.51(e) is added to state that both a contractor and the contractor's designated master are responsible for the supervision of all licensees working on the contractor's behalf.

Section 73.52(b) is amended to change a sign contractor's responsibility for electrical sign work it performs to responsibility for work performed on the contractor's behalf. New §73.52(d) is added to require a contractor to maintain its employment records and records of work performed on its behalf and to make them available to the Department. New §73.52(e) is added to state that both a contractor and the contractor's designated master are responsible for the supervision of all licensees working on the contractor's behalf.

New §73.54 is added to set out responsibilities of residential appliance installation contractors in the same fashion that §73.51 and §73.52 set out responsibilities of electrical contractors and electrical sign contractors. The structure of all three rule sections is similar.

Section 73.80 is amended by adding paragraphs (11) and (12) to establish application and renewal fees for appliance installers, $40.00, and appliance installation contractors, $125.00.

Section 73.90 is amended to delete language that refers to rules currently found in 16 Texas Administrative Code, Chapter 60.

The Department drafted and distributed the proposed amendments and new rule to persons internal and external to the agency. The proposal was published in the *Texas Register* on September 14, 2007. The comment period closed on October 15, 2007. One public comment was received in response to the rule proposal and is summarized below. The Electrical Safety and Licensing Advisory Board met on October 25, 2007, to consider public comments and make a final recommendation on the rule proposal to the Commission. The Advisory Board recommended the proposed rules for adoption with no changes based on the public comment that was received.

The commenter proposed to add language to §73.10(17), the definition of electrical maintenance work, specifically to provide that licensed maintenance electricians may replace raceways, conductors, etc. The published proposal simply deletes those items the commenter proposes to name from a list of items maintenance electricians may not perform. In other words, the commenter proposes to provide a specific grant of authority for maintenance electricians to perform the items deleted from the list of prohibited items. The commenter's rationale is that the definition will also apply to unlicensed maintenance persons employed by any business. Though the commenter did not specify the exemption, it appears that he was referring to Occupations Code §1305.003(8), which exempts persons who perform electrical work for businesses if they meet additional criteria. That exemption, however, is not limited to electrical maintenance work; it applies to all electrical work if the person meets all the criteria set out in the exception. Since the definition of electrical maintenance work will not affect those exempted pursuant to §1305.003(8), the Commission makes no change to the published rules in response to this comment.

The amendments and new rule are adopted under Texas Occupations Code, Chapters 51 and 1305, which authorize the Department to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1305. No other statutes, articles, or codes are affected by the adoption.

§73.10. Definitions.

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

(1) Assumed name--A name used by a business as defined in the Business and Commerce Code, Title 4, Chapter 36, Subchapter A, §36.02.

(2) Business affiliation--The business organization to which a master licensee may assign his or her license.

(3) Employee--An individual who performs tasks assigned to him by his employer. The employee is subject to the deduction of social security and federal income taxes from his pay. An employee may be full time, part time, or seasonal.

(4) Employer--One who employs the services of employees, pays their wages, deducts the required social security and federal income taxes from the employee's pay, and directs and controls the employee's performance.

(5) Filed--A document is deemed to have been filed with the department on the date that the document has been received by the department or, if the document has been mailed to the department, the date a postmark is applied to the document by the U.S. Postal Service.

(6) General Supervision--Exercise of oversight by a master electrician on behalf of an electrical contractor, or electrical sign contractor, or by a master sign electrician on behalf of an electrical sign contractor of performance by all classes of electrical licensees of electrical work bearing responsibility for the work's compliance with applicable codes under Texas Occupations Code, Chapter 1305.

(7) On-Site Supervision--Exercise of supervision of electrical work or electrical sign work by a licensed individual other than an electrical apprentice. Continuous supervision of an electrical apprentice is not required, though the on-site supervising licensee is responsible for review and inspection of the electrical apprentice's work to ensure compliance with any applicable codes or standards.

(8) Electrical Contractor--A person, or entity, licensed as an electrical contractor, that is in the business of performing "Electrical Contracting" as defined by Texas Occupations Code, §1305.002(5).

(9) Master Electrician--An individual, licensed as a master electrician, who on behalf of an electrical contractor, electrical sign contractor, or employing governmental entity, performs "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(10) Journeyman Electrician--An individual, licensed as a journeyman electrician, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing

governmental entity, while performing "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(11) Electrical Apprentice--An individual, licensed as an apprentice who works under the on-site supervision of a master electrician, a journeyman electrician, or a residential wireman, on behalf of an electrical contractor, or employing governmental entity performing "Electrical Work" as defined by Texas Occupations Code, §1305.002(11).

(12) Electrical Sign Contractor--A person, or entity, licensed as an electrical sign contractor, that is in the business of performing "Electrical Sign Contracting" as defined by Texas Occupations Code, §1305.002(9).

(13) Master Sign Electrician--An individual, licensed as a master sign electrician, who, on behalf of an electrical sign contractor, performs "Electrical Sign Work" as defined in paragraph (18) of this section.

(14) Journeyman Sign Electrician--An individual, licensed as a journeyman sign electrician, who works under the general supervision of a master electrician or a master sign electrician, on behalf of an electrical sign contractor, while performing "Electrical Sign Work" as defined in paragraph (18) of this section.

(15) Residential Wireman--An individual, licensed as a residential wireman, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing governmental entity, while performing electrical work that is limited to electrical installations in single family and multifamily dwellings not exceeding four stories, as defined by Texas Occupations Code, §1305.002(13).

(16) Maintenance Electrician--An individual, licensed as a maintenance electrician, who works under the general supervision of a master electrician, on behalf of an electrical contractor, or employing governmental entity and performs "Electrical Maintenance Work" as defined in paragraph (17) of this section.

(17) Electrical Maintenance Work--The replacement, or repair of existing electrical appurtenances, apparatus, equipment, machinery, or controls used in connection with the use of electrical energy in, on, outside, or attached to a building, residence, structure, property, or premises. All replacements or repairs must be of the same rating and type as the existing installation. No improvements may be made that are necessary to comply with applicable codes under Texas Occupations Code, Chapter 1305. Electrical maintenance work does not include the installation of any new electrical appurtenances, apparatus, equipment, machinery, or controls beyond the scope of any existing electrical installation.

(18) Electrical Sign Work--Any labor or material used in manufacturing, installing, maintaining, extending, connecting or reconnecting an electrical wiring system and its appurtenances, apparatus or equipment used in connection with signs, outline lighting, awnings, signals, light emitting diodes, and the repair of existing outdoor electric discharge lighting, including parking lot pole lighting. This also includes the installation of an electrical service integral to an isolated sign and/or outline lighting installation

(19) Work Involved in the Manufacture of Electrical Equipment--Work involved in the manufacture of electrical equipment includes on and off-site manufacture, commissioning, testing, calibration, coordination, troubleshooting, evaluation, repair or retrofits with components of the same ampacity, maintenance and servicing of electrical equipment within their enclosures performed by authorized employees, or authorized representatives of electrical equipment manufacturers and limited to the type of products they manufacture.

(20) Electrical Sign Apprentice--An individual, licensed as an electrical sign apprentice who works under the on-site supervision of a master electrician, a master sign electrician, or a journeyman sign electrician, on behalf of an electrical sign contractor performing "Electrical Sign Work" as defined by these rules.

(21) A Principal Place of Business--For purposes of these rules, a contractor has a principal place of business in another state or territory or foreign country if the contractor is doing business in Texas without complying with all applicable Texas statutes and the contractor conducts substantial business in another state, territory or country while business conducted by the contractor in Texas is minimal.

(22) On-the-job Training--Training or experience performing electrical work as defined by Occupations Code, §1305.002(11).

(23) Residential Appliance Installer--An individual, licensed as a residential appliance installer, who on behalf of a residential appliance installation contractor, performs electrical work that is limited to residential appliance installation as defined by Texas Occupations Code, §1305.002(12-e).

(24) Residential Appliance Installation Contractor--A person or entity licensed as a residential appliance installation contractor, that is in the business of residential appliance installation as defined by Texas Occupations Code §1305.002(12-d).

(25) Residential Appliance--A unit of electrical equipment that is designed and installed in a dwelling by direct connection to an existing electrical circuit to perform a specific function such as water heating, for example. The term does not include general use equipment, such as an electric motor, for example, that is not designed for a specific function.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2007.

TRD-200705473
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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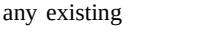
Proposal publication date: September 14, 2007
For further information, please call: (512) 463-7348



PART 8. TEXAS RACING COMMISSION

CHAPTER 321. PARI-MUTUEL WAGERING
SUBCHAPTER D. SIMULCAST WAGERING
DIVISION 3. SIMULCASTING AT HORSE RACETRACKS

16 TAC §321.505

The Texas Racing Commission (Commission) adopts amendments to 16 TAC §321.505, concerning Allocation of Purses and Funds for Texas Bred Incentive Programs, with changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5277).

These amendments identify criteria that the Commission may consider when evaluating an association's proposed division of purse revenue. If the Commission determines that the association's proposal does not accord reasonable access to races for all breeds of horses, the Commission may require the association to submit additional information, require the association to submit a revised recommendation, or substitute its own division of purse revenue. The changes also provide that an association may submit a signed agreement between it and all the recognized representatives of horse owners, trainers and breeders in lieu of the documentation that the association would otherwise have to submit to support its proposal.

The changes to §321.505 also specify the criteria the Commission may consider when determining the percentages by which Texas Bred Incentive Program funds generated from simulcasting are divided. The changes provide that the official horse breed registries may jointly submit a signed agreement regarding the percentages for the Commission's consideration and approval.

The Commission received comments in response to the published notice during a meeting held on September 6, 2007. Attending the meeting were representatives of each horse racetrack association, each horse breed registry, the Texas Horsemen's Partnership, and the agency.

As a result of the comments offered during the meeting, the Commission adopted the amendments with changes from the published text. These additional changes require the associations to begin negotiations at least 30 days before recommending the percentages by which the purse revenue should be divided, and require the associations to provide supporting documentation in writing. The changes consolidated the criteria of sales and market surveys into a single criterion. In connection with the Accredited Texas Bred Incentive Programs, the additional changes clarified that the Commission will consider the availability of administrative funds to the breed registries when reviewing the activities of the registries to promote their breeds. Finally, the changes added a new criterion that accounts for the median sales price of accredited Texas-bred horses.

The amendments are adopted under the Texas Racing Act, Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting greyhound and horse racing and rules to administer the Act.

§321.505. Allocation of Purses and Funds for Texas Bred Incentive Programs.

(a) Purses.

(1) An association shall recommend the percentages by which it will divide the purse revenue generated from simulcasting among the various breeds of horses. The percentages are subject to the approval of the Commission.

(2) Negotiations.

(A) At least 30 days before recommending the percentages, the association shall begin negotiations with the organizations recognized by the Commission or in the Act as representatives of horse owners, trainers, and/or breeders.

(B) When requested, the association shall provide the material specified in paragraph (3) of this subsection to the organizations recognized by the Commission or in the Act as representatives of horse owners, trainers, and/or breeders.

(3) When requesting Commission approval of the percentages, the association shall present in writing studies, statistics, or other documentation supporting the association's application of the criteria in paragraph (4) of this subsection in its proposed division.

(4) The Commission may consider the following criteria in evaluating whether to approve the association's proposed division of purse revenue:

(A) local public interest in each breed as demonstrated by, but not limited to, the following factors:

(i) live handle by breed;

(ii) simulcast import handle by breed;

(iii) live attendance at the racetracks; and

(iv) sales and market survey information.

(B) earnings generated by the association from each breed;

(C) national public interest in each breed as determined by the live simulcast export handle of each Texas meet;

(D) racetrack race date request and opportunities given to each breed; and

(E) availability of and ability to attract competitive horses.

(5) If the Commission determines that the association's proposed division of purse revenue is inconsistent with the association's obligation to accord reasonable access to races for all breeds of horses, the Commission may:

(A) require the association to submit additional information supporting its recommendation for consideration at the next Commission meeting;

(B) reject the association's recommendation and require the association to submit a new recommendation for consideration at the next Commission meeting; or

(C) reject the association's recommendation and approve an alternate division of purse revenue as determined by the Commission.

(6) In lieu of the process outlined in paragraphs (3) - (5) of this subsection, the association may submit a signed agreement between the association and the organizations referenced in paragraph (2) of this subsection for the Commission to consider for approval. For the Commission to approve the agreement, the agreement must:

(A) delineate the percentages by which the association will divide the purse revenue generated from simulcasting among the various breeds of horses; and

(B) be signed by the association and all organizations referenced in paragraph (2) of this subsection.

(b) Texas Bred Incentive Program Funds.

(1) The Commission shall determine the percentages by which Texas Bred Incentive Program funds generated from simulcasting are divided among the various breeds of horses.

(2) In determining the percentages by which Texas Bred Incentive Program funds generated from simulcasting are divided, the Commission may consider the following criteria:

(A) the amount of participation in live racing by each of the breeds;

(B) the activities of the breed registries to promote their breed for racing and breeding, taking into consideration each registry's available administrative funds;

(C) the national public interest in each breed as determined by the live simulcast export handle of each Texas meet;

(D) the effect of the proposed allocation on the state's agricultural racing horse breeding industry;

(E) the effect of the proposed allocation on the state's agricultural racing horse training industry;

(F) the amount of Texas Bred Incentive Programs funds from simulcasting generated by each breed; and

(G) the median sales price of accredited Texas bred horses as submitted on the performance measures report as required under §303.83 of this title.

(3) Before determining the percentages, the Commission shall provide an opportunity for the official horse breed registries designated in the Act to present information in writing regarding the criteria specified in paragraph (2) of this subsection and any other information that the registries believe may be useful to the Commission.

(4) In lieu of the process outlined in paragraphs (2) and (3) of this subsection, a signed agreement between the organizations referenced in paragraph (3) of this subsection may be submitted to the Commission for consideration and approval. For the Commission to approve the agreement, the agreement must:

(A) delineate the percentages by which the Texas Bred Incentive Program funds generated from simulcasting are divided among the various breeds of horses; and

(B) be signed by all organizations referenced in paragraph (3) of this subsection.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705354
Mark Fenner
General Counsel
Texas Racing Commission
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Proposal publication date: August 24, 2007
For further information, please call: (512) 833-6699

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16 TAC §321.509

The Texas Racing Commission (Commission) adopts amendments to 16 TAC §321.509, concerning Escrowed Purse Account, with changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5277).

These amendments identify criteria that the Commission may consider when evaluating an association's proposed division of revenue within the escrowed purse account. If the Commission determines that the association's proposal does not accord reasonable access to races for all breeds of horses, the Commission may require the association to submit additional information, require the association to submit a revised recommendation, or substitute its own division of revenue within the escrowed purse account. The changes also provide that an association may submit a signed agreement between it and all the recognized representatives of horse owners, trainers and breeders in lieu of the documentation that the association would otherwise have to submit to support its proposal.

The Commission received comments in response to the published notice during a meeting held on September 6, 2007. Attending the meeting were representatives of each horse racetrack association, each horse breed registry, the Texas Horsemen's Partnership, and the agency. As a result of the comments offered during the meeting, the Commission adopted the amendment with one change from the published text. This change requires the associations to provide supporting documentation in writing.

The amendments are adopted under the Texas Racing Act, Texas Civil Statutes, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting greyhound and horse racing and rules to administer the Act.

§321.509. Escrowed Purse Account.

(a) At least once a year, the Commission shall distribute all funds accrued in the escrowed purse account created by the Act, §6.091(e). The executive secretary shall establish a deadline for receiving requests for distribution from the account and publicize that deadline to the horse racetrack associations at least 30 days before the deadline. The associations when requesting for distribution from the account shall also recommend the percentages by which it will divide the escrowed purse account revenue among the various breeds of horses.

(b) The Commission shall determine the amount of the distribution to each racetrack in accordance with the standards set forth in the Act, §6.091(e) and (f).

(c) The percentages by which an association will divide the escrowed purse account revenue among the various breeds of horses is subject to the approval of the Commission. When requesting Commission approval of the percentages, the association shall present in writing studies, statistics, or other documentation to support its proposed division of escrowed purse account revenue. The Commission may consider the following criteria when evaluating the association's studies, statistics, or other documentation submitted to support its proposed division of escrowed purse account revenue before granting its approval:

(1) local public interest in each breed as demonstrated by, but not limited to, the following factors:

(A) simulcast import handle by breed;

(B) live handle by breed; and

(C) live attendance.

(2) earnings generated by the association from each breed;

(3) racetrack race date request and opportunities given to each breed;

(4) statewide need by breed; and

(5) national public interest in each breed as determined by the live simulcast export handle of each Texas meet.

(d) If the Commission determines that the association's proposed division of the escrowed purse account revenue is inconsistent with the association's obligation to accord reasonable access to races for all breeds of horses, the Commission may:

(1) require the association to submit additional information supporting its recommendation for consideration at the next Commission meeting;

(2) reject the association's recommendation and require the association to submit a new recommendation for consideration at the next Commission meeting; or

(3) reject the association's recommendation and approve an alternate division of the escrowed purse account revenue as determined by the Commission.

(e) In lieu of the process outlined in subsections (c) and (d) of this section, a signed agreement between the association and the organizations recognized by the Commission or in the Act as representatives of horse owners, trainers, and/or breeders maybe submitted to the Commission for consideration an approval. For the Commission to approve the agreement, the agreement must:

(1) delineates the percentages by which the escrowed purse account revenue received by the association will be divided amongst the various breeds of horses; and

(2) be signed by all organizations recognized by the Commission or in the Act as representatives of horse owners, trainers, and/or breeders.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705355
Mark Fenner
General Counsel
Texas Racing Commission
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For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.5

The Texas Higher Education Coordinating Board adopts amendments to §1.5 concerning voting by Board Members on Board Committees, without changes to the proposed text as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6507). Specifically, the amendment will provide that while Board Members may participate in Committee Meetings, only members of a given Committee may vote on that Committee's actions.

No comments have been received on the proposed amendment.

The amendment is adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to make rules to govern its proceedings.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 9, 2007.

TRD-200705476
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: November 29, 2007
Proposal publication date: September 21, 2007
For further information, please call: (512) 427-6114

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19 TAC §1.16

The Texas Higher Education Coordinating Board adopts an amendment to §1.16 concerning contracts for materials and services with changes to the proposed text as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6509). Specifically, the amendment provides that in instances in which the agency has no real discretion with regard to grants or contracts, such contracts need not be approved by the Board or the Agency Operations Committee.

No comments have been received on the proposed amendment.

The amendment is adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules.

§1.16. Contracts for Materials and Services.

(a) The Board shall approve all requests for the purchase of materials or services if the cost for those materials or services is expected to exceed $750,000.00. After a vendor is selected, the Chair and Vice Chair of the Board shall provide final approval of the contract with the selected vendor.

(b) The Agency Operations Committee shall approve all requests for the purchase of materials or services if the cost for those materials or services is greater than $100,000.00 but less than or equal to $750,000.00. After a vendor is selected, the Chair and Vice Chair of the Board shall provide final approval of the contract with the selected vendor.

(c) The Commissioner shall approve all contracts for the purchase of materials or services if the contract amount is less than or equal to $100,000.00. The Commissioner may delegate his approval authority to a deputy, associate, or assistant commissioner if:

(1) The contract amount is less than or equal to $5,000; or

(2) The Commissioner will be away from the agency and unavailable to approve contracts for more than one business day.

(d) The Commissioner shall provide a report to the Agency Operations Committee, at least quarterly, describing all contracts for the purchase of materials or services.

(e) The Chair and Vice Chair of the Board shall have the authority to approve emergency purchase requests and contracts for materials or services over $100,000 that must be entered into in order to prevent a hazard to life, health, safety, welfare, property or to avoid undue additional cost to the state. Emergency purchase requests and contracts shall be exempt from subsections (a) and (b) of this section.

(f) In the event that the agency is required by statute to enter into a contract for the award of a grant with a value of over $100,000, approval of such a request or contract by the Board or the Agency Operations Committee pursuant to subsection (a) or (b) of this section, as appropriate, shall not be required when such an award involves no significant exercise of discretion by the Board or agency staff. The Commissioner shall approve such contracts and report them to the Board at the next quarterly Board meeting following the approval.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 9, 2007.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: November 29, 2007
Proposal publication date: September 21, 2007
For further information, please call: (512) 427-6114

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CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §4.3

The Texas Higher Education Coordinating Board adopts amendments to §4.3, concerning Definitions with changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5595).

Specifically, the amendment adds a definition of a "dropped course" and renumbers the existing definitions to accommodate the new definition in alphabetical order.

The following comments were received regarding the amendments:

Comment: The Texas Association of Collegiate Registrars and Admissions Officers (TACRAO) requested clarification to §4.3(11) of proposed rules regarding the phrase "without receiving a grade." TACRAO asked for a definition of a grade in the context of the proposed rules.

Response: Staff added a definition of a grade to §4.10(c) for purposes of this section of the rules.

Comment: TACRAO suggested modifying language in proposed §4.3(11)(B) to remove reference to the drop-add period, which is confusing and raises a question about the intent of the statute.

Response: Staff has modified the section to remove the reference.

The amendments are adopted under the Texas Education Code, §51.907(e), which authorizes the Coordinating Board to adopt rules concerning limitations on the number of courses that may be dropped under certain circumstances by undergraduate students.

§4.3. Definitions.

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

(1) Active military service--Active service in the armed forces of the United States or in the National Guard or the Texas State Guard.

(2) Associate of Science degree and the Associate of Arts degree--Collegiate degrees consisting of lower-division courses designed to prepare students for transfer to a bachelor's degree program.

(3) Associate of Applied Science degree and the Associate of Applied Arts degree--Technical certificates issued to students who complete workforce education curricula of collegiate level.

(4) Associate of Arts in Teaching degree--Board-approved collegiate degree programs consisting of lower-division courses intended for transfer to baccalaureate programs that lead to initial Texas teacher certification.

(5) Bachelor of General Studies degree--A program designed principally for mature students who seek a flexible degree program and who do not desire or may not meet prerequisites of a highly structured traditional degree program, and to permit students to plan, with advisement, an individualized program with access to a wide range of academic disciplines and fields of professional study.

(6) Bachelor of Applied Arts and Sciences degree--A program designed to provide a path to a bachelor's degree for students who have earned previous collegiate credit through workforce education curricula. The degree program combines general education requirements and a professional component designed to complement the student's technical or vocational competence.

(7) Board--The Texas Higher Education Coordinating Board.

(8) Commissioner--The Commissioner of Higher Education.

(9) Common calendar--Dates and information pertaining to the beginning and ending (and lengths) of academic semesters and sessions, applicable to all Texas public universities and community, technical and state colleges.

(10) Consulting or testifying expert witness--Any non-fact witness whose name must be disclosed during litigation as required by the Texas Rules of Civil Procedure.

(11) Dropped Course--A course in which an undergraduate student at an institution of higher education has enrolled for credit, but did not complete, under these conditions:

(A) the student was able to drop the course without receiving a grade or incurring an academic penalty;

(B) the student's transcript indicates or will indicate that the student was enrolled in the course past the census date; and

(C) the student is not dropping the course in order to withdraw from the institution.

(12) Degree program--Any grouping of subject matter courses which, when satisfactorily completed by a student, will entitle the student to a degree from an institution of higher education.

(13) Faculty or professional staff of an institution of higher education--A non-classified, full-time employee who is a member of the faculty or staff and whose duties include teaching, research, administration or performing professional services, including professional library services.

(14) Fiscal year--The State of Texas' fiscal year, September 1 through August 31.

(15) Institution of higher education or institution--Any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined in Texas Education Code, §61.003.

(16) Interdisciplinary baccalaureate degrees--The Bachelor of General Studies degree (defined in paragraph (5) of this section) and such general degrees as liberal arts or humanities. These broad-based degrees vary in the amount of prescriptive structure but share the characteristics of flexibility for the student and interdisciplinary course selection.

(17) Non-classified--An employee whose position is not controlled by the institution's classified personnel system or a person employed in a similar position if the institution does not have a classified personnel system.

(18) Religious holy day--A holy day observed by a religion whose places of worship are exempt from property taxation under the Texas Tax Code, §11.20.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2007.

TRD-200705433
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: November 28, 2007
Proposal publication date: August 31, 2007
For further information, please call: (512) 427-6114

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19 TAC §4.10

The Texas Higher Education Coordinating Board adopts new §4.10, concerning limitations on the number of courses that may be dropped under certain circumstances by undergraduate students with changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5596).

Specifically, the new section describes situations under which a student would be permitted to drop more than the six courses allowed by the provisions of §1 of Senate Bill (SB) 1231 (80th Regular Session, Texas Legislature), as part of the provisions of a new section of the Texas Education Code, §51.907.

Comments were received during a period from August 31, 2007 through October 1, 2007. These comments are summarized as follows:

Comment: Texas Woman's University suggested that, given the high number of non-traditional students, "member of the student's family" should also include the student's spouse, child, or grandchild.

Response: Staff agrees with the comment. The draft rules were modified to include the student's spouse, child or grandchild among "members of the student's family."

Comment: TACRAO requests clarification of proposed §4.10(a) regarding which students are affected by the provisions of the statute. Senate Bill 1231 states that the provisions of the bill apply "only to the number of courses that may be dropped by a student who beginning with the fall 2007 semester enrolls in an institution of higher education as a first-time freshman."

Response: Based upon the provision in SB 1231, staff interprets this provision to indicate that anyone who was enrolled as a post-secondary student anywhere prior to fall 2007 is not affected by the statute. A student who enrolls in an institution of higher education (i.e., a Texas public college or university, specified in the statute by reference to the definition in TEC §61.003) as a first time freshman beginning with fall 2007, and extending to subsequent semesters, is affected by the statute. A student who enrolls at any other college, university, or other post-secondary educational institution as a first-time freshman during fall 2007 or later is affected by the statute only upon transfer into a Texas public institution of higher education, and a course dropped during enrollment at an institution that does not fall under the definition of "institution of higher education" provided in TEC §61.003 should not be considered for purposes of this section. Because these interpretations are clear based upon the established definition of an "institution of higher education," no change was made to the proposed rules as a result of this comment.

Comment: TACRAO asks for clarification regarding students who have enrolled in college courses prior to high school graduation, and whether such students are affected by the limitation on dropped courses.

Response: Students who are still enrolled in high school are not affected by the provisions of SB 1231 and any course a student drops while they are still enrolled in high school should not be counted toward the limitation on dropped courses under this section. No change was made to the proposed rules as a result of this comment.

Comment: TACRAO suggests that the definition of a "member of the student's family" should include a student's spouse and children.

Response: See the similar comment from Texas Woman's University, and the staff response indicating a modification to the proposed rules.

Comment: North Harris Montgomery County College District submitted a number of comments regarding the statute itself, including comments regarding increased negative impact on student success; negative impact on Closing the Gaps goals; inequitable impact on students who transfer from independent or out-of-state institutions (that they would be less significantly affected than students who receive all their undergraduate education at Texas public colleges and universities); and significant cost implications for institutions for implementation of the statute. The comments also expressed concern for particular groups of students, including those enrolled in developmental education, ESL students, and first-time-in-college, low-income, minority students. No comments were directed specifically at the proposed rules and no suggestions for modifications of the proposed rules were offered.

Response: The proposed rules can be used by institutions to allow exemptions for good cause under the provisions of the statute. No change was made to the proposed rules as a result of this comment.

Comment: Austin Community College offered several comments regarding the proposed rules: (1) developmental courses should

not count against the drop limit; (2) dual credit courses should not count against the drop limit; (3) institution-initiated (or "administrative") drops should not count against the drop limit; (4) requesting clarification of TEC §51.907(b) "academic penalty;" (5) allow for the development of flexible "best practices" in implementation; (6) that a decision regarding an exempted course drop at one institution be immune from review and reclassification at a subsequent institution; (7) that standard exemptions be included for students serving on a jury for a period of time that would prevent completion of the course; incarceration of the student for a period of time that would prevent the student from completing the course; a change in child care arrangements beyond the control of the student that would prevent the student form completing the course; and documented institutional error.

Response: These concerns can all be addressed through the development of local policies under the proposed rules. No change was made to the proposed rules as a result of these comments.

The new section is adopted under the Texas Education Code, §51.907(e), which authorizes the Coordinating Board to adopt rules concerning limitations on the number of courses that may be dropped under certain circumstances by undergraduate students.

§4.10. Limitations on the Number of Courses That May Be Dropped under Certain Circumstances by Undergraduate Students.

(a) Beginning with the fall 2007 academic term, and applying to students who enroll in higher education for the first time during the fall 2007 academic term or any term subsequent to the fall 2007 term, an institution of higher education may not permit an undergraduate student a total of more than six dropped courses, including any course a transfer student has dropped at another institution of higher education, unless:

(1) the institution has adopted a policy under which the maximum number of courses a student is permitted to drop is less than six; or

(2) the student shows good cause for dropping more than that number, including but not limited to a showing of:

(A) a severe illness or other debilitating condition that affects the student's ability to satisfactorily complete the course;

(B) the student's responsibility for the care of a sick, injured, or needy person if the provision of that care affects the student's ability to satisfactorily complete the course;

(C) the death of a person who is considered to be a member of the student's family or who is otherwise considered to have a sufficiently close relationship to the student that the person's death is considered to be a showing of good cause;

(D) the active duty service as a member of the Texas National Guard or the armed forces of the United States of either the student or a person who is considered to be a member of the student's family or who is otherwise considered to have a sufficiently close relationship to the student that the person's active military service is considered to be a showing of good cause;

(E) the change of the student's work schedule that is beyond the control of the student, and that affects the student's ability to satisfactorily complete the course; or

(F) other good cause as determined by the institution of higher education.

(b) For purposes of this section, a "member of the student's family" is defined to be the student's spouse, child, grandchild, father, mother, brother, sister, grandmother, grandfather, aunt, uncle, nephew, niece, first cousin, step-parent, step-child, or step-sibling; a "person who is otherwise considered to have a sufficiently close relationship to the student" is defined to include any other relative within the third degree of consanguinity, plus close friends, including but not limited to roommates, housemates, classmates, or other persons identified by the student, for approval by the institution on a case-by-case basis.

(c) For purposes of this section, a "grade" is defined to be the indicator, usually a letter like A, B, C, D, or F, or P (for pass) assigned upon the student's completion of a course. A "grade" indicates either that the student has earned and will be awarded credit, if the student has completed the course requirements successfully; or that the student remained enrolled in the course until the completion of the term or semester but failed to provide satisfactory performance required to be awarded credit. A "grade" under this definition does not include symbols to indicate that the course has been left incomplete, whether those symbols indicate a negotiated temporary suspension of the end-of-term deadline for completion of the course requirements commonly designated as "incomplete" status, a dropped course under the conditions designated for this section, or a withdrawal from the institution.

(d) Each institution of higher education shall adopt a policy and procedure for determining a showing of good cause as specified in subsection (a) of this section and shall provide a copy of the policy to the Coordinating Board.

(e) Each institution of higher education shall publish the policy adopted under this section in its catalogue and other print and Internet-based publications as appropriate for the timely notification of students.

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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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER I. NURSING EDUCATION PERFORMANCE INITIATIVE

19 TAC §§4.181 - 4.183

The Texas Higher Education Coordinating Board adopts new §§4.181 - 4.183, concerning the Nursing Education Performance Initiative. Section 4.182 and 4.183 are adopted with changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5597). Section 4.181 is adopted without changes to the proposed text and will not be republished.

Sections 4.181 - 4.183 responds to Senate Bill 138, 80th Texas Legislature, which directs the Coordinating Board to consider and develop methods to promote the retention and graduation of students enrolled in initial licensure nursing programs and to recognize those programs that achieve a graduation rate of 85

percent or more. The rules describe the Board's initiative to promote the retention and graduation of students in these programs and its method for calculating graduation rates and recognizing these programs that achieve high graduation rates. For further clarification, staff made minor edits to §4.183(1)(A) and (B).

The following comments were received regarding the new rules:

Comments: Three general comments were received from Texarkana College about the challenges for schools in obtaining an 85 percent or higher retention rates. Faculty believed that the proposed rules would penalize community colleges that serve students who have significant challenges in completing their nursing education.

Response: No response; these were general comments.

Comments: A comment was received from The WorkSource/Greater Houston Partnership, suggesting that "RN" be inserted into the phrase "initial licensure program" and that the definition of "nursing program" be eliminated because it was redundant with "initial licensure program."

Response: Staff agrees to change the phrase "initial licensure program" to "initial RN licensure program" to further clarify the definition. The staff will change "nursing program" to "nursing school" to further distinguish the administrative unit responsible for the program from the sequence of nursing courses leading to initial licensure.

Comments: Several comments were received about the definition of the graduation rate. The WorkSource/Greater Houston Partnership had two comments: (1) that the phrase "first time, full time students" be changed to "new, full-time students;" (2) that the definition for §4.182(7)(A) read as "within thirty six months of initial enrollment for two-year programs leading to initial RN licensure" and the definition for §4.182(7)(B) read as "within eighteen months of initial enrollment for one-year programs leading to initial RN licensure." Trinity Valley Community College suggested that Paramedics to RN tracks be included in the definition for §4.182(7)(B). Lamar University at Port Arthur suggested that the time period for community college students to complete the program be extended to two years rather than 18 months. The University of Texas System suggested tracking students individually over six semesters regardless of the time or sequence taken to complete those semesters rather than as a cohort of students tracked over a set period of two years. The University of Texas System also recommended that students enrolled in baccalaureate program should be tracked only in their second year of the two-year program.

Response: Staff disagrees with the proposed change to "new, full-time students." "First time, full-time students" is standard phrasing in Board performance measures and is used here to maintain consistency in language and meaning. Staff agrees to the language offered by The WorkSource/Greater Houston Partnership for the definition under §4.182(7)(A) and (B) which would also incorporate comments by Trinity Valley Community College. Staff believes the change reflects a broader and more flexible definition for measuring graduation rates among the wide variety of nursing programs at community colleges, universities, health-related institutions, and diploma programs. Staff disagrees with the suggestion to track students individually and only calculate second year retention rates because, given that applications greatly exceed available seats in most initial licensure programs, the focus should be on-time graduation and on promoting student success at the point of initial enrollment.

Comments: Several comments were received about the use of NCLEX scores in identifying nursing schools for recognition. The WorkSource/Greater Houston Partnership wrote that the 85 percent or higher score was too low. Lamar University at Port Arthur suggested that NCLEX scores should be based on graduates passing the national exam within three attempts or 12 months, rather than on one attempt.

Response: Staff disagrees with the comments. It has included NCLEX scores in the methodology to ensure and maintain a base level of quality of instruction, while emphasizing retention efforts. For purposes of expediency, the Staff will receive NCLEX scores by whatever definition is used by the Texas Board of Nursing, which currently calculates those rates based on first-time test takers.

Comments: A comment was received by The WorkSource/Greater Houston Partnership that the recognition program should be phased in with lower rates and that different rates be set by type of institution.

Response: Staff disagrees with the comments, given the intent of Senate Bill 138; however, Staff agrees to add language that acknowledges initial RN licensure programs which have shown a significant improvement in retention rates without actually reaching a retention rate of 85 percent or higher. This new language is consistent with a recommendation in the Board's report to the Texas Legislature on strategies to increase the number of nurse graduates in October 2007.

The new sections are adopted under the Texas Education Code, §61.0901, which gives the Coordinating Board the authority to adopt rules for developing methods to promote the retention and graduation of students enrolled in initial licensure nursing programs and to recognize those programs that achieve a graduation rate of 85 percent or more.

§4.182. Definitions.

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

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--Commissioner of Higher Education.

(3) Initial RN licensure program--A sequence of nursing courses and learning experiences that prepares students for initial licensure as registered nurses.

(4) Nursing school--An educational entity of an institution of higher education or hospital that offers the courses and learning experiences of the initial licensure program.

(5) Institution of Higher Education--A public or independent university, community college or health-related institution that offers an initial RN licensure program that is approved by the Texas Board of Nursing.

(6) Hospital--A public or private hospital that offers an initial RN licensure program that is approved by the Texas Board of Nursing.

(7) Graduation rate--A calculation by the Texas Higher Education Coordinating Board that represents the percentage of first-time full-time students enrolled in an initial licensure program in a predefined academic cohort who are reported as graduates of the initial RN licensure program within:

(A) 36 months of initial enrollment for two-year programs.

(B) 18 months of initial enrollment for one year programs.

(8) Best practices--Strategies, activities or approaches that have been shown through research and evaluation to be effective and/or efficient.

§4.183. Nursing Education Performance Recognition Program.

The Board shall recognize nursing schools that are successful in retaining and graduating students from initial RN licensure programs:

(1) Eligibility for Recognition. To be eligible for Board recognition, a nursing school must:

(A) have an 85 percent or higher graduation rate for the most current year for which rates are calculated by the Board.

(B) have an 85 percent NCLEX pass rate or higher for the most current period for which pass rates are available from the Texas Board of Nursing.

(C) demonstrate best practices for retaining and graduating students from initial RN licensure programs as determined by the Board.

(2) Calculation of Graduation Rate. Board shall calculate graduation rates each year using admission and graduation data submitted by the Registrar of each institution of higher education. Institutions may review the preliminary results of the Board's calculation but may not submit revised data for calculation unless approved by the Commissioner.

(3) Demonstration of Best Practices:

(A) The nursing school shall:

(i) demonstrate to the Board through data collection efforts and analysis the specific strategies and activities that have contributed to a graduation and NCLEX pass rate of 85 percent or higher.

(ii) submit a plan for disseminating information about the best practices to nursing programs in the state.

(B) The Commissioner shall make the final determination of whether or not the program has demonstrated best practices.

(4) Method of Recognition. Nursing schools that meet eligibility requirements for recognition will be reported to the Texas Board of Nursing, Governor, and Texas Legislature each year and the names of their institutions will be posted on the Board's website. Recognized nursing programs are also eligible for incentive funding that shall be used only to increase enrollments and the number of graduates from initial RN licensure programs and to promote best practices in the state.

(5) Acknowledgement of Increased Retention Rates. The Board shall acknowledge by letter nursing schools that have not obtained an 85 percent graduation rate or higher, but have otherwise increased graduation rates in their initial RN licensure programs above 50 percent and by more than 10 percent from the previous year to the current year.

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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Bill Franz
General Counsel
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SUBCHAPTER J. WORK-STUDY STUDENT MENTORSHIP PROGRAM

19 TAC §§4.191 - 4.196

The Texas Higher Education Coordinating Board adopts new §§4.191 - 4.196, concerning Work-Study Student Mentorship Program, without changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5279).

Specifically, these new sections are being adopted under the provisions of Texas Education Code, §56.079, added by Senate Bill 1050, §2 (80th Texas Legislature) which states, "The Texas Higher Education Coordinating Board shall adopt rules relating to the administration of the work-study student mentorship program under §56.079, Education Code, as amended by the Act, as soon as practicable after the effective date of this Act." The new sections describe the Work-Study Student Mentorship Program.

The following comments were received regarding the rules:

Comments: The University of Texas at Dallas commented regarding §4.191 and §4.194 (Purpose Statement and Institutional Eligibility) and stated that the text does not clearly indicate whether the term participating institutions refers to the institution or to the financial aid operation within the institution. As such, it is not entirely clear whether or not a separate unit, such as a Career Center or Internship Program, could operate the mentorship program apart from the financial aid operation. On a related note, it appears the student mentorship program will provide additional funds to students in need, although it also appears the program is mandatory for institutions. If, for example, an institution wanted to offer the work-study program without the mentorship program, that possibility seems to exist only because the Purpose statement (§4.191) indicates the two programs are separate and distinct.

Response: The definition of participating institution does not limit the institution to operating the program within any specific department. The institution could operate the program apart from the financial aid operation. The program will provide additional funds to students in need, although it is not mandatory for institutions to participate.

The new sections are adopted under the Texas Education Code, §56.079, which authorizes the Texas Higher Education Coordinating Board to adopt rules concerning the work-study student mentorship program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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SUBCHAPTER K. INSTRUCTIONAL MATERIAL FOR BLIND AND VISUALLY IMPAIRED STUDENTS AND STUDENTS WITH DYSLEXIA

19 TAC §§4.201 - 4.206

The Texas Higher Education Coordinating Board adopts new §§4.201 - 4.206 concerning instructional material for blind and visually impaired students and students with dyslexia. The new sections were proposed in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6508). Sections 4.203 and 4.206 are adopted with changes to the proposed text and will be republished. Sections 4.201, 4.202, 4.204, and 4.205 are adopted without changes and will not be republished.

Specifically, these adopted sections will allow the Coordinating Board to establish the method for identifying instructional material considered to be required or essential for a student's success in a course and the procedures and standards relating to distribution of electronic copies of instructional material as required by statute found in Texas Education Code, §51.970. Comments were solicited from an advocacy organization for persons who are blind or visually impaired, an advocacy organization for persons with dyslexia, representatives from one or more instructional materials publishing companies or publishing associations, and institutions of higher education as required by Texas Education Code, §51.970(i).

The following comments were received concerning these new sections.

Comment: The Association of American Publishers requested clarification to §4.203(4) of proposed rules regarding definitions. They want to be sure the definition of "Institution of higher education" is limited to public institutions located in the state of Texas.

Response: As defined in the law cited in the rule, "Institution of higher education" is limited to Texas public institutions of higher education.

Comment: The Association of American Publishers requested a word change in §4.203(5)(B) of proposed rules in the phrase "issued a new copyright date" to "printed with a new copyright date" for clarification purposes.

Response: Staff made the suggested word change.

Comment: The Association of American Publishers requested the definition of "Special instructional material" in §4.203(6) be changed to, "Braille, audio, or digital text which is exclusively for use by persons with disabilities."

Response: Staff determined the rules were written to include the limited definition of special instructional materials in the statue and the suggested definition can not be accepted.

Comment: The Association of American Publishers requested a word change in §4.205(a)(2) by changing the phrase "listed on a course syllabus" to "listed as required on a course syllabus."

Response: Staff determined the materials listed on a syllabus are those that the instructor determines are necessary and required for a class and did not accept the change.

Comment: The Association of American Publishers suggested the inclusion of wording in §4.205 indicating how the Coordinating Board will monitor to ensure that institutions' procedures are being followed in a timely manner.

Response: The statue does not provide the Coordinating Board with the authority the commenter suggests.

Comment: The Association of American Publishers recommended a word change in §4.206(d)(3) changing "service provided" to "provision of electronic formats".

Response: Staff made the suggested word change.

Comment: The Association of American Publishers suggested an addition of the phrase "by e-mail" in §4.206(d)(3).

Response: Staff added the phrase.

Comment: The Association of American Publishers requested the hearing process be spelled out in detail in §4.206(e).

Response: Staff determined that existing Coordinating Board rules under Chapter 1, Subchapter B, adequately address the hearing and administrative hearing process. However, in an effort to provide additional clarity under the rules, staff added a direct reference to Chapter 1, Subchapter B, in §4.206 (e).

Comment: The Association of American Publishers wanted to be sure the rules stressed that whether to allow the institution to store the electronic format in a repository in §4.206(g) is a voluntary decision to be made by the publisher in its sole discretion and that, if the publisher does grant this authorization, the institution must still submit a written request complying with the provisions of §4.206(b) and (c) in each instance where the institution wants to re-use the format for an additional student.

Response: Staff agreed to add the term "sole discretion" to §4.206(g).

The new sections are adopted under the Texas Education Code, §51.970, which gives the Coordinating Board the authority to establish the method for identifying instructional material to be included under the rule, the establishment of procedures and standards relating to the distribution of electronic copies of these materials, and the authority to impose reasonable administrative penalties against a publisher or manufacturer that knowingly violates this section.

§4.203. Definitions.

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

(1) Blind or visually impaired student--Includes any student whose visual acuity is impaired to the extent that the student is unable to read the print in the standard instructional material used in a course in which the student is enrolled.

(2) Coordinating Board--The Texas Higher Education Coordinating Board.

(3) Dyslexia--A condition of dyslexia considered to be a disability under the Americans with Disabilities Act (42 U.S.C. §12101 et seq.) or §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794).

(4) Institution of higher education--Has the meaning assigned by §61.003(8) of the Texas Education Code.

(5) Instructional material--A printed textbook or other printed instructional material or a combination of a printed book and supplementary printed instructional material sold through a Texas bookstore that:

(A) conveys information to or otherwise contributes to the learning process of a student; and

(B) was first printed with a new copyright date on or after January 1, 2004.

(6) Special instructional material--Instructional material in Braille, large print, audio format, digital text, or any other medium or any apparatus that conveys information to or otherwise contributes to the learning process of a blind or visually impaired student or a student with dyslexia.

§4.206. The Procedures and Standards Relating to Distribution of Electronic Copies of Instructional Material Under this Section.

(a) Students who qualify to receive instructional materials under this provision will submit their request to the publisher or manufacturer through their institution. To assist the institution in producing special instructional material, a publisher or manufacturer of instructional material assigned by an institution of higher education for use by students in connection with a course at the institution shall provide to the institution on the institution's request in accordance with this section a copy in an electronic format of the instructional material. The publisher or manufacturer, as applicable, shall provide the electronic copy not later than the 15th business day after the date of receipt of the request or 15th business day after publication of the material, whichever comes later.

(b) A request made by an institution of higher education under this provision must:

(1) certify that for each blind or visually impaired student or student with dyslexia who will use specialized instructional material based on the requested copy of the material in an electronic format for a course in which the student is enrolled at the institution, either the institution or the student has purchased a printed copy of the instructional material;

(2) be signed by the person at the institution with primary responsibility for services for students with disabilities or his designee; and

(3) include all available identifying information related to the material, to include but not limited to ISBN number.

(c) A publisher or manufacturer may require that a request made by an institution of higher education under this section include from each student for whom the institution is mailing the request a signed statement in which the student agrees:

(1) to use the requested electronic copy and related special instructional material only for the student's own educational purposes;

(2) not to copy or otherwise distribute in a manner that violates 17 U.S.C. §101 et seq. the requested electronic copy or the instructional material on which the requested electronic copy is based;

(3) agree to return electronic copy of instructional material to the institution's disability services office upon re-selling the original printed material, dropping the course for which the material was requested, or withdrawing from the institution; and

(4) attest that any violation of provisions contained in the signed statement may jeopardize future provision of electronic formats by the manufacturer or publisher for the student under this section, and may result in further disciplinary measures from the institution.

(d) Each electronic copy of instructional material must:

(1) be in a format that:

(A) except as provided by this subsection, contains all of the information that is in the instructional material, including any text, sidebar, table of contents, chapter headings, chapter subheadings, footnotes, index, glossary, and bibliography, and is approved by the publisher or manufacturer, as applicable, and the institution of higher education as a format that will contain that material; and

(B) is compatible with commonly used Braille translation and speech synthesis software; and

(C) includes any correction or revision available at the time the electronic copy is provided.

(2) If the publisher or manufacturer and the institution of higher education are not able to agree on a format as required by paragraph (1) of this subsection, the publisher or manufacturer, as applicable, shall provide the electronic copy of the instructional material in a format that can be read by a word processing application and that contains as much of the material specified by that subsection as is practicable.

(3) Materials provided under this section may be delivered by traditional mail, by email or via a File Transfer Protocol site with notification provided to an institution as to the availability of the material.

(e) The Coordinating Board may impose a reasonable administrative penalty, not to exceed $250 per violation, against a publisher or manufacturer that knowingly violates this section. The Coordinating Board shall provide for a hearing to be held, in accordance with Chapter 1, Subchapter B (relating to Dispute Resolution) of Coordinating Board rules, to determine whether a penalty is to be imposed and the amount of any penalty. The Coordinating Board shall base the amount of any penalty on:

(1) the seriousness of the violation;

(2) any history of a previous violation;

(3) the amount necessary to deter a future violation;

(4) any effort to correct the violation; and

(5) any other matter justice requires.

(f) Notwithstanding any other provision of this section, a publisher or manufacturer is not required to comply with subsection (a) or (d) of this section, as applicable, if the coordinating board, using procedures and criteria adopted by coordinating board rule and based on information provided by the publisher or manufacturer, determines that:

(1) compliance by the manufacturer or publisher would violate a law, rule, or regulation relating to copyrights; or

(2) the instructional material on which the requested electronic copy is based is:

(A) out of print; or

(B) in a format that makes it impracticable to convert the material into an electronic format.

(g) The manufacturer or publisher has the sole discretion to allow an institution to maintain a repository of electronic formats of previously requested instructional materials for re-use in order to comply with this Section. An institution that is authorized to re-use previously requested instructional materials must comply with provisions in subsections (b) and (c) of this section related to requesting instructional material and all other provisions outlined in this section.

(h) A manufacturer or publisher may deliver an electronic format authorized under this section with electronic security measures (to include encryption) so long as the measures do not interfere with access for the institution or the student who requested the materials.

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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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §5.5

The Texas Higher Education Coordinating Board adopts an amendment to §5.5 concerning high school curriculum requirements for admission to public institutions of higher education, without changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5280). Specifically, the proposed amendment permits institutions of higher education to admit a certain number of students who have not taken the recommended high school program. The amendment by its term expires on August 31, 2009.

No comments have been received on the proposed amendment.

The amendment is adopted under the Texas Education Code, §51.807, which authorizes the Coordinating Board to adopt rules concerning the uniform admissions policy.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER B. ROLE AND MISSION, TABLES OF PROGRAMS, COURSE INVENTORIES

19 TAC §§5.21 - 5.23

The Texas Higher Education Coordinating Board adopts amendments to §§5.21 - 5.23, concerning Rules Applying to Public Institutions, Health-Related Institutions, and/or Selected Public Colleges of Higher Education in Texas without changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5598) and will not be republished.

Specifically the amendments make current rules regarding baccalaureate degrees applicable to any public community college that is authorized by statute to offer such degrees. During the regular session of the 80th Legislature, South Texas College, Midland College, and Brazosport College were authorized to have up to five baccalaureate programs each. Without the amendment, the rules would only apply to public universities and health-related institutions.

No comments were received concerning the amendments.

The amendments are adopted under the Texas Education Code, §130.0012 which provides the Coordinating Board the authority for the selected public colleges to offer baccalaureate degrees in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. APPROVAL OF NEW ACADEMIC PROGRAMS AND ADMINISTRATIVE CHANGES AT PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES

19 TAC §§5.41 - 5.43

The Texas Higher Education Coordinating Board adopts amendments to §§5.41 - 5.43, concerning Rules Applying to Public Institutions, Health-Related Institutions, and/or Selected Public Colleges of Higher Education in Texas without changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5599) and will not be republished.

Specifically, the amendments make current rules regarding baccalaureate degrees applicable to any public community college that is authorized by statute to offer such degrees. During the regular session of the 80th Legislature, South Texas College, Midland College, and Brazosport College were authorized to have up to five baccalaureate programs each. Without the amendment, the rules would only apply to public universities and health-related institutions.

No comments were received concerning the amendments.

The amendments are adopted under the Texas Education Code, §130.0012 which provides the Coordinating Board the authority for the selected public colleges to offer baccalaureate degrees in Texas.

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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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER E. TEXAS GOVERNOR'S SCHOOLS

19 TAC §§5.91 - 5.96

The Texas Higher Education Coordinating Board adopts new §§5.91 - 5.96, concerning Texas Governor's Schools, without changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5600).

Specifically, these new sections are being adopted under the provisions of Texas Education Code, §61.07621, added by House Bill 1748 of the 80th Texas Legislature, which states that the Coordinating Board has authority to adopt rules to enact Texas Governor's Schools.

No comments were received regarding these new sections.

The new sections are adopted under the Texas Education Code, §61.07621, which authorizes the Coordinating Board to adopt rules concerning Texas Governor's Schools.

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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Bill Franz
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SUBCHAPTER F. MATH, SCIENCE, AND TECHNOLOGY TEACHER PREPARATION ACADEMIES

19 TAC §§5.111 - 5.115

The Texas Higher Education Coordinating Board adopts amendments to §5.111 - 5.115, concerning Math, Science, and Technology Teacher Preparation Academies, without changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5281).

Specifically, these adopted amendments provide the Board with oversight, rulemaking authority, and funding through the Texas Education Agency (TEA) to establish academies at institutions of higher education to improve the instructional skills of certified teachers and train students enrolled in a teacher preparation program to perform at the highest levels in mathematics, science, and technology.

The following comments were received regarding the adopted amendments:

Comments: Richard C. Huckaba, The University of Texas at Dallas commented on §5.114 (Institutional Eligibility), the competitive process remains undefined. The notion of the academies is an excellent addition to the available resources for teachers in Texas. UT Dallas is certainly interested in participating in such a program. However, in a university such as UT Dallas, there are three different areas that could apply for such an award, specifically the Science Education program and the Math Education Program (both of which are connected within Math and Science Education within the School of Natural Sciences and Mathematics) as well as the School of Engineering and Computer Science. In the definition of the competitive process, it would be helpful to have some clear direction on how applications are to be submitted. Specifically, the rules should address whether or not individual units, such as the Math Education Program or the School of Engineering and Computer Science, should apply directly or coordinate their applications through a centralized university official, such as the chief academic officer.

Response: Because this is the first year for implementation of the Math, Science, Technology Teacher Preparation Academies, the Board staff proposed rules that would provide flexibility regarding the competitive process to make appropriate changes in subsequent years. The exact parameters for the first year, including which units within an institution are eligible to apply, will be included in the request for proposals, or other competitive process, expected to be distributed in early to mid-fall 2007.

The amendments are adopted under the Texas Education Code, §21.462, which gives the Coordinating Board the authority to adopt rules to establish mathematics, science, and technology teacher preparation academies at institutions of higher education that have a State Board for Educator Certification approved

teacher preparation program or are affiliated with a program approved by the Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS
SUBCHAPTER D. TEXAS HOSPITAL-BASED NURSING EDUCATION GRANT PROGRAM

19 TAC §§6.81 - 6.83

The Texas Higher Education Coordinating Board adopts new §§6.81 - 6.83, concerning the Texas Hospital-based Nursing Education Partnership Grant Program. Sections 6.82 and 6.83 are adopted with changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5282). Section 6.81 is adopted without changes and will not be republished.

The proposed sections provides information on the application process, methodology and criteria for awarding grants and making funding decisions, and the terms and conditions of the grant agreements. For further clarification staff made a minor edit to §6.83(d)(2).

The following comments were received regarding the new sections:

Comments: A comment was received from The Texas Nurses Association, asking whether the rules should direct an applicant to file a waiver with the Texas Board of Nursing (TBON), if a waiver of the TBON rules was needed to implement a proposed nursing program.

Response: Staff believes the current language is sufficient. Further direction on applying for a waiver from TBON would be included in the Request for Proposal.

Comments: A comment was received from the Texas Nurses Association, asking whether specific criteria stated in the statute for prioritizing grant proposals are included in §6.83(a)(5) and (b)(4).

Response: Staff agrees to add wording in §6.83(b)(4) to ensure that the broad criteria listed in §6.83(b)(4) would incorporate the specific criteria stated in the statute. Further information about those criteria would be included in the Request for Proposal.

Comments: A comment was received from The University of Texas System suggesting that §6.83(a)(3)(A) requiring eligible degree programs to use existing expertise and facilities be changed to include a statement that nursing schools and hospitals could use grant funds to expand faculty or facilities supporting the partnership.

Response: Staff agrees to add language clarifying language in the statute which allows schools and hospitals to use a reasonable amount of the grant funds for development and initial implementation costs.

Comments: A comment was received from The University of Texas System, suggesting that the marginal costs for the new degree programs should be differentiated by type of institution.

Response: Staff agrees to add language to consider differentiating costs by type of institution or other characteristics that would better reflect the actual costs of different kinds of partnership.

Comments: A comment was received from The University of Texas System requesting that the rule provide assurances on methods for selecting students to these programs and on clinical experiences.

Response: Staff disagrees that the rules should include language about the selection of students. Criteria and procedures should be developed jointly by the partners and included in the application to the grant program. The staff believes existing language in the statute and rules ensure that students receive appropriate clinical instruction.

Comments: A comment was received from The University of Texas System, asking that the rules recognize that both new degree programs and expanded existing degree programs are eligible to apply for grant funds through this program.

Response: Staff agrees to add language clarifying that new and expanded existing programs are eligible to apply through this program.

The new sections are adopted under the Texas Education Code, §61.9756, which gives the Coordinating Board the authority to adopt rules for administering the Texas Hospital-based Nursing Education Partnership Grant Program.

§6.82. Definitions.

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

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education.

(3) Hospital--A health care facility that provides in-patient services in the state, that is in good standing with all regulators and accreditation bodies, and that is not owned, maintained, or operated by the federal or state government or an agency of the federal or state government.

(4) Nursing school--An educational entity of a Texas public or independent institution of higher education that offers a degree program that prepares students for initial licensure as registered nurses and that has initial or full approval status from the Texas Board of Nursing on the date that grant applications are due to the Board.

(5) Hospital-based nursing education partnership--One or more hospitals as defined in paragraph (3) of this section and one or more nursing schools as defined in paragraph (4) of this section which serve to increase the number of students enrolled in and graduating from one or more degree programs as a result of a partnership.

(6) Degree program--Courses and learning experiences leading to:

(A) an associate degree in nursing;

(B) a baccalaureate degree in nursing, leading to initial licensure as a registered nurse;

(C) a master's degree in nursing with a concentration in nursing education; and

(D) an academic program designed to advance a registered nurse from an associate degree to a bachelor of science degree in nursing or to a master of science degree in nursing with a concentration in nursing education.

§6.83. Texas Hospital-based Nursing Education Grant Program.

(a) General Information. The program, as it applies to this section:

(1) Purpose--To provide funding to eligible hospitals in partnership with one or more nursing schools to establish, expand or pilot innovative degree programs which serve to increase the number of students enrolled in and graduating from nursing degree programs.

(2) Authority--Texas Education Code, §§61.9751 - 61.9759

(3) Eligible degree program--Degree programs offered through hospital-based nursing education partnerships which:

(A) use existing expertise and facilities of the partners. This restriction does not prohibit a hospital or nursing school from requesting grant funds to support reasonable development and initial implementation costs necessary to support a new degree program. Hospitals and nursing schools proposing an expansion of an existing degree program may request grant funds to support reasonable development and implementation costs for expanding the degree program with the specific intent to increase the number of students enrolled. Hospitals and nursing schools in existing partnerships may not request grant funds for initial or on-going costs incurred in operating an existing degree program. The Commissioner shall make the final determination of a partnership's eligibility for funding to support development and initial implementation costs.

(B) meet applicable Board and Texas Board of Nursing standards for instruction and student competency, or receive approval from the Board and the Texas Board of Nursing to waive those standards as a pilot project. The application for approval of a pilot project will be contained in the Request for Proposal;

(C) require each nursing school participating in the partnership, as a result of the partnership, to enroll in the degree program a sufficient number of additional students as specified in the Request for Proposal;

(D) provide comparable marginal costs to the state of producing a graduate from a nursing school that is participating in partnership with the marginal costs to the state of producing a graduate from a nursing school not participating in a partnership. The range of acceptable marginal costs will be calculated by the Board and contained in the Request for Proposal. Criteria used to determine marginal costs are based on the appropriate formula funding calculation for nursing increased by a factor to adjust to the full reported costs of a representative sample of the nursing schools. The Board may differentiate marginal costs by type of institution or by other institutional or educational characteristics which better reflect the actual costs of different kinds of partnerships.

(E) provide students with appropriate clinical placements to fulfill licensing and academic requirements of the degree.

(4) Application requirements--Applications shall be submitted to the Board in the format and at the time specified by the Board.

(5) General Selection Criteria--Competitive. Designed to award grants that provide the best overall value to the state. Selection criteria shall be based on:

(A) Program quality as determined by peer reviewers;

(B) Impact the grant award shall have on academic instruction and training in nursing education in the state;

(C) Cost of the proposed program; and

(D) Other factors to be considered by the Board, including financial ability to perform the program, state and regional needs and priorities, ability to continue the program after the grant period, and past performance.

(6) Minimum award--$50,000 per award in any fiscal year.

(7) Maximum award--30 percent of the estimated available funding per award in any fiscal year.

(8) Maximum award length--A program is eligible to receive funding for up to three years, contingent upon available funds and a positive evaluation of the progress and effectiveness of the program after the first and second years of funding.

(b) Peer Review.

(1) The Board shall use peer reviewers to evaluate the quality of applications.

(2) The Commissioner shall select qualified individuals to serve as reviewers. Peer reviewers shall demonstrate appropriate credentials to evaluate grant applications in nursing education. Reviewers shall not evaluate any applications for which they have a conflict of interest.

(3) The Board staff shall provide written instructions and training for peer reviewers.

(4) The peer reviewers shall score each application according to these award criteria which incorporate the specific priority criteria stated in Texas Education Code, §61.9754:

(A) Originality;

(B) Potential replication;

(C) Partnership design;

(D) Degree program design;

(E) Student services;

(F) Matching funds;

(G) Cost effectiveness;

(H) Evaluation and expected outcomes; and

(I) Sustainability of program.

(c) Application Review Process.

(1) The Board staff shall review applications to determine if they adhere to the grant program requirements and the funding priorities contained in the Request for Proposal. An application must meet the requirements of the Request for Proposal and be submitted with proper authorization before or on the day specified by the Board to qualify for further consideration. Qualified applications shall be forwarded to the peer reviewers for evaluation. Board staff shall notify applicants eliminated through the screening process within 30 days of the submission deadline.

(2) Peer reviewers shall evaluate applications and assign scores based on award criteria. All evaluations and scores of the reviewers are final.

(3) Board staff shall rank each application based on points assigned by peer reviewers, and then may request that individuals representing the most highly-ranked applications make oral presentations on their applications to the peer reviewers and Board staff. The Board staff may consider reviewer comments from the oral presentations in recommending a priority ranked list of applications to the Commissioner for approval.

(d) Funding Decisions.

(1) Applications for grant funding shall be evaluated only upon the information provided in the written application.

(2) The Board will approve grants based upon the recommendation of peer reviewers and Board staff.

(3) Funding recommendations to the Commissioner shall consist of the most highly ranked and recommended applications up to the limit of available funds. If available funds are insufficient to fund a proposal after the higher-ranking and recommended applications have been funded, staff shall negotiate with the applicant to determine if a lesser amount would be acceptable. If the applicant does not agree to the lesser amount, the staff shall negotiate with the next applicant on the list of highly ranked applications.

(4) If the Board does not use all of the available funds for the program, unspent funds may be used to make grants under the Professional Nursing Shortage Reduction Program and the Nursing, Allied Health, and Other-Health-related Education Grant Program.

(e) Contract. Following approval of grant awards by the Commissioner, the successful applicants must sign a contract issued by Board staff and based on the information contained in the application.

(f) Cancellation or Suspension of Grants. The Board has the right to reject all applications and cancel a grant solicitation at any point before a contract is signed.

(g) Request for Proposal. The full text of the administrative regulations, budget guidelines, reporting requirements, and other standards of accountability for this program are contained in the official Request for Proposal available upon request from the Board.

(h) Grants, Gifts, and Donations. The Board may solicit, receive, and spend grants, gifts, and donations from any public or private source for the purpose of this subchapter.

(i) Administrative Costs. Three percent of any money appropriated for purposes of this subchapter may be used to pay the costs of administering the program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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CHAPTER 13. FINANCIAL PLANNING
SUBCHAPTER L. ENGINEERING RECRUITMENT SUMMER CAMPS

19 TAC §§13.200 - 13.202

The Texas Higher Education Coordinating Board adopts new §§13.200 - 13.202, concerning engineering recruitment summer camps as part of the Coordinating Board's engineering recruitment programs (House Bill 2978, 80th Texas Legislature). Section 13.201 is adopted with changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5284). Sections 13.200 and 13.202 are adopted without changes and will not be republished.

The rules were first adopted on an emergency basis at the Coordinating Board's July 19, 2007, meeting as Subchapter Q, §§22.312 - 22.315 of Chapter 22 (Grant and Scholarship Programs). The Coordinating Board received no comments after posting the emergency rules in the *Texas Register*. These rules will establish requirements for admission to a summer program for middle and high school students, reflecting the demographics of the state, at engineering degree programs of general academic teaching institutions.

No comments were received concerning the new sections.

The new sections are adopted under Texas Education Code, §61.027, which provides the Coordinating Board with general rule-making authority, §61.002, which establishes the Coordinating Board as an agency charged to provide leadership and coordination for the Texas higher education system, and Texas Education Code, §§61.791 - 61.793, which authorized the Coordinating Board to adopt rules concerning engineering recruitment programs established by the Texas Higher Education Coordinating Board.

§13.201. Definitions.

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

(1) Board--The Texas Higher Education Coordinating Board.

(2) Commissioner--The Commissioner of Higher Education.

(3) Eligible institution--Any general academic teaching institution (public) that offers one or several undergraduate degree programs in engineering.

(4) Engineering degree program--Any undergraduate degree program in engineering at an eligible institution.

(5) Summer camp--A math, science, and engineering laboratory-oriented day camp, organized by an eligible institution with one or more one-week sessions, to take place on the campus of the eligible institution.

(6) Proposal--A summer camp proposal written by an eligible institution.

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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Bill Franz
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CHAPTER 21. STUDENT SERVICES
SUBCHAPTER W. EDUCATIONAL LOAN REPAYMENT PROGRAM FOR ATTORNEYS EMPLOYED BY THE OFFICE OF THE ATTORNEY GENERAL

19 TAC §§21.710, 21.714 - 21.716

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §21.710 and §§21.714 - 21.716 concerning the Education Loan Repayment program for attorneys employed by the Office of the Attorney General, without changes to the proposed texts as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6510). Specifically, the adopted amendment will require that the eligible attorney be employed full-time by the Office of the Attorney General, delete the requirement that the applicant be an Assistant Attorney General I - III at the time of application, delete the requirement that the applicant have been employed for fewer than five years, and change the requirement as to the time the eligible loan not be in default from the beginning of the service period to the time of application for the program.

No comments have been received on the proposed amendments.

The amendments are adopted under the Texas Education Code, §61.9729, which provides the Coordinating Board with the authority to make rules concerning the Education Loan Repayment Program for Attorneys Employed by the Office of the Attorney General.

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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Bill Franz
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SUBCHAPTER CC. EARLY HIGH SCHOOL GRADUATION SCHOLARSHIP PROGRAM

19 TAC §21.951

The Texas Higher Education Coordinating Board adopts amendments to §21.951, concerning the Early High School Graduation Scholarship Program, without changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5286).

Specifically, amendments to §21.951 provide a definition for the term "to graduate" as the process of completing the academic requirements for graduation from high school. This definition more clearly applies to student eligibility requirements than did the previous definition of "high school graduate"--a person who has completed requirements for graduation.

No comments were received concerning these amendments.

The amendments are adopted under the Texas Education Code, §56.209, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 56, Subchapter K, relating to the Early High School Graduation Scholarship Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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19 TAC §21.953, §21.956

The Texas Higher Education Coordinating Board adopts amendments to §21.953 and §21.956, concerning the Early High School Graduation Scholarship Program, without changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5601).

Specifically, the amendment to §21.953(b) reflects the effective date of House Bill 2383 of the 80th Texas Legislature, which is the date new program provisions went into effect. New §21.953(e) describes the process by which the Coordinating Board will measure enrollment periods for determining student eligibility for awards. Amendments to §21.956 also reflect the effective date of House Bill 2383 of the 80th Texas Legislature, which is the date new program provisions went into effect.

No comments were received concerning the amendments.

The amendments are adopted under the Texas Education Code, §56.209, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, Chapter 56, Subchapter K, relating to the Early High School Graduation Scholarship Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER NN. EXEMPTION PROGRAM FOR VETERANS AND THEIR DEPENDENTS (THE HAZLEWOOD ACT)

19 TAC §§21.2100, 21.2102 - 21.2106

The Texas Higher Education Coordinating Board adopts amendments to §21.2100 and §§21.2102 - 21.2106, concerning the Exemption Program for Veterans and their Dependents (The Hazlewood Act). Section 21.2100 is adopted with changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5286). Sections 21.2102 - 21.2106 are adopted without changes and will not be republished.

Specifically, amendments to §21.2100 (Definitions), paragraph (1), reflect the fact that relevant tuition and fee charges for credit hours dropped before the census date are to be counted in determining how many of the original 150 hours of eligibility a student has remaining. Amendments to §21.2100, paragraph (4), bring the definition of "children" for the Hazlewood Act into agreement with the definition used for the exemption for the children of deceased public servants. This should simplify the process of documenting most children's eligibility because it will require tax returns only for children who are not biological or had not been adopted by the veteran at the time of his or her death or major disability. Amendments to paragraph (8) clarify that the child of an otherwise eligible veteran is eligible for the exemption if he or she was claimed as a dependent the year prior to the veteran's death or disabling injury. Paragraph (16) is deleted, since "date of registration" is the same as "census date," a term already defined in rule. Paragraphs (17) - (20) are renumbered as paragraphs (16) - (19). Amendments to §21.2102 and §21.2103 reflect the new provisions from Senate Bill 1640 that veterans are no longer required to exhaust their federal benefits before using benefits under the Hazlewood Act. They are entitled to combine federal and state education benefits in the same term if the value of the federal benefits does not exceed the value of the state benefit. Amendments to §21.2104 replace the term "registration date" with the more common term "census date." Amendments to §21.2105 reflect new provisions from House Bill 125, passed by the 80th Texas Legislature, which extends the Hazlewood Act benefit to the children of veterans who are disabled as a result of service-related injuries. In addition, they indicate a veteran's place of entry into the service is not sufficient evidence that the person was a Texas resident at that time. Amendments to §21.2106 clarify that veterans or eligible children who continue to use benefits under the Hazlewood Act no longer have to first exhaust their federal benefits if the value of the federal exemption is less than the value of the state exemption. It also indicates the persons continuing to receive awards through the program must complete and summit applications each term in which they receive an exemption.

The following comments were received regarding the amendments:

Comment: Coordinating Board staff commented that in §21.2100(4)(A) in the definition of "children" addresses biological or adopted children who are younger than 18 on the date of the death or disabling injury of the veteran. Section 21.2100(4)(B) addresses dependents who are not biological or adopted children but does not mention an age. Subparagraph (B) would require other persons referred to as "children" to have been dependents of the veteran parent during the year prior to the parent's death or injury. This would apply, for instance, to stepchildren who were not adopted. Should subparagraph (B) specify that these stepchildren should be 18 years old or younger at the time of the veteran's death or disability since a dependent can be older than that?

Response: The Coordinating Board agreed and the definition was revised so that the age limit would apply to dependents who are not biological or adopted children.

Comment: The University of Texas at Dallas commented that the change in §21.2100, affecting federal benefits, provides relief to students, and the university applauds this change. This change will, however, require closer monitoring by the financial aid operation within the institution to ensure compliance. This also requires the student to apply for the exemption if a timely manner. The change from census date to the first day of classes as the marker for attempted credit hours provides a more accurate picture of student registration behavior. There is, however, a reasonable argument that the drop/add of courses that result in an equivalent load (such as moving from one section of a course to another section of the same course or being the recipient of an administrative drop/add) would not have a direct impact on the calculation of attempted hours. Similarly, there is a reasonable argument that a student who is forced to withdraw from a course because of a course cancellation would not be penalized for those hours if a second course cannot be assigned to replace those hours. The rules may not need to specify such arguments as they tend to be, on many campuses, routine processes, or may need to specify such arguments, depending upon the intent of the legislation.

Response: The Coordinating Board agrees with the comment. If individuals want to stack federal and state benefits, it will be very advantageous for them to apply for and clarify their eligibility for the benefits in a timely manner. As for adding/dropping classes, the intent of the rule is to hold the student accountable for any charges to the institution that he or she does not pay and therefore leaves as a charge against the Hazlewood Act exemption. If courses added and dropped off-set one another, there would be no need to make adjustments. The student's course load as of the census date would be the same as it was on the first day of classes. If the student is forced to withdraw from the course and the institution waives tuition and fee charges for that course, the Hazlewood program is not being held for any expenses and there would be no credit against the student's 150 hours of eligibility. Again, the goal is to hold the student accountable only for charges left unpaid at the school and covered through the Hazlewood Act exemption.

The amendments are adopted under the Texas Education Code, §54.203, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.203.

§21.2100. Definitions.

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

(1) Attempted credit hours--Hours for which the veteran is registered as of the first day of classes of a term or semester.

(2) Board--The Texas Higher Education Coordinating Board.

(3) Census date--the date in an academic term or semester for which an institution is required to certify a person's enrollment in the institution to the board for the purposes of determining formula funding for the institution.

(4) Children--

(A) Persons who are the veteran's biological or adopted children and who are younger than 18 years of age on the date of the death or disabling injury of the veteran; or

(B) Persons who are not the biological or adopted children of the veteran, but who were claimed as dependents on the federal income tax return of the veteran for the year preceding the year of the veteran's death or disabling injury and who are younger than 18 years of age on the date of the death or disabling injury of the veteran.

(5) Citizen of Texas--A person who is a United State Citizen and a resident of Texas.

(6) Commissioner--The Commissioner of Higher Education.

(7) Contact hours--A unit of measure that represents an hour of scheduled instruction given to students of which 50 minutes must be of direct instruction. Also referred to as clock hours.

(8) Dependent--An individual who was claimed as a dependent for federal income tax purposes by the individual's parent or court-appointed legal guardian in a particular year and in the previous tax year. A veteran was a dependent if he or she was claimed as such by a parent or legal guardian during the veteran's year of entry into the service and in the previous tax year. A child was a dependent if he or she was claimed as a dependent for tax purposes the year preceding the year of the veteran's death or disabling injury.

(9) Extraordinary costs--(for community/junior colleges only) tuition and fee costs that exceed the average tuition and fee charges at the institution.

(10) Federal survivor benefits--Benefits offered the surviving children of deceased veterans through Title 38, United States Code, Chapter 35.

(11) Hazlewood Act Exemption--The tuition and partial fee exemption authorized under Texas Education Code, §54.203.

(12) Honorably discharged--Released from active duty military service with an Honorable Discharge, General Discharge under Honorable Conditions, or Honorable Separation or Release from Active Duty, as documented by the Certificate of Release or Discharge from Active Duty (DD214) issued by the Department of Defense.

(13) Identification number--An individual's social security number.

(14) Institution--A Texas public institution of higher education as defined in Texas Education Code, §61.003(8).

(15) Property deposit fees--Fees that an institution may, under Texas Education Code, §54.502, elect to charge to insure that institution against losses, damages, and breakage in libraries and laboratories.

(16) Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, §§21.727 - 21.736, of this title (relating to Determination of Resident Status and Waiver Programs for Certain Nonresident Persons).

(17) Student service fees--Fees that an institution may, under Texas Education Code, §§54.503, 54.5061 and 54.513, elect to charge to students to cover the cost of student services.

(18) Training--Time spent as a member of the armed forces that is not included in the "Net Active Service" or the sum of "Net Active Service" indicated on the Certificate of Release or Discharge from Active Duty (DD214).

(19) Tuition--All types of tuition that an institution may, under Texas Education Code, Chapter 54, collect from students attending the institution, including statutory tuition, discretionary tuition, designated tuition, and board-authorized tuition.

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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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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19 TAC §21.2101

The Texas Higher Education Coordinating Board adopts amendments to §21.2101, concerning the Exemption Program for Veterans and their Dependents (The Hazlewood Act), without changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5602).

Specifically, amendments to §21.2101(b) reflect changes to the Hazlewood Act as a result of the passage of Senate Bill 1640 by the 80th Texas Legislature, which entitles veterans and eligible children to receive both federal and state veterans education benefits in the same term if the value of the federal benefits do not exceed the value of the state benefit (tuition and fees other than property deposit and student service fees). Amendments to §21.2101(e) clarify the manner in which attempted hours are to be calculated for hours dropped after the first class day and prior to the census date.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.203, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.203.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS
SUBCHAPTER Q. ENGINEERING SCHOLARSHIP PROGRAM

19 TAC §§22.312 - 22.318

The Texas Higher Education Coordinating Board adopts new §§22.312 - 22.318, concerning the Engineering Scholarship Program. Section 22.317 is adopted with changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5288). Sections 22.312 - 22.316 and §22.318 are adopted without changes to the proposed text and will not be republished. These new sections were adopted on an emergency basis at the July Texas Higher Education Coordinating Board meeting to implement House Bill 2978, passed by the 80th Texas Legislature.

The new sections established rules for engineering recruitment programs, which include both an engineering summer program and an engineering scholarship program. Following the July Board meeting, staff decided the programs could be more effectively administered if rules for the summer program were separated from rules for the scholarship program. Rules for the summer program will be adopted in other sections of Board rules. Specifically, new §22.312 describes the authority, scope, and purpose of the rules. New §22.313 provides definitions for terms used in the sections. New §22.314 describes the scholarship program announcement that is to be made by the Coordinating Board, indicating funding for the program, application procedures and student eligibility requirements. New §22.315 provides detailed information regarding student eligibility requirements. The section also addresses the issue of continuation awards. New §22.316 describes how annual award amounts are to be announced to institutions. New §22.317 describes scholarship application procedures for institutions and clarifies that institutions must not make awards in excess of their allocation of funds. New §22.318 describes reporting requirements for participating institutions.

The following comment was received regarding the new sections:

Comment: The University of Texas at Dallas commented that §22.317 required that each eligible institution collect the student applications, verify eligibility, and select the recipients to reflect the demographics of the state. The legislation says the Board will "consider" the demographics and "encourage the program to enroll students that reflect the demographics of the state." If one assumes the financial aid operation will administer this program, does that not place the financial aid operation in the role of awarding aid on the basis of gender and/or ethnicity? How should a financial aid operation make such awards if no candidates are available to reflect some aspect of the state's demographics? As such, the matter of reflecting the state's ethnic composition should remain at the state level and not at the institutional level. This is even more the case if the administration of the scholarship program is within the engineering program itself rather than in the financial aid operation. That distinction is not entirely clear within the rules as proposed.

Response: The Coordinating Board agrees that the application of this requirement in the selection of recipients will be difficult. Upon further review of the statute, the Board determined this requirement appears only in the section dealing with the summer program, and not in the section dealing with scholarships. Therefore, this specific requirement has been deleted from the rules.

The new sections are adopted under the Texas Education Code, §61.792(c), which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §61.792.

§22.317. Application Process.

(a) Eligible institutions shall:

(1) make the program application form accessible to all engineering students in paper or through electronic access;

(2) collect engineering student applications;

(3) verify student eligibility;

(4) use the scholarships to augment, not replace, other gift aid.

(b) The value of awards made for a given year by an institution may not exceed the funds allocated to the institution for that year by the Coordinating Board.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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SUBCHAPTER R. PROVISIONS REGARDING SCHOLARSHIPS TO RELATIVES OF BOARD MEMBERS OF INSTITUTIONS OF HIGHER EDUCATION AND UNIVERSITY SYSTEMS

19 TAC §§22.401 - 22.407

The Texas Higher Education Coordinating Board adopts new §§22.401 - 22.407, concerning Provisions Regarding Scholarships to Relatives of Board Members of Institutions of Higher Education and University Systems. Section 22.402 is adopted with changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5289). Section 22.401 and §§22.403 - 22.407 are adopted without changes to the proposed text and will not be republished. As a result of

comments received, the title of Subchapter R was changed to include the words "and University Systems;" and §22.402(7) and (8) were revised to more clearly explain the definitions.

Specifically, Senate Bill 1325, passed by the 80th Texas Legislature, added Texas Education Code §51.969 and authorized the Board to adopt rules to implement the section, beginning with scholarships for which a scholarship application was filed on or after January 1, 2008. The new sections will establish definitions, identify the categories of scholarships to which the restrictions shall apply, identify the possible penalty for failure to adhere to program requirements, and direct institutions to the Coordinating Board's web site for wording of the statement to be filed by scholarship recipients.

The following comments were received regarding the new sections:

Comment: Senate Bill 1325 applies to members of governing boards of both institutions and university systems. Staff noticed that reference to university systems was included in the text of the proposed sections, but not in the title of the subchapter.

Response: The Coordinating Board agreed and the phrase "and University Systems" was added to the title of the subchapter.

Comment: The University of Texas at Dallas does require students to apply for most scholarships and, thus, can require students to complete the Declaration of Eligibility as required in §22.405. The university also awards scholarships for incoming freshmen based entirely on the academic record of the entering student and, thus, does not require the students to apply for the scholarship; they merely accept or reject the award. As such, if a scholarship award is made in line with §22.404(2), it is not entirely clear that the student would be required to complete the Declaration of Eligibility. The rules, to be posted on the Board's website, should address whether or not all scholarship recipients must declare their eligibility or if the declaration applies only if the students makes application for a scholarship.

Response: The Board thinks that, in effect, the student is applying for a scholarship by applying and being accepted for enrollment by the institution. In cases such as this, the student could sign the declaration prior to accepting the scholarship.

The comments below were all received from Texas Tech University:

Comment: The definitions in §22.402(7) and (8) are drafted too narrowly. It would be preferable for these to reference the definitions given in §22.402(1) and (3), respectively.

Response: The Board agreed and §22.402(7) and (8) have been expanded to clearly explain the definitions.

Comment: If a scholarship committee has a minimum academic requirement, but conducts a holistic review of every applicant, would a person related to a current member of the board of regents be ineligible to receive the award since more than academic credentials alone were considered?

Response: It is the opinion of the Board that the person would be ineligible to receive the award. The statute and rules both state that the scholarship must be either based exclusively on merit, be an athletic scholarship, or be granted by a private third party not affiliated with the university or system.

Comment: Texas Tech commented that there is a concern regarding its talent scholarships that require auditions, such as music, dance and theatre. These scholarships are viewed in the same manner as other competitive scholarships, and Texas Tech requests that such talent scholarships be added to the list of exceptions to the prohibited scholarships.

Response: The Board agrees that these applicants would be eligible to receive a scholarship as long as an institution considers that these scholarships are based on merit and that all applicants in these groups are treated consistently.

Comment: Should it be clarified that an athletic scholarship must be offered by the athletic department?

Response: The Board thinks that this is an institutional decision.

Comment: Do athletic scholarships include trainers, managers and videographers?

Response: The Board thinks that if these scholarships are currently classified as athletic scholarships then they can continue to be classified as such.

Comment: Texas Tech offered the following case study: A student was offered a four-year scholarship as a freshman. The criteria for selection included more than academic credentials. At the time of the offer, the student was not related to a member of the board of regents. During the student's sophomore year (year two), the student's grandfather was named to the board of regents. Must the scholarship be revoked in year three?

Response: The Board agrees that both the statute and rules state that the determination is to be made at the time the award is made. If this is a scholarship for which the student applies one time and it is automatically renewed if he or she meets certain criteria, then the student would remain eligible. If the student must reapply each year, then the student would no longer be eligible for the scholarship beginning with the year the student's grandfather became a regent.

Comment: Must this information be collected from all students yearly?

Response: The Board agrees that if the student has to reapply for the scholarship each year, the information must be collected yearly. If the student does not have to reapply for the scholarship each year, then the information does not have be collected yearly.

The new sections are adopted under the Texas Education Code, §51.969 which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §51.969.

§22.402. Definitions.

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

(1) Affinity--Relationship between individuals based on being married or the fact that the spouse of one of the individuals is related by consanguinity to the other individual. The ending of a marriage ends relationships by affinity unless a child of that marriage is living, in which case the affinity continues as long as a child of that marriage lives. These relationships are named as follows:

(A) 1st Degree--Spouse, spouse's child, spouse's mother or father, child's spouse, parent's spouse.

(B) 2nd Degree--Spouse's brother or sister, spouse's grandparent, spouse's grandchild, brother or sister's spouse, grandparent's spouse, grandchild's spouse.

(2) Board or Coordinating Board--the Texas Higher Education Coordinating Board.

(3) Consanguinity--Relationship between individuals based on being descendants of one another or sharing a common ancestor. An adopted child is considered to be a child of the adoptive parent. These relationships are named as follows:

(A) 1st Degree--Mother, father, daughter, son.

(B) 2nd Degree--Brother, sister, grandparent, grandchild.

(C) 3rd Degree--Great-grandparent, great-grandchild, uncle (brother of parent), aunt (sister of parent), nephew (son of brother or sister), niece (daughter of brother or sister).

(4) Institution of Higher Education--A public institution of higher education as defined in Texas Education Code Chapter 61, §61.003.

(5) Scholarship--An award of gift aid that does not have to be repaid by the student or earned through service or performance.

(6) University System--The association of one or more public senior colleges or universities, medical or dental units or other agencies of higher education under the policy direction of a single governing board.

(7) Within the Second Degree by Affinity--A circumstance in which a person is a spouse, spouse's child, spouse's mother or father, child's spouse, parent's spouse, spouse's brother or sister, spouse's grandparent, spouse's grandchild, brother or sister's spouse, grandparent's spouse, grandchild's spouse.

(8) Within the Third Degree by Consanguinity--A circumstance in which a person is a parent, child, brother, sister, grandparent, grandchild, great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual of an individual. An adopted child is considered to be a child of the adoptive parent for this purpose.

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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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER GG. COMMISSIONER'S RULES CONCERNING DROPOUT PREVENTION STRATEGIES

19 TAC §89.1701

The Texas Education Agency (TEA) adopts new §89.1701, concerning the dropout prevention strategy plan. The new section is adopted with changes to the proposed text as published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6234). The adopted new section implements the requirements of the Texas Education Code (TEC), §29.918, as added by House Bill (HB) 2237, 80th Texas Legislature, 2007, which requires the commissioner by rule to establish procedures through which districts with a high dropout rate will submit a plan detailing the manner in which the compensatory education allotment and the high school allotment will be used as part of a dropout prevention strategy.

HB 2237, 80th Texas Legislature, 2007, added the TEC, §29.918, requiring districts with a high dropout rate to develop a dropout prevention strategy plan. This plan must detail the manner in which a district will use its resources, specifically the compensatory education allotment and the high school allotment, to contribute to the district's dropout prevention strategy. The compensatory education allotment, established through the TEC, §42.152, provides an annual allotment to districts based on the number of economically disadvantaged students enrolled at campuses in the district. The compensatory education allotment is intended to increase the academic achievement and high school completion rates for at-risk students. Similarly, the high school allotment, as detailed in the TEC, §42.2516(b)(3), provides funding to districts to improve graduation and college readiness rates for Texas secondary school students.

In addition to a dropout prevention strategy plan, the Legislature, in previous legislation, mandated that certain districts develop two other plans--a school improvement plan and a plan to increase college enrollment--both of which may address issues related to a district's dropout rate. Under the TEC, §39.1323, a campus with a specific state accountability rating is required to work with a campus intervention team and to design a school improvement plan addressing factors contributing to the campus' rating as academically unacceptable. In addition, under the TEC, §29.904, a campus with a low college- going rate is required to enter into an agreement with a nearby institution of higher education to develop a plan to increase the percentage of its graduating seniors enrolling in an institution of higher education. The newly mandated requirement for a dropout prevention strategy plan offers an opportunity to coordinate these three plans, where appropriate.

The adopted new 19 TAC §89.1701, Dropout Prevention Strategy Plan, implements the TEC, §29.918, relative to the dropout prevention strategies. The adopted new rule establishes applicable definitions and specifies that affected districts will be identified and notified annually of the requirement to submit a dropout prevention strategy plan. The adopted rule also addresses the coordination of a dropout prevention strategy plan with a plan to increase college enrollment and with a school improvement plan. Submission of a plan by a school district and review of a plan by the TEA are also addressed as well as conditions under which the commissioner of education could impose sanctions. In response to public comment, subsection (b) is modified at adoption to incorporate into rule the method used to identify districts that must comply with the new requirements.

The public comment period on the proposal began September 14, 2007, and ended October 14, 2007. Following is a summary of public comments received and corresponding agency responses regarding the proposed new 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter GG, Commissioner's Rules Concerning Dropout Prevention Strategies.

Comment. The superintendent of the Austin Independent School District recommended that the standard used to identify districts for compliance with the requirement to submit a dropout prevention plan be established in advance in order to allow for advance notice, consistency, and the opportunity for districts to provide feedback each year. Further, the superintendent recommended that the standard be linked to a standard set by the commissioner for other purposes, such as that used in the state accountability system. The superintendent also suggested that the current method employed by the agency to identify districts is unfair, as 10 percent of districts will be identified year after year regardless of the improvements that are made or how their rates compare with other districts of a different size. The superintendent suggested that such a method is subjective and does not allow for districts to be able to predict whether they have to submit a plan until comparisons with other districts are made to determine their rank.

Agency Response. The agency partially agrees. The method used to identify districts that must comply with the statute has been added to 19 TAC §89.1701(b). The agency partially agrees with the statement that the method should be "linked to a standard set by the commissioner for other purposes." The rate used this year to determine whether districts must comply with the statute is the Grade 7-12 annual dropout rate, which is information collected by the agency through the Public Education Information Management System (PEIMS) and is an indicator used to evaluate the performance of districts under the Performance-Based Monitoring Analysis System (PBMAS) and the alternative education accountability procedures. The agency disagrees that the method used is unfair and subjective. The commissioner identified districts for compliance with the statute by grouping districts by comparable size and requiring a percentage of districts with relatively high dropout rates to submit dropout prevention strategy plans. This method reflects an objective and fair use of data collected by the agency and supplied by districts.

The agency disagrees that this method does not allow districts to improve. Districts may be relieved of the requirement to submit a dropout prevention strategy plan if efforts to reduce the dropout rate are successful and the district dropout rate declines. Further, the agency finds that it is important to collect plans from a percentage of districts over time to determine the types of programs that districts with high dropout rates are implementing with high school and compensatory allotment funds and to assess any impact on student achievement and graduation rates. The agency intends to use information from these plans to inform the development of future statewide programs to support dropout prevention and high school completion and success.

The agency disagrees that districts will be unable to predict whether they will be required to submit a plan. Information about dropout rates is publicly available annually on August 1. At that time, districts will be able to compare their dropout rates to the rates of other districts. Additionally, the agency anticipates notifying districts each September of the requirement to submit a plan by December 1.

Comment. The president of the Texas School Alliance (TSA) and the associate executive director of the Texas Association of School Administrators recommended that the agency specify in rule the dropout rate that will be used to trigger the submission of a plan under the TEC, §29.918, to provide more transparency and predictability to school districts working to comply with the requirement. The president of TSA further recommended that the agency specify a fixed rate, rather than a "moving target" so districts that improve performance are able to work their way off of the low performing list in subsequent years.

Agency Response. The agency partially agrees and has incorporated the methodology used to identify districts into 19 TAC §89.1701(b). The agency disagrees with the comment regarding a fixed rate. Requiring a percentage of districts to submit a plan, rather than requiring those that fail to meet a standard or fixed rate to submit a plan, allows the agency to better respond to changes in statewide dropout patterns. This will avoid frequent revisions to a fixed rate in the rule and ensure that the agency will have the capacity to evaluate and approve plans from school districts in a timely manner as required by the statute. Additionally, the agency finds that it is important to collect plans from a percentage of districts over time to determine the types of programs districts are implementing with high school and compensatory allotment funds and to assess any impact on student achievement and graduation rates. Information from plans submitted by districts will inform the development of future statewide dropout prevention programs.

The new section is adopted under the Texas Education Code, §29.918, which authorizes the commissioner to adopt rules to administer dropout prevention strategies.

The new section implements the Texas Education Code, §29.918.

§89.1701. Dropout Prevention Strategy Plan.

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

(1) Compensatory education allotment--Funds allocated under the Texas Education Code (TEC), §42.152.

(2) Dropout prevention strategy plan--The document prepared for submission to the Texas Education Agency (TEA) in compliance with the TEC, §29.918, and in accordance with specifications set forth in subsection (e) of this section.

(3) High school allotment--Funds allocated under the TEC, §42.2516(b)(3).

(4) Plan to increase college enrollment--The document prepared in compliance with the TEC, §29.904, for submission to the TEA by a district ranked among the lowest 10% of districts, based on its college-going rate. A district's college-going rate is calculated as the percentage of its graduating class enrolled in higher education the fall after completing high school.

(5) School district--For the purposes of this section, the definition of school district includes an open-enrollment charter school.

(6) School improvement plan--The document prepared for submission to the TEA by a school district in compliance with the TEC, §39.1323, or by a school district with a campus rated academically unacceptable for failure to meet the required performance standards set forth in the TEC, §39.073.

(b) Identification of districts with a high dropout rate. In accordance with the TEC, §29.918(a), a school district with a high dropout rate, as defined by the commissioner of education, shall be identified and notified annually of the requirement to submit a dropout prevention

strategy plan as specified by this section. The commissioner shall identify on an annual basis the school districts that are required to comply with the TEC, §29.918, and this section by grouping school districts by comparable size and then establishing a percentage of school districts with relatively high dropout rates that must submit dropout prevention strategy plans.

(c) Coordination with statutory requirement to submit a plan to increase college enrollment. If a school district is required by statute to submit both a dropout prevention strategy plan and a plan to increase college enrollment, the school district must describe in its dropout prevention strategy plan how the activities identified in both plans will be coordinated.

(d) Coordination with statutory requirement to submit a school improvement plan.

(1) If a school district is required by statute to submit both a school improvement plan due to failure to meet the required performance standard regarding dropout rates or completion rates as well as a dropout prevention strategy plan, then the school district may request that its school improvement plan be used to satisfy the requirements of both statutes. To exercise this option, a school district superintendent must submit a request in writing to the commissioner of education for approval.

(2) A school improvement plan used to satisfy the statutory requirements of both plans, as provided in paragraph (1) of this subsection, must clearly identify those programs and activities to be funded with compensatory education allotment and high school allotment funds.

(e) Dropout prevention strategy plan specifications.

(1) A school district identified as having a high dropout rate under subsection (b) of this section shall submit a dropout prevention strategy plan to the commissioner describing the manner in which it intends to use its compensatory education allocation and high school allocation funds for the purpose of developing and implementing dropout prevention strategies.

(2) A school district's dropout prevention strategy plan shall include the following components:

(A) analysis of factors that have had an impact on the school district or campus dropout rate using evaluation and needs assessment data available to the school district;

(B) description of programs and activities designed to reduce the school district and campus dropout rate to be funded in whole or in part with compensatory education allotment funds;

(C) description of programs and activities identified in §61.1093 of this title (relating to Use of Funds) designed to reduce the school district and campus dropout rate to be funded in whole or in part with high school allotment funds;

(D) quantifiable benchmarks to measure evidence of change;

(E) resources to be used in implementing programs and activities identified in subparagraphs (B) and (C) of this paragraph;

(F) timeline for initiation of activities identified in subparagraphs (B) and (C) of this paragraph; and

(G) description of how activities will be coordinated with those identified in the school district's plan to increase college enrollment, if the school district is required by the TEC, §29.904, to submit such a plan.

(3) The dropout prevention strategy plan shall include research-based programs and activities.

(f) Dropout prevention strategy plan submission. In accordance with the TEC, §29.918(a), a school district shall submit its dropout prevention strategy plan not later than December 1 of each school year preceding the school year in which the school district will receive the compensatory education allotment or high school allotment. The plan shall be submitted to the TEA in a manner determined by the commissioner.

(g) Dropout prevention strategy plan approval. In accordance with the TEC, §29.918(b), review of district dropout prevention strategy plans shall be completed by the commissioner not later than March 1 of the school year preceding the school year in which the district will receive the compensatory education allotment or high school allotment. Until a district receives commissioner approval in writing for its dropout prevention strategy plan, a district may not spend or obligate more than 25% of the district's compensatory education allotment or high school allotment funds as set forth in the TEC, §29.918(b).

(h) Sanctions. The commissioner may impose sanctions under the TEC, §39.131 or §39.1321, if the district:

(1) fails to submit its dropout prevention strategy plan by December 1;

(2) submits a dropout prevention strategy plan that fails to meet the plan specifications set forth in subsection (e) of this section; or

(3) spends or obligates compensatory education allotment or high school allotment funds in excess of 25% of the allotment amount prior to receiving approval of the dropout prevention strategy plan by the commissioner.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER FF. COMMISSIONER'S RULES CONCERNING THE JOB CORPS DIPLOMA PROGRAM

19 TAC §97.2001

The Texas Education Agency (TEA) adopts an amendment to §97.2001, concerning the Job Corps diploma program. The amendment is adopted with changes to the proposed text as published in the August 31, 2007, issue of the *Texas Register* (32 TexReg 5603). The section implements the requirements of the Texas Education Code (TEC), §18.006, added by Sen-

ate Bill 1395, 79th Texas Legislature, 2005, that requires the commissioner to develop and implement a system of accountability to rate the annual performance of the Job Corps diploma program. The section also adopts the most recently published Job Corps diploma program accountability procedures manual. The amendment to §97.2001 adopts the *Job Corps Diploma Program Accountability Procedures Manual,* dated August 2007, and incorporates other applicable updates to the rule.

Effective December 10, 2006, the commissioner adopted 19 TAC §97.2001, exercising rulemaking authority over developing and implementing a system of accountability consistent with the TEC, Chapter 39, where appropriate, to be used in assigning an annual performance rating to Job Corps diploma programs consistent with the ratings assigned to school districts under the TEC, §39.072. Section 97.2001 includes the *Job Corps Diploma Program Accountability Procedures Manual,* dated September 2006, in rule as a figure. The intention is to annually update 19 TAC §97.2001 to refer to the most recently published *Job Corps Diploma Program Accountability Procedures Manual.*

The adopted amendment to 19 TAC §97.2001 updates the rule to adopt the new *Job Corps Diploma Program Accountability Procedures Manual,* dated August 2007, as a figure. The adopted amendment prescribes the specific procedures, standards, and performance indicators by which Job Corps diploma programs will be evaluated and rated in 2008.

Revisions in the new manual include: (1) updates to year references to make the document current; (2) a change to the due date for data submission to the first Monday in December rather than specifying an exact date; (3) the addition of a new leaver code to address the need to account for students who enroll in distance education programs; (4) adjustment to the Economically Disadvantaged student group definition to be consistent with definitions used for public school accountability and applicability to the Job Corps diploma program; (5) removal of procedures regarding first-year, on-site visits since they are inapplicable to second-year programs; and (6) other applicable updates and clarifications.

The adopted amendment to 19 TAC §97.2001 also updates rule text, as follows. Subsection (a) was modified to refer to the diploma program. Subsection (c)(3) was revised to broaden reference to applicable assessments required for graduation. Subsection (d) was updated to reference the *2007 Job Corps Diploma Program Accountability Procedures Manual,* dated August 2007, and ratings issued in 2008. Subsection (d) was updated to establish that the manual adopted for each prior year remains in effect for the respective school year.

No changes were made to the text of the rule since published as proposed. However, one technical change was made at the top of page 2 of the procedures manual to correct a statutory reference in the section entitled, "Purpose of Job Corps Diploma Accountability Procedures." The manual as filed as proposed referenced TEC, §39.023(c). This citation was corrected at adoption to reference TEC, §39.025. This statutory reference is consistent with other references in this manual.

The adopted amendment to 19 TAC §97.2001 modifies the reporting requirements to address the characteristics of the students served by the Job Corps diploma program. Alternative collection methods were considered; however, based on the number and frequency of data submissions to the Texas Education Agency (TEA), it was determined that electronic submission via the TEA Secure Environment (TEASE) would incur higher costs to the TEA than simple paper submission.

The public comment period on the proposal began August 31, 2007, and ended September 30, 2007. No public comments were received.

The amendment is adopted under the Texas Education Code, §18.006, which requires the commissioner to develop and implement a system of accountability consistent with the Texas Education Code, Chapter 39, where appropriate, to be used in assigning an annual performance rating to Job Corps diploma programs consistent with the ratings assigned to school districts under the Texas Education Code, §39.072.

The amendment implements the Texas Education Code, §18.006.

§97.2001. Job Corps Diploma Program Accountability Procedures.

(a) Intent and purpose. The Job Corps diploma program develops and implements educational programs specifically designed for persons eligible for enrollment in a Job Corps training program established by the U.S. Department of Labor. The Job Corps diploma program was established in order for eligible students to satisfy the requirements necessary to receive a high school diploma.

(b) Student eligibility. A person is eligible to participate in the Job Corps diploma program if the person is enrolled in an established Job Corps training program and has not satisfied the state requirements to receive a high school diploma. Any person enrolled in good standing in the Job Corps diploma program is eligible for programs or services under the Texas Education Code (TEC), Chapter 18. A person's eligibility for programs and services under the TEC, Chapter 18, does not make a person ineligible for an education program or service under any other chapter of the TEC.

(c) Program requirements. The TEC, §1.001, applies to a Job Corps diploma program operated by or under contract with the U.S. Department of Labor.

(1) The Job Corps diploma program shall provide a course of instruction that includes the required curriculum under the TEC, §28.002, §74.1 of this title (relating to Essential Knowledge and Skills), and §74.3 of this title (relating to Description of a Required Secondary Curriculum).

(2) The Job Corps diploma program shall offer, annually, at least all the courses required for an eligible student to graduate under the applicable minimum high school program described in Chapter 74 of this title (relating to Curriculum Requirements).

(3) A student enrolled in the Job Corps diploma program must satisfy the assessments required for graduation under the TEC, §39.025, before receiving a high school diploma.

(d) Accountability procedures. Job Corps diploma program evaluations and ratings issued in 2008 are based upon specific procedures, standards, and performance indicators, which are described in the *Job Corps Diploma Program Accountability Procedures Manual*, dated August 2007, provided in this subsection. The specific procedures, standards, and performance indicators used in the *Job Corps Diploma Program Accountability Procedures Manual* adopted for use prior to 2008 remain in effect for all purposes, including accountability, data standards, and audits, with respect to the applicable school year.
Figure: 19 TAC §97.2001(d)

(e) Annual review. The Texas Education Agency (TEA) shall conduct an annual review to evaluate Job Corps diploma program performance based on indicators provided in the *Job Corps Diploma Program Accountability Procedures Manual* described in subsection (d)

of this section. The diploma program shall comply with all applicable requirements of state laws and rules.

(f) Performance indicators. Annually, the commissioner of education shall review and determine the student performance indicators appropriate to the characteristics of the students served by the Job Corps diploma program. The performance of the Job Corps diploma program shall be evaluated on the basis of the specific indicators as determined by the commissioner of education.

(1) The annual evaluation shall be based on, at a minimum, the following performance indicators:

(A) student performance on assessment instruments required under the TEC, §39.023;

(B) dropout rate for the grade levels served; and

(C) diploma program completion rate.

(2) To the extent appropriate, the annual performance review shall incorporate other indicators from the Academic Excellence Indicator System (AEIS) under the TEC, Chapter 39.

(g) Accountability ratings and criteria. The procedures for determining the Job Corps diploma program accountability ratings are established in the *Job Corps Diploma Program Accountability Procedures Manual* described in subsection (d) of this section.

(1) The Job Corps diploma program performance on selected AEIS indicators shall be used by the TEA in determining the annual performance rating of the Job Corps diploma program.

(2) A performance rating assigned to the Job Corps diploma program may be appealed to the commissioner of education in accordance with the procedures established in the *Job Corps Diploma Program Accountability Procedures Manual* described in subsection (d) of this section.

(3) The commissioner of education may lower the Job Corps diploma program accountability rating based on the findings of an on-site investigation conducted under the TEC, §39.074.

(4) If a Job Corps diploma program is below any standard under the TEC, §39.073(b), the program is considered a low-performing program. If the Job Corps diploma program is low performing for a period of two consecutive years or more, the commissioner of education may close the program.

(h) Reporting of data. The Job Corps diploma program shall report to the TEA accountability data on a submission schedule determined by the TEA. Performance data shall be disaggregated with respect to student attributes as determined by the commissioner of education.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2007.

TRD-200705441
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: November 28, 2007
Proposal publication date: August 31, 2007
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 131. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER A. ORGANIZATION OF THE BOARD

22 TAC §131.9

The Texas Board of Professional Engineers adopts an amendment to §131.9, relating to Officers of the Board, without changes to the proposed text as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6511) and will not be republished.

The adopted amendment is related to the duties of the Secretary of the Board. HB 899 (80th Regular Session 2007) was signed into law adding a treasurer to the list of Board officers and repealing §1001.109 from the Texas Engineering Practice Act. The adopted rule change is to conform with these statutory changes.

No comments were received regarding the Board's adoption of the amended section.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; Occupations Code §1001.108 which provides for certain officers of the Board, and §1001.109 which outlines certain responsibilities for the Board Secretary. HB 899 amended sections §1001.108 and §1001.109 of the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

TRD-200705507
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: December 2, 2007
Proposal publication date: September 21, 2007
For further information, please call: (512) 440-7723

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CHAPTER 133. LICENSING

SUBCHAPTER F. REFERENCE DOCUMENTATION

22 TAC §133.53

The Texas Board of Professional Engineers adopts an amendment to §133.53, relating to Reference Statements, without changes to the proposed text as published in the September

21, 2007, issue of the *Texas Register* (32 TexReg 6512) and will not be republished.

The adopted amendment is related to the requirements for preparing a reference statement for an application for licensure. The adopted rule distinguishes between the supplementary experience record (SER) and reference statements that must be submitted for an application for licensure, and requires that both forms are signed by the reference provider.

No comments were received regarding the Board's adoption of the amended section.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; Occupations Code §1001.302 which outlines the minimum requirements for licensure; and §1001.303 which lists the requirements for an application for licensure.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

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Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Effective date: December 2, 2007
Proposal publication date: September 21, 2007
For further information, please call: (512) 440-7723

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SUBCHAPTER G. EXAMINATIONS

22 TAC §133.73

The Texas Board of Professional Engineers adopts an amendment to §133.73, relating to Exam Analysis, without changes to the proposed text as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6513) and will not be republished.

The adopted amendment requires that the Board provide numeric scores for examinations that have numeric scores, and clarifies the score required to pass an examination.

No comments were received regarding the Board's adoption of the amended section.

The amendment is adopted pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; Occupations Code §1001.302(a)(2) and §1001.305 provide for the Board to administer exams to determine the qualifications of applicants; and §1001.306 outlines the requirements for providing examination results. HB 899 amended §1001.306 of the Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Dale Beebe Farrow, P.E.
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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 83. PUBLIC HEALTH IMPROVEMENT GRANTS

SUBCHAPTER B. COMMUNITY HOSPITAL CAPITAL IMPROVEMENT FUND

25 TAC §§83.20 - 83.29

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §§83.20 - 83.29, concerning the Community Hospital Capital Improvement Fund. The sections are adopted without changes to the proposed text as published in the September 7, 2007 issue of the *Texas Register* (32 TexReg 5964) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The repeals are necessary because the funding for the program ended in August 31, 2005. Chapter 83, Subchapter B, pertains to the Community Hospital Capital Improvement Fund, which is a dedicated account in the general revenue fund that originated when the 76th Legislature set aside $25 million of the tobacco settlement monies to create this fund in 1999. The fund, now named the Permanent Hospital Fund for Capital Improvements and the Texas Center for Infectious Disease, is mandated by Government Code, §§403.1066 - 403.1069, which delineates the department's responsibility to provide grants, utilizing the earnings of the fund, to small urban hospitals for capital improvement projects. Eligibility is limited to nonprofit hospitals licensed for 125 or fewer beds and located in counties exceeding 150,000 in population. In 2005, the 79th Texas Legislature appropriated earnings from the fund only to support activities at the Texas Center for Infectious Disease. In 2007, there has been no indication that earnings from the fund will be appropriated for the small urban hospital capital improvements.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 83.20 - 83.29 have been reviewed and the department has determined that reasons for

the rules pertaining to this subject matter no longer exist, and the rules are repealed.

SECTION-BY-SECTION SUMMARY

The repeals are necessary because the funding for this program ended on August 31, 2005. By not funding the program, it cannot function and rules governing that program are unnecessary.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The repeals are adopted under the Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 9, 2007.

TRD-200705487
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: November 29, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 84. PREVENTIVE HEALTH AND HEALTH SERVICES BLOCK GRANT

25 TAC §84.1

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts an amendment to §84.1 concerning the State Preventive Health Advisory Committee without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5965) and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

The amendment is necessary to update the rule regarding the State Preventive Health Advisory Committee (committee) to reflect the new name of the agency, delete the reference to the Texas Board of Health, and make other minor updates that do not substantially change the rule. The rule is still needed due to the continued responsibilities for implementing United States Code - Title 42, §300w-4(d) regarding formulation of an annual state plan for the Preventive Health and Health Services Block Grant (PHHSBG).

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 84.1 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The amendment to §84.1 reflects changes in the agency name, removes references to the now non-existent Texas Board of Health, updates references to include the Executive Commissioner of the Health and Human Services Commission, and identifies the center within the department that is to receive the committee's annual report. The section of the rule regarding abolishing the committee is removed because the committee is a requirement of United States Code - Title 42, §300w-4(d), which requires the formulation of an annual state plan for the PHHSBG.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is adopted under Government Code, Chapter 2110, which requires state agencies to adopt rules concerning advisory committees; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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CHAPTER 128. PERMITS FOR CONTACT LENS DISPENSERS

25 TAC §§128.1 - 128.15

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §§128.1 - 128.15, concerning contact lens dispensers, without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5986) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The adopted repeals are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140, Health Professions Regulation. The new rules transfer and update existing language and do not impose any new requirements or fees on applicants or permit holders.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 128.1 - 128.15 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is repealing the existing sections and readopting the rules in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

The adopted repeal of §§128.1 - 128.15 combines Professional Licensing and Certification Unit rules in one chapter, 25 TAC Chapter 140, Health Professions Regulation.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The adopted repeals are authorized by Occupations Code, §353.005, which authorizes the adoption of rules regarding contact lens dispensing permits; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the adopted sections implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200705521

Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 2, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 137. BIRTHING CENTERS

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts the repeal of §§137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, 137.31 - 137.34, 137.36 - 137.44, 137.46 - 137.55 and new §§137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, 137.31 - 137.34, 137.36 - 137.44, and 137.46 - 137.55, concerning the regulation of birthing centers. The new §§137.2, 137.11, 137.21, 137.22, and 137.37 are adopted with changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 5988). The repeal of §§137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, 137.31 - 137.34, 137.36 - 137.44, 137.46 - 137.55, and new §§137.1, 137.3, 137.4, 137.12, 137.13, 137.23 - 137.26, 137.31 - 137.34, 137.36, 137.38 - 137.44, and 137.46 - 137.55 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The repeal and new sections are necessary to comply with Government Code, Chapter 2054, Subchapter K, which requires the department to participate in an electronic system for occupational licensing transactions (Texas Online); Acts, 2003, 78th Legislature, Regular Session, Chapter 198, (House Bill (HB) 2292), §2.42, added Health and Safety Code, §12.0111, which requires the department to charge a fee sufficient to cover the cost of administering and enforcing the licensing program; and Health and Safety Code, §12.0112, which requires that the term for licenses issued or renewed after January 1, 2005 will be two years.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, 137.31 - 137.34, 137.36 - 137.44, and 137.46 - 137.55 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

New §§137.1 - 137.4, 137.11 - 137.13, 137.21 - 137.26, and 137.31 - 137.34, 137.36 - 137.44, and 137.46 - 137.55 provide clarification to the rules, update references to statutes and rules, and change the name of the department and its programs. The new §137.2 adds definitions and deletes definitions not used in the rules. The new §§137.3 - 137.4 and §137.11 adds language regarding the implementation of the two-year renewal cycle for licenses as mandated under HB 2292, the payment of fees for a two-year license, and the department's authority to collect fees related to application processing through the TexasOnline Authority. The new §137.13 clarifies timelines for submitting applications and/or corrections to applications and clarifies language regarding and applicants right to request a refund of an application fee. The new §137.22 requires a hearing to be requested

within 25 days instead of 20 calendar days. New §137.33 clarifies personnel policy requirements. New §137.34 adds language to show additional documents to be included in the personnel record for each employee. The new §137.39 clarifies that the birthing center is responsible for all care provided on its licensed premises.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenters were individuals and the commenters suggested recommendations for changes as discussed in the summary of the comments. The commenters were in favor of the rules.

Comment: Concerning §137.37(d)(5), one commenter stated it was not clear in the rules that references to "sterilizers" meant "steam sterilizers (saturated steam under pressure)".

Response: The commission agrees with the commenter and has added text to §137.37(d)(5)(B) stating that steam sterilizers (saturated steam under pressure) shall be utilized for sterilization of heat and moisture stable items. Also, steam sterilizers shall be used according to manufacturer's written instructions.

Comment: Concerning §137.11(a)(3)(K)(i), a commenter suggested deleting the duplicate word "convictions".

Response: The commission agrees and the word was deleted.

Comment: Concerning §137.2(21), §137.21(c)(1), and 137.22(a)(5)(B)(iii), commenters suggested revisions for grammatical changes.

Response: The commission agrees and corrected the sections for grammar and clarity.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §137.1 - 137.4

STATUTORY AUTHORITY

The repeals are adopted under the Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

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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Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: September 7, 2007
For further information, please call: (512) 458-7111 x6972

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25 TAC §§137.1 - 137.4

STATUTORY AUTHORITY

The new sections are adopted under the Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§137.2. Definitions.

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

(1) Act--Texas Birthing Center Licensing Act, Health and Safety Code, Chapter 244, relating to the licensure and regulation of centers.

(2) Acute postpartum period--A minimum of two hours following the delivery of the placenta and until the client is clinically stable.

(3) Administrator--A person who is delegated the responsibility for the implementation and proper application of policies, programs, and services established for the center.

(4) Admission--A client that is accepted by the center after a risk assessment is performed.

(5) Affiliate--With respect to an applicant or owner which is:

(A) a corporation--includes each officer, director, stockholder with a direct ownership of at least 5.0%, subsidiary, and parent company;

(B) a limited liability company--includes each officer, member, and parent company;

(C) an individual--includes:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iii) each corporation in which the individual is an officer, director, or stockholder with a direct ownership of at least 5.0%;

(D) a partnership--includes each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--includes each officer, director, or the equivalent under the specific business arrangement and each parent company.

(6) Applicant--The owner of a center which is applying for a license under the Act. This is the person in whose name the license will be issued.

(7) Birth attendant--A physician, certified nurse-midwife (CNM), or a licensed midwife.

(8) Center--A facility, place, or institution where a woman is scheduled to give birth. This term does not include a hospital, ambulatory surgical center, a nursing home, or the residence of the woman giving birth.

(9) Certified nurse-midwife (CNM)--A person who is:

(A) a registered nurse who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapters 301, 303 and 304;

(B) recognized as an advanced practice nurse by The Board of Nursing for the State of Texas; and

(C) certified by the American College of Nurse-Midwives (ACNM) or ACNM Accreditation Council.

(10) Client--A woman who is scheduled to give birth at a center and the newborn of that birth.

(11) Clinical care--Direct provision of care to center clients.

(12) Clinical care provider--A registered nurse (RN), licensed vocational nurse (LVN), physician assistant (PA), or adult unlicensed staff person who is capable of recognizing complications and who can care for the mother and newborn by performing the minimum duties set out in §137.48(d) of this title (relating to Labor and Birth Procedures).

(13) Clinical director--A person who is responsible for advising and consulting with the staff of a center on all matters relating to the clinical management of all clients.

(14) Critical item--All surgical instruments and objects that are introduced directly into the bloodstream or into other normally sterile areas of the body.

(15) Decontamination--The physical and chemical process that renders an inanimate object safe for further handling.

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

(17) Disinfection--The destruction or removal of vegetative bacteria, fungi, and most viruses but not necessarily spores; the process does not remove all organisms but reduces them to a level that is not harmful to health. There are three levels of disinfection:

(A) high level disinfection--kills all organisms, except high levels of bacterial spores, and is effected with a chemical germicide cleared for marketing as a sterilant by the Food and Drug Administration;

(B) intermediate-level disinfection--kills mycobacteria, most viruses, and bacteria with a chemical germicide registered as a "tuberculocide" by the Environmental Protection Agency (EPA); and

(C) low-level disinfection--kills some virus and bacteria with a chemical germicide registered as a hospital disinfectant by the EPA.

(18) Health care facility--Any type of facility or home and community support services agency licensed (or equivalent) to provide health care in any state or certified for Medicare (Title XVIII) and Medicaid (Title XIX) participation in any state.

(19) Hospital--A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241 or, if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §§1395 et seq.).

(20) Initial license--The first license that is issued to an applicant indicating that the center meets all requirements of this chapter for a license.

(21) Licensed health care professional--An individual licensed in the State of Texas to provide specific health care services within a defined scope of practice by their licensing rules or Act.

(22) Licensed midwife--A person who practices midwifery and is licensed under the Texas Midwifery Act, Texas Occupations Code, Chapter 203.

(23) Licensed premises--The location stated or described in the application that is licensed by the department.

(24) Licensed vocational nurse (LVN)--A person who is currently licensed under the Nurse Practice Act, Texas Occupations Code, Chapters 301, 303, and 304, as a licensed vocational nurse.

(25) Low-risk pregnancy--A pregnancy that is determined by history, application of a risk assessment, and prenatal care that broadly predicts an outcome of a normal, uncomplicated pregnancy.

(26) Manager--The manager of the Facility Licensing Group of the Department of State Health Services or his or her designee.

(27) Midwife--A certified nurse-midwife (CNM) or a licensed midwife.

(28) Noncritical items--Items that come in contact with intact skin.

(29) Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(30) Person--An individual, firm, partnership, corporation, or association.

(31) Physician--A person who is currently licensed under the Medical Practice Act, Texas Occupations Code, Chapters 151-165, to practice medicine.

(32) Physician assistant (PA)--A person who is currently licensed under the Physician Assistant Licensing Act, Texas Occupations Code, Chapter 204, as a physician assistant.

(33) Physician consultant--A physician who is currently licensed under the Medical Practice Act, Texas Occupations Code, Chapters 151-165, to practice medicine and who consults with a center.

(34) Plan of correction--A written strategy for correcting a licensing violation. The plan of correction shall be developed by the facility and shall address the systems operations of the facility as the systems operations apply to the deficiency.

(35) Policy--A written document which describes all procedures to be followed at the facility including medical and personnel issues which is to be maintained at the licensed premises for a minimum of five years.

(36) Presurvey conference--A conference held with department staff and the applicant or his or her representatives to review licensure standards, survey documents, and provide consultation prior to the on-site licensure survey.

(37) Quality assurance--An ongoing, objective, and systematic process of monitoring, evaluating, and improving the quality, appropriateness, and effectiveness of care.

(38) Quality improvement--An organized, structured process that selectively identifies improvement projects to achieve improvements in products or services.

(39) Referral hospital--A hospital that a center has identified as capable of providing care and services to mothers or infants who require the services of a physician.

(40) Registered nurse (RN)--A person who is currently licensed under the Nurse Practice Act, Texas Occupations Code, Chapters 301, 303, and 304 as a registered nurse.

(41) Risk-assessment--A process by which application of historical, physical, and laboratory data is used for the prediction of pregnancy outcome.

(42) Semi-critical items--Items that come in contact with nonintact skin or mucous membranes. Semi-critical items may include respiratory therapy equipment and thermometers.

(43) Standards--Minimum requirements under the Act and this chapter.

(44) Sterile field--The operative area of the body and anything that directly contacts this area.

(45) Sterilization--The use of a physical or chemical procedure to destroy all microbial life, including bacterial endospores.

(46) Survey--A survey or investigation conducted by a representative of the department to determine if a licensee is in compliance with the statute and this chapter. A survey may be conducted onsite, by mail, by telephone, or by electronic communication methods.

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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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER B. LICENSING PROCEDURES

25 TAC §§137.11 - 137.13

STATUTORY AUTHORITY

The repeals are adopted under the Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

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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Lisa Hernandez
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25 TAC §§137.11 - 137.13

STATUTORY AUTHORITY

The new sections are adopted under the Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§137.11. Application Procedures and Issuance of Licenses.

(a) The application.

(1) An applicant shall not misstate a material fact on any documents required to be submitted under this subsection.

(2) The application form must be accurate and complete and must contain original signatures. The nonrefundable license fee must be submitted with the application.

(3) The following information must be submitted on the original application form and the application shall be notarized:

(A) information on the applicant including name, street address, mailing address, social security number or federal tax identification number, and if applicable, date of birth and driver's license number;

(B) the name, mailing address, and street address of the center. The street address provided on the application must be the address from which the center will be operating and providing services;

(C) a list of names and business addresses of all persons who own any percentage interest in the applicant including:

(i) each limited partner and general partner if the applicant is a partnership; and

(ii) each shareholder, member, director, and officer if the applicant is a corporation, limited liability company or other business entity;

(D) a list of any businesses with which the applicant subcontracts and in which the persons listed under subparagraph (C) of this paragraph hold any percentage of the ownership;

(E) if the applicant has held or holds a center license or has been or is an affiliate of another licensed center, the relationship, including the name and current or last address of the other center and the date such relationship commenced and, if applicable, the date it was terminated;

(F) if the center is operated by or proposed to be operated under a management contract, the names and addresses of any person and organization having an ownership interest of any percentage in the management company;

(G) a written plan for the orderly transfer of care of the applicant's clients and clinical records if the applicant is unable to maintain services under the license;

(H) the organizational structure of the staffing for the center;

(I) the names and addresses of the physicians, certified nurse-midwives, licensed midwives and other clinical care providers who will provide services at the center;

(J) the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) any orders of denial, suspension, or revocation of a center license, a license for any health care facility in any state, or documentation as a midwife; or any other enforcement action, such as (but not limited to) court civil or criminal action;

(ii) any orders of denial, suspension, or revocation of or other enforcement action against a center license, a license for any health care facility in any state, or documentation as a midwife which is or was proposed by the licensing agency and the status of the proposal;

(iii) surrendering a license before expiration of the license or allowing a license to expire in lieu of the department proceeding with enforcement action;

(iv) federal or state (any state) criminal felony arrests or convictions;

(v) federal or state Medicaid or Medicare sanctions or penalties relating to the operation of a health care facility;

(vi) operation of a health care facility that has been decertified in any state under Medicare or Medicaid; or

(vii) debarment, exclusion, or contract cancellation in any state from Medicare or Medicaid;

(K) for the two-year period preceding the application date, the following data concerning the applicant, the applicant's affiliates, and the managers of the applicant:

(i) federal or state (any state) criminal misdemeanor arrests or convictions;

(ii) federal or state (any state) tax liens;

(iii) unsatisfied final judgement(s);

(iv) eviction involving any property or space used as a center or health care facility in any state;

(v) injunctive orders from any court; or

(vi) unresolved final state or federal Medicare or Medicaid audit exceptions; and

(L) the telephone number, and fax number (if available) of the center and the telephone number where the administrator can usually be reached when the center is closed.

(b) Applicant copy. The applicant shall retain a copy of all documentation that is submitted to the department.

(c) Application processing. Upon the department's receipt of the application form, the required information described in subsection (a)(3) of this section, and the initial license fee from an applicant, the department shall review the material to determine whether it is complete and correct.

(1) The time periods for reviewing the material shall be in accordance with §137.13 of this title (relating to Time Periods for Processing and Issuing a License).

(2) If a center receives a notice from the department that some or all of the information required under subsection (a)(3) of this section is deficient, the center shall submit the required information no later than 60 calendar days from the date of the notice.

(A) A center which fails to submit the required information within 60 calendar days from the notice date is considered to have withdrawn its application for an initial license. The license fee will not be refunded.

(B) A center which has withdrawn its application must reapply for a license in accordance with this section, if it wishes to continue the application process. A new license fee is required.

(d) Withdrawal of application process. If an applicant decides at any time not to continue the application process for an initial license, the application will be withdrawn upon written request from the applicant. The license fee will not be refunded.

(e) Issuance of an initial license and renewal procedures.

(1) Presurvey conference. Once the department has determined that the application form, the information required to accompany the application form, and the license fee are complete and correct, a representative from the department shall schedule a presurvey conference with the applicant in order to inform the applicant of the standards for the operation of the center. The presurvey conference may be waived by the department.

(2) Survey recommendation.

(A) The survey office shall verify compliance with the applicable provisions of the Act and this chapter and recommend that the center be issued an initial license or that the application be denied pursuant to §137.22 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(B) Upon recommendation by the survey office:

(i) the department shall issue an initial license to an applicant that has been found to be in compliance with the provisions of the Act and this chapter; or

(ii) the department shall deny the application if the center has been found to be out of compliance with the provisions of the Act and this chapter. The procedure for denial of a license shall be in accordance with §137.22 of this title.

(3) Effective period of initial license. The initial license is valid for 24 months. The initial license expires on the last day of the month ending the licensure period.

(4) General requirements during the initial license period.

(A) A center shall comply with the provisions of the Act and this chapter during the initial license period.

(B) If an applicant decides not to continue the application process, the application will be withdrawn upon written request. If an initial license has been issued, the applicant shall cease providing services and return the original license certificate to the department with its written request to withdraw. The department shall acknowledge receipt of the request to withdraw. The license fee will not be refunded.

(f) Procedures for renewing a license.

(1) The department will send notice of expiration to a licensee at least 60 calendar days before the expiration date of a license. If the licensee has not received notice of expiration from the department 45 calendar days prior to the expiration date, it is the duty of the licensee to notify the department and request a renewal form.

(2) The licensee shall submit the renewal form to the department postmarked no later than 30 calendar days prior to the expiration date of the license:

(A) a complete and correct renewal form which includes updated disclosure information and ownership and management information as required by subsection (a)(3) of this section; and

(B) the renewal license fee.

(3) The time periods for processing an application shall be in accordance with §137.13 of this title.

(4) If timely and sufficient application is made for renewal, the license will not expire until the department issues the license or until the department denies renewal of the license.

(5) The department shall issue a renewal license to a licensee who meets the minimum standards for a license in accordance with the provisions of the Act and this chapter.

(6) Renewal licenses will be valid for 24 months.

(g) Failure to timely renew.

(1) General.

(A) If a licensee fails to submit a timely and sufficient renewal form and fee in accordance with subsection (f) of this section, the department shall notify the licensee that the center must cease operation on the expiration date of the license.

(B) No services shall be provided at the center after the expiration of the license.

(2) Active military duty exception. If a licensee fails to timely renew his or her license because the licensee is or was on active duty with the armed forces of the United States of America serving outside the State of Texas, the licensee may renew the license pursuant to this paragraph.

(A) Renewal of the license may be requested by the licensee, the licensee's spouse, or an individual having power of attorney from the licensee. The renewal form shall include a current address and telephone number for the individual requesting the renewal.

(B) Renewal may be requested before or after the expiration of the license.

(C) A copy of the official orders or other official military documentation showing that the licensee is or was on active military duty serving outside the State of Texas shall be filed with the department along with the renewal form.

(D) A copy of the power of attorney from the licensee shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this section.

(E) A licensee renewing under this paragraph shall pay the applicable renewal fee.

(F) A licensee is not authorized to operate the center for which the license was obtained after the expiration of the license unless and until the licensee actually renews the license.

(G) This paragraph applies to a licensee who is a sole practitioner or a partnership with only individuals as partners where all of the partners were on active duty with the armed forces of the United States serving outside the State of Texas.

(h) General requirements for renewal of license.

(1) After the issuance of the initial license, a licensee is eligible for subsequent renewal of the license biannually if the licensee continues to comply with the provisions of the Act and this chapter and has applied for renewal of the license in accordance with subsection (f) of this section.

(2) If a licensee makes a timely and sufficient application for renewal of a license, and an action to revoke, suspend, or deny renewal of the license is pending, the license does not expire but does extend until the application for renewal is granted or denied after the opportunity for a formal hearing. A renewal license will not be issued unless the department has determined the reason for the proposed action no longer exists.

(3) Continuing compliance by the center with the provisions of the Act and this chapter is required during the previous 24-month license period in order for the license to be renewed.

(4) The licensee shall not misstate or omit a material fact on any documents required to be submitted to the department or required to be maintained by the center in accordance with the provisions of the Act and this chapter.

(5) During the license period, the center shall provide services to one or more clients and document the provision of services. The center must show proof that services have been provided under the license within the previous 24 months. Such documentation shall be available for review by a department surveyor.

(6) If a licensee decides not to continue the application process for the renewal of a license, the application may be withdrawn upon written request. The applicant shall cease providing services and return the original license certificate to the department with its written request to withdraw. The department shall acknowledge receipt of the request to withdraw. The license fee will not be refunded.

(i) On-site surveys. On-site surveys of the center shall be performed at a frequency prescribed by and in accordance with §137.21 of this title (relating to On-Site Surveys).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ENFORCEMENT

25 TAC §§137.21 - 137.26

STATUTORY AUTHORITY

The repeals are adopted under the Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

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25 TAC §§137.21 - 137.26

STATUTORY AUTHORITY

The new sections are adopted under the Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§137.21. On-Site Surveys.

(a) Requirement for on-site surveys. A representative of the department may enter the premises of a license applicant or license holder at reasonable times to conduct a survey incidental to the issuance of a license, and at other times as it considers necessary to ensure compliance with the Act and the rules adopted under the Act.

(b) Initial on-site survey.

(1) The department shall conduct the on-site survey within 90 calendar days of the date of issuance of the initial license to determine if the center meets the requirements of the Act and this chapter.

(2) The on-site survey shall include a standard-by-standard evaluation.

(3) At the time of the initial on-site survey, the center shall assure that the administrator or his or her designee(s) is present during the survey.

(4) If at the time of the initial on-site survey, the center has not admitted its first client for antepartum, intrapartum, or postpartum care, the center must notify the Manager, Health Facility Compliance Group, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, when the first such admission and care delivery does occur.

(A) Within seven calendar days of the first client admission, the center shall submit a copy of the clinical record to the department for review.

(B) The department shall review the clinical record(s) to evaluate the center's compliance with the care delivery standards of this chapter.

(5) Upon completion of the on-site survey, a department surveyor shall verify a center's compliance with the provisions of the Act and this chapter and recommend to the department:

(A) that the center's initial license be continued for the duration of the initial license period; or

(B) that the department propose an enforcement action.

(c) Subsequent on-site surveys. After the initial on-site survey that is required for an initial license under subsection (b) of this section, an on-site survey shall be performed at least every three years with the following exceptions.

(1) If the department has written deficiencies for the center under the following provisions of this chapter, that may pose a threat to the health and safety of the center's clients and/or staff, the department shall conduct another on-site survey no later than one year after issuance of the initial or renewal license:

(A) §137.31 of this title (relating to Operational and Clinical Policies);

(B) §137.32 of this title (relating to Organizational Structure and Delegation of Authority);

(C) §137.33(4) and (5) of this title (relating to Personnel Policies);

(D) §137.34 of this title (relating to Qualifications and Duties of Staff);

(E) §137.36 of this title (relating to Physical and Environmental Requirements for Centers);

(F) §137.37 of this title (relating to Infection Control Standards);

(G) §137.38 of this title (relating to Disposition of Medical Waste);

(H) §137.39 of this title (relating to General Requirements for the Provision and Coordination of Treatment and Services);

(I) §137.40 of this title (relating to Risk Assessments);

(J) §137.41 of this title (relating to Emergency Services);

(K) §137.48 of this title (relating to Labor and Birth Procedures);

(L) §137.49 of this title (relating to Care of the Newborn);

(M) §137.50 of this title (relating to Discharge Procedures); and

(N) §137.55 of this title (relating to Other State and Federal Compliance Requirements).

(2) If the department has taken enforcement action against a center and the action allowed the center to remain licensed, the department shall conduct another on-site survey.

(3) This subsection does not limit complaint surveys by the department.

(d) Survey procedures.

(1) Prior to the survey, the department may notify the applicant or licensee, in writing by fax or mail to the mailing address of the center, of the date and time of the survey. The department is not required to notify the applicant or licensee prior to a complaint investigation.

(2) At the start of the survey, the department's surveyor shall notify the person who is in charge of a center of the nature and scope of the survey.

(3) Except for a complaint investigation or a follow-up visit, a survey will include a standard-by-standard evaluation.

(4) When the survey is completed, the surveyor shall hold an exit conference and fully inform the person who is in charge of the center of the preliminary findings of the survey and shall give the person a reasonable opportunity to submit additional facts or other information to the surveyor in response to those findings. A written response may be filed and must be received by the department within 14 calendar days of receipt of the preliminary findings of the survey by the center. The surveyor shall identify any records that were duplicated. Any original center records that are removed from a center shall be removed only with the consent of the center.

(5) After the survey is completed, the department shall provide the administrator of the center specific and timely written notice of the findings of the survey within 14 calendar days of the exit conference.

(6) If the department determines that the center is in compliance with minimum standards at the time of the on-site inspection, the department will send a license to the center, if applicable.

(7) If the surveyor determines there are no deficiencies found, a statement shall be provided to the center indicating this fact.

(8) If the surveyor finds there are deficiencies, the center and the department shall comply with the following procedure.

(A) The department shall provide the center with a statement of deficiencies within 14 calendar days of the exit conference.

(B) The center administrator shall sign the written statement of deficiencies and return it to the department with its plan of correction(s) for each deficiency within 14 calendar days of its receipt of the statement of deficiencies. The signature does not indicate the person's agreement with deficiencies stated on the form.

(C) The department shall determine if the written plan of correction is acceptable. If the plan of correction(s) is not acceptable to the department, the department shall notify the center and request that the plan of correction be modified and resubmitted no later than 14 calendar days from the date notified.

(D) The center shall come into compliance in accordance with the plan of correction or no later than 60 calendar days prior to the expiration of the license, whichever is sooner.

(E) Acceptance of a plan of correction by the department does not preclude the department from taking enforcement action as appropriate under §137.22 of this title (relating to License Denial, Suspension, Probation, or Revocation).

(9) The department may refer issues and complaints relating to the conduct or actions by licensed health care professionals to their appropriate boards.

§137.22. License Denial, Suspension, Probation, or Revocation.

(a) The department may deny, suspend, or revoke a license if the licensee or the center:

(1) violates a provision of Texas Birthing Center Licensing Act, Health and Safety Code, Chapter 244;

(2) fails to meet a requirement of this chapter;

(3) fails to comply with an order of the commissioner of health or another enforcement procedure under the Act;

(4) is involved in any action as described in §137.11(a)(3)(J)-(K) of this title (relating to Application Procedures and Issuance of Licenses); or

(5) has been convicted of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a center.

(A) In determining whether a criminal conviction directly relates, the department shall consider the provisions of Texas Occupations Code, Chapter 53.

(B) The department may deny a person a license or suspend or revoke an existing license on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the ownership or operation of a facility. The department shall apply the requirements of the Texas Occupations Code, Chapter 53.

(i) The department is entitled to obtain criminal history information maintained by the Texas Department of Public Safety (Government Code, §411.122), the Federal Bureau of Investigation Identification Division (Government Code, §411.087) or any other law enforcement agency to investigate the eligibility of an applicant for an initial or renewal license and to investigate the continued eligibility of a licensee.

(ii) In determining whether a criminal conviction directly relates, the department shall consider the provisions of the Texas Occupations Code, §53.022 and §53.023.

(iii) The following felonies and misdemeanors directly relate because these criminal offenses adversely affect a person's ability to own or operate a facility:

(I) a misdemeanor or felony involving moral turpitude;

(II) a misdemeanor or felony relating to deceptive business practices;

(III) a misdemeanor or felony of practicing any health-related profession without a required license;

(IV) a misdemeanor or felony under any federal or state law relating to drugs, dangerous drugs, or controlled substances;

(V) a misdemeanor or felony under the Texas Penal Code (TPC):

(-a-) Title 4 - offenses of attempting or conspiring to commit any of the offenses in this clause;

(-b-) Title 5 - offenses against the person;

(-c-) Title 7 - offenses against property;

(-d-) Title 8 - offenses against public administration;

(-e-) Title 9 - offenses against public order and decency;

(-f-) Title 10 - offenses against public health, safety or morals; or

(-g-) Title 11 - offenses involving organized crime.

(VI) offenses listed in clause (iii) of this subparagraph are not exclusive in that the department may consider similar criminal convictions from other state, federal, foreign or military jurisdictions which indicate an inability or tendency for the person to be unable to own or operate a facility.

(VII) a license holder's license shall be revoked on the license holder's imprisonment following a felony conviction, felony community supervision revocation, revocation of parole, or revocation of mandatory supervision.

(6) fails to comply with applicable requirements within a designated probation period;

(7) has a history of failure to comply with the rules adopted under this chapter;

(8) has aided, abetted or permitted the commission of an illegal act;

(9) has committed fraud, misrepresentation, or concealment of a material fact on any documents required to be submitted to the department or required to be maintained by the facility pursuant to the provisions of this chapter;

(10) fails to pay administrative penalties; or

(11) fails to implement plans of corrections to deficiencies cited by the department.

(b) Notice. If the department proposes to deny, suspend or revoke a license, the department shall send a notice of the proposed action by certified mail, return receipt requested, at the address shown in the current records of the department or the department may personally deliver the notice. The notice to deny, suspend, or revoke a license shall state the alleged facts or conduct to warrant the proposed action, provide an opportunity to demonstrate or achieve compliance, and shall state that the applicant or license holder has an opportunity for a hearing before the action taken is final.

(c) Within 25 days after the date of the notice, the applicant or license holder may notify the department, in writing, of acceptance of the department's determination. If the applicant or license holder does not accept the proposed action, a hearing may be requested. The request for a hearing must be submitted in writing to the Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756.

(1) A hearing shall be conducted pursuant to the Administrative Procedure Act, Texas Government Code, Chapter 2001 and the department's formal hearing procedures in §§1.21, 1.23, 1.25, and 1.27 of this title (relating to Formal Hearing Procedures).

(2) If the applicant or licensee does not request a hearing in writing within 25 days after the date of the notice, the licensee is deemed to have waived the opportunity for a hearing and the proposed action shall be taken.

(3) If the applicant or licensee fails to appear or be represented at the scheduled hearing, the applicant or licensee is deemed to have waived the right to a hearing and the proposed action shall be taken.

(d) A person who has had a center license revoked under this section may not apply for a license under this chapter for one year following the date of revocation.

(e) Probation. In lieu of suspending or revoking the license, the department may schedule the facility for a probation period of not less than 30 days if the facility is found in repeated noncompliance and the facility's noncompliance does not endanger the health and safety of the public.

(f) After a survey in which deficiencies were cited by the surveyor, a center may submit its license for voluntary cancellation in lieu of the department proceeding with enforcement action. The department may accept such submission or reject it and proceed with an enforcement action. The center, its owner(s), and its affiliates may not reapply for a license for six months from the date of the surrender or expiration.

(g) If the department suspends a license, the suspension shall remain in effect until the department determines that the reason for suspension no longer exists. A department surveyor shall conduct a survey of the center prior to making a determination.

(1) During the time of suspension, the suspended license holder shall return the original license certificate to the department.

(2) If a suspension overlaps a renewal date, the suspended license holder shall comply with the renewal procedures in this chapter; however, the department may not renew the license until the department determines that the reason for suspension no longer exists.

(3) If suspension is for more than one year, the suspended license holder may apply to the department for cancellation of the suspension only after one year following the initial date of the suspension.

(h) If the department denies, revokes, or does not renew a license, a person may reapply for a license (subject to subsection (b) of this section), by complying with the requirements and procedures in this chapter at the time of reapplication. The department may refuse to issue a license if the reason for denial, revocation, or non-renewal continues to exist and may consider the enforcement history of the applicant, administrator or clinical director in making such a determination.

(i) Upon revocation or nonrenewal, a license holder shall return the original license certificate to the department.

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SUBCHAPTER D. OPERATIONAL AND CLINICAL STANDARDS FOR THE PROVISION AND COORDINATION OF TREATMENT AND SERVICES

25 TAC §§137.31 - 137.34, 137.36 - 137.44, 137.46 - 137.55

STATUTORY AUTHORITY

The repeals are adopted under the Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

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25 TAC §§137.31 - 137.34, 137.36 - 137.44, 137.46 - 137.55

STATUTORY AUTHORITY

The new sections are adopted under the Health and Safety Code, §244.009, which requires the department to develop, establish, and enforce standards for the operation of birthing centers; Health and Safety Code, §12.0112, which requires the term of each license issued to be two years; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

§137.37. Infection Control Standards.

(a) A center shall develop, implement, and enforce written infection control policies and procedures to minimize the transmission of infection. Policies shall include educational course requirements; cleaning and laundry requirements; and decontamination, disinfection, sterilization, and storage of sterile supplies.

(b) Universal/standard precautions.

(1) Ensure that all staff complies with universal/standard precautions.

(2) Establish procedures for monitoring compliance with universal/standard precautions.

(3) Enforce a policy to ensure compliance of the center and all of the health care workers within the center with the Health and Safety Code, Chapter 85, Subchapter I, concerning the prevention of the transmission of human immunodeficiency virus (HIV) and hepatitis B virus (HBV) by infected health care workers.

(4) Require its health care workers to complete educational course work or training in infection control and barrier precautions, including basic concepts of disease transmission, scientifically accepted principles and practices for infection control and engineering and work practice controls.

(c) Cleaning and laundry.

(1) Adopt policies and procedures on cleaning the center.

(2) Adopt policies and procedures for the handling, processing, storing, and transporting of clean and dirty laundry.

(3) A center may provide cleaning and laundry services directly or by contract in accordance with Occupational Safety and Health Association standards.

(d) Policies shall include receiving, cleaning, decontaminating, disinfecting, preparing and sterilization of critical items (reusable items), as well as those for the assembly, wrapping, storage, distribution, and quality control of sterile items and equipment.

(1) Supervision. Shall be under the supervision of the clinical director.

(2) Quantity of sterile surgical instruments. Ensure that surgical instruments are sufficient in number to meet the needs of the center.

(3) Inspection of surgical instruments.

(A) All instruments shall undergo inspection before being packaged for reuse or storage. Routine inspection of instruments shall be made to assure clean locks, crevices, and serrations.

(B) Inspection procedures shall be thorough and include visual and manual inspection for condition and function.

(i) Cutting edges shall be checked for sharpness; tips shall be properly aligned, and instruments shall be clean and free from buildup of soap, detergent, dried blood, or tissue.

(ii) There shall be no evident cracks or fissures, and the hinges shall work freely.

(iii) There shall be no corrosion or pitting of the finish.

(iv) Rachets shall hold and be routinely tested.

(C) Instruments needing maintenance shall be taken out of service and repaired by a qualified surgical instruments repair person.

(D) Instrument identification shall not damage the instrument or its protective finish or compromise the sterilization process.

(4) Items to be disinfected and sterilized.

(A) Critical items.

(i) Must be sterilized in accordance with this subsection.

(ii) All items that come in contact with a sterile field during an operative procedure must be sterile.

(B) Semi-critical items. High-level disinfection shall be used for semi-critical items.

(C) Noncritical items. Intermediate-level or low-level disinfection shall be used for noncritical items.

(5) Equipment and sterilization procedures. Effective sterilization of instruments depends on performing correct methods of cleaning, packaging, arrangement of items in the sterilizer, and storage. The following procedures shall be included in the written policies as required in this paragraph to provide effective sterilization measures.

(A) Equipment. A center shall provide sterilization equipment adequate to meet the requirements for sterilization of critical items. Equipment shall be maintained and operated to perform, with accuracy, the sterilization of critical items.

(B) Sterilizers. Steam sterilizers (saturated steam under pressure) shall be utilized for sterilization of heat and moisture stable items. Steam sterilizers shall be used according to manufacturer's written instructions.

(C) Environmental requirements. Where cleaning, preparation, and sterilization functions are performed in the same room or unit, soiled or contaminated supplies and equipment shall be physically separated from the clean or sterilized supplies and equipment.

(i) A center shall have a sink for hand washing. This sink shall not be used for cleaning instruments or disposal of liquid waste.

(ii) A center shall have a separate sink for cleaning instruments and disposal of liquid waste. Hand washing may only be performed at this sink after it has been disinfected.

(D) Preparation for sterilization.

(i) All items to be sterilized shall be prepared to reduce the bioburden. All items shall be thoroughly cleaned, decontaminated, and prepared in a clean, controlled environment.

(ii) One of the following methods of cleaning and decontamination shall be used as appropriate.

(I) Manual cleaning. Manual cleaning of instruments at the sink is permitted.

(II) Ultrasonic cleaning. The water must be changed more than once a shift. The chambers shall be covered to prevent potential hazards to personnel from aerosolization of the contents.

(III) Washer-sterilizers. These machines must reach a temperature of 140 degrees Celsius (285 degrees Fahrenheit).

(IV) Washer-decontaminator machines.

(iii) All articles to be sterilized shall be arranged so all surfaces will be directly exposed to the sterilizing agent for the prescribed time and temperature.

(E) Packaging.

(i) All wrapped articles to be sterilized shall be packaged in materials recommended for the specific type of sterilizer and material to be sterilized, and to provide an effective barrier to microorganisms. Acceptable packaging includes peel pouches, perforated metal trays, or rigid trays. Muslin packs must be limited in size to 12 inches by 12 inches by 20 inches with a maximum weight of 12 pounds. Wrapped instrument trays must not exceed 17 pounds.

(ii) All items shall be labeled for each sterilizer load as to the date and time of sterilization, the sterilizing load number, and the equipment.

(F) External chemical indicators.

(i) External chemical indicators, also known as sterilization process indicators, shall be used on each package to be sterilized, including items being flash sterilized to indicate that items have been exposed to the sterilization process.

(ii) The indicator results shall be interpreted according to the manufacturer's written instructions and indicator reaction specifications.

(G) Biological indicators.

(i) The efficacy of the sterilizing process shall be monitored with reliable biological indicators appropriate for the type of sterilizer used.

(ii) Biological indicators shall be included in at least one run a month.

(iii) If a test is positive, the sterilizer shall immediately be taken out of service. A malfunctioning sterilizer shall not be put back into use until it has been serviced and successfully tested according to the manufacturer's recommendations.

(iv) All available items shall be recalled and reprocessed if a sterilizer malfunction is found; and a list of all items which were used after the last negative biological indicator test shall be submitted to the administrator.

(H) Sterilizers. Sterilizers shall be used according to manufacturer's written instructions.

(I) Maintenance of sterility.

(i) Items that are properly packaged and sterilized will remain sterile indefinitely unless the package becomes wet or torn, has a broken seal, is damaged in some way, or is suspected of being compromised.

(ii) All packages must be inspected before use. If a package is torn, wet, discolored, has a broken seal, or is damaged, the item may not be used. The item must be returned to sterile processing for reprocessing.

(J) Commercially packaged items. Commercially packaged items are considered sterile according to the manufacturer's instructions.

(K) Storage of sterilized items. The loss of sterility is event-related, not time related. The center shall ensure proper storage and handling of items in a manner that does not aid the compromise of the packaging of the product.

(i) Sterilized items shall be transported so as to maintain cleanliness, sterility, and to prevent physical damage.

(ii) Sterilized items shall be stored in well-ventilated, limited access areas with controlled temperature and humidity.

(iii) Sterilized items shall be positioned so that the packaging is not crushed, bent, compressed, or punctured.

(iv) Storage of supplies shall be in areas that are designated for storage.

(L) Disinfection.

(i) The manufacturer's written instructions for the use of disinfectants shall be followed.

(ii) An expiration date, determined according to manufacturer's written recommendations, shall be marked on the container of disinfection solution currently in use.

(iii) Disinfectant solutions shall be kept covered and used in well-ventilated areas.

(M) Performance records.

(i) Performance records for all sterilizers shall be maintained for each cycle. These records shall be retained and available for review for a minimum of two years.

(ii) Each sterilizer shall be monitored during operation for pressure, temperature, and time at desired temperature and pressure. A record shall be maintained either manually or machine generated and shall include:

(I) the sterilizer identification;

(II) sterilization date and time;

(III) load number;

(IV) duration and temperature of exposure phase;

(V) identification of operator(s);

(VI) results of biological tests and dates performed; and

(VII) time-temperature recording charts from each sterilizer.

(N) Preventive maintenance of all sterilizers shall be performed according to policy on a scheduled basis by qualified personnel, using the sterilizer manufacturer's service manual as a reference. A record shall be maintained for each sterilizer, retained at least two years, and shall be available for review.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

TRD-200705534
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 2, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 458-7111 x6972

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CHAPTER 140. HEALTH PROFESSIONS REGULATION

SUBCHAPTER F. CONTACT LENS DISPENSERS

25 TAC §§140.250 - 140.264

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts new §§140.250 -140.264, concerning contact lens dispensers, without changes to the proposed text as published in the September 7, 2007, issue of the *Texas Register* (32 TexReg 6025) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The adopted new rules are necessary to consolidate existing Professional Licensing and Certification Unit program rules in 25 TAC Chapter 140, Health Professions Regulation. The new rules transfer and update existing language and do not impose any new requirements or fees on applicants or permit holders.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 128.1 - 128.15 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed; however, the department is repealing the existing sections and readopting the rules in 25 TAC Chapter 140, Health Professions Regulation.

SECTION-BY-SECTION SUMMARY

Adopted new §140.250 sets forth purpose and scope of the rules. New §140.251 includes definitions for terms used within the rules. New §140.252 lists the fees required for issuance of a permit, renewal, and issuance of a duplicate permit. New §140.253 references the relevant Health and Human Services Commission rules on submitting a petition for rulemaking. New §140.254 sets forth standards for the sale or delivery of contact lenses and prescription verification. New §140.255 sets forth requirements for the display of the permit. New §140.256 describes application procedures and lists qualifications for a permit. New §140.257 provides timelines for the processing of initial and renewal applications and for refunds to be issued if the timelines are exceeded without sufficient cause. New §140.258 sets forth information concerning permit renewal and late renewal, including renewal procedures for a retired permit holder providing voluntary charity care and a permit holder on active military duty. New §140.259 covers procedures for changes of name or address, including the issuance of a duplicate permit. New §140.260 sets out procedures concerning complaints and investigations. New §140.261 lists violations and prohibited actions and actions the department may take against a person when violations have occurred. New §140.262 describes the procedures for informal disposition of a complaint. New §140.263 describes the procedures for formal hearings. New §140.264 sets out the guidelines and criteria on the eligibility of persons with criminal backgrounds to obtain a permit.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The adopted new rules are authorized by Occupations Code, §353.005, which authorizes the adoption of rules regarding contact lens dispensing permits; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Ex-

ecutive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the adopted sections implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

TRD-200705522
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: December 2, 2007
Proposal publication date: September 7, 2007
For further information, please call: (512) 458-7111 x6972

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER A. GENERAL RULES

34 TAC §3.9

The Comptroller of Public Accounts adopts an amendment to §3.9, concerning electronic filing of returns and reports; electronic transfer of certain payments by certain taxpayers, without changes to the proposed text as published in the September, 28, 2007, issue of the *Texas Register* (32 TexReg 6751).

This section is being amended to implement House Bill 11, 80th Legislature, 2007. Effective September 1, 2007, Tax Code, §§151.433, 154.212, and 155.105 are added to allow the Comptroller of Public Accounts to require wholesalers and distributors of beer, wine, malt liquor, cigarettes, cigars or tobacco products to electronically file with the comptroller a report each month of sales to retailers in this state. This requirement will apply to sales occurring on or after January 1, 2008, with first reports due on February 25, 2008. Subsection (c) is being amended to identify who must file the required reports, the information that must be reflected in the reports, penalties for certain taxpayers who fail to file a report and other information regarding the reports. Subsection (e) is being amended to reflect that the reporting requirement shall be effective without any additional notice to taxpayers. Subsection (f) is being amended to provide taxpayers the ability to request an alternative filing method.

We received a comment from Tax & Fiscal Consulting asking how essential clause (v) in subsection (c)(2)(A), (3)(A), and (4)(A) were to the proposed rule. These subsections require as part of a report "any other information deemed necessary by the comptroller for the efficient administration of this subsection." These subsections are essential to the proposed rule in order to allow the comptroller to request all information necessary to facilitate the filing of a report without specifically enumerating every single element. The language also gives the comptroller the flexibility to adjust to any changing circumstances of the industry that may occur over time. Further, Tax Code, §111.002(a), grants the comptroller the authority to adopt rules that do not conflict with the laws of this state or with the Texas or United States constitutions. Accordingly, the comptroller may require additional information for reports required by House Bill 11 to the extent those requirements do not conflict with the bill. The agency declined to amend the proposed rule.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§151.433, 154.212, 155.105.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

TRD-200705520
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: December 2, 2007
Proposal publication date: September 28, 2007
For further information, please call: (512) 475-0387

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SUBCHAPTER C. CRUDE OIL PRODUCTION TAX

34 TAC §3.40

The Comptroller of Public Accounts adopts an amendment to §3.40, concerning tax credit for enhanced efficiency equipment, without changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6754).

The amendment incorporates legislative changes in House Bill 3314, 80th Legislature, 2007, which amended Tax Code, Chapter 202. Subsection (b)(6) is amended accordingly to extend the end date of the tax credit for enhanced efficiency equipment to include equipment installed prior to September 1, 2013.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.102, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §202.062

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705389

Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: November 27, 2007
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For further information, please call: (512) 475-0387

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SUBCHAPTER G. CIGARETTE TAX

34 TAC §3.102

The Comptroller of Public Accounts adopts an amendment to §3.102, concerning applications, definitions, permits and reports, without changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6755).

This section is being amended to implement House Bill 11, 80th Legislature, 2007. Effective September 1, 2007, Tax Code, §154.212 was added to allow the Comptroller of Public Accounts to require wholesalers and distributors of cigarettes to electronically file with the comptroller a report each month of sales to retailers in this state. Subsection (f) is amended accordingly to refer affected taxpayers to §3.9 of this title for additional information regarding the reporting requirements. Subsection (f) is also amended to distinguish the filing date of the reports required by Tax Code, §154.212 from the filing date of other reports.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code §154.212

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200705517
Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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SUBCHAPTER H. CIGAR AND TOBACCO TAX

34 TAC §3.121

The Comptroller of Public Accounts adopts an amendment to §3.121, concerning definitions, imposition of tax, permits and reports, without changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6755).

This section is being amended to implement House Bill 11, 80th Legislature, 2007. Effective September 1, 2007, Tax Code, §155.105 was added to allow the Comptroller of Public Accounts to require wholesalers and distributors of cigars or tobacco products to electronically file with the comptroller a report each month of sales to retailers in this state. Subsection (h) is amended accordingly to refer affected taxpayers to §3.9 of this title for additional information regarding the reporting requirements.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002 which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §155.105.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200705518
Martin Cherry
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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SUBCHAPTER J. PETROLEUM PRODUCTS DELIVERY FEE

34 TAC §3.151

The Comptroller of Public Accounts adopts an amendment to §3.151, concerning imposition, collection, and bonds or other security of the fee, without changes to the proposed text as published in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6516).

The amendment is necessary to reflect the passage of House Bill 3554, 80th Legislature, 2007, that amended Texas Water Code, Chapter 26, to reduce the petroleum products delivery fee imposed on the withdrawal of petroleum products imported into Texas or withdrawn from bulk facilities and delivered into cargo tanks or barges.

Subsection (c) is being amended to implement the reduced fee rate schedule for fiscal years 2008, 2009, 2010 and 2011. The fee remains in effect through August 31, 2011.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendment implements Texas Water Code, §26.3574.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705386
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: November 27, 2007
Proposal publication date: September 21, 2007
For further information, please call: (512) 475-0387

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SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.286

The Comptroller of Public Accounts adopts an amendment to §3.286, concerning seller's and purchaser's responsibilities, without changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6756).

This section is being amended to implement House Bill 11, 80th Legislature, 2007. Effective September 1, 2007, Tax Code, §151.433 was added to allow the Comptroller of Public Accounts to require wholesalers and distributors of beer, wine and malt liquor to electronically file with the comptroller a report each month of sales to retailers in this state. New subsection (h) is added accordingly to refer affected taxpayers to §3.9 of this title for additional information regarding the reporting requirements. The remaining subsections are being relettered accordingly. Subsection (k)(2) is amended to correct a section name.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §151.433.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 12, 2007.

TRD-200705519
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: December 2, 2007
Proposal publication date: September 28, 2007
For further information, please call: (512) 475-0387

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34 TAC §3.337

The Comptroller of Public Accounts adopts an amendment to §3.337, concerning gratuities without changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6760).

The amendment to subsection (c)(2) clarifies that mandatory gratuity charges when in excess of 20% are subject to sales tax in total regardless of how they are disbursed. A misspelled word is corrected in subsection (a)(2).

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §151.007(c)(7).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2007.

TRD-200705430
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: November 28, 2007
Proposal publication date: September 28, 2007
For further information, please call: (512) 475-0387

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SUBCHAPTER S. MOTOR FUEL TAX

34 TAC §3.448

The Comptroller of Public Accounts adopts an amendment to §3.448, concerning transportation services for Texas public school districts, without changes to the proposed text as published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6765).

This amendment incorporates legislative changes in House Bill 3314, 80th Legislature, 2007, which amended Tax Code, Chapter 162 to authorize refunds of taxes paid on gasoline, diesel fuel and liquefied gas used by a metropolitan rapid transit authority to provide transportation services to a Texas public school district under a contract governed by Education Code, §34.008. This amendment also prescribes the records required to be kept and the information required to be submitted by a metropolitan rapid transit authority to support a refund and examples on calculating refund. Subsection (h) is amended accordingly.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of Tax Code, Title 2.

The amendment implements Tax Code, §§162.104, 162.125, 162.1275 162.204, 162.227, 162.2275, 162.3021 and 162.3022.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 7, 2007.

TRD-200705390
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: November 27, 2007
Proposal publication date: September 28, 2007
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 403. CRIMINAL CONVICTIONS AND ELIGIBILITY FOR CERTIFICATION

37 TAC §§403.1, 403.3, 403.11

The Texas Commission on Fire Protection (the Commission) adopts, without changes, the amendments to Chapter 403, Criminal Convictions and Eligibility for Certification; §403.1, Purpose; §403.3, Scope; §403.11, Procedures for Suspension, Revocation, or Denial of a Certificate to Persons with Criminal Backgrounds. These amendments are adopted without changes to the proposed text as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4331) and will not be republished.

The justification for adopting these amendments is to insert additional language allowing the Commission to investigate charges of a sexual nature, to correct grammar and punctuation, and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to establish guidelines and criteria regarding persons being charged with a crime of a sexual nature and to correct any grammatical or punctuation errors.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.036 of the Texas Government Code, which allows the Commission to revoke or suspend a certificate.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2007.

TRD-200705446
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: November 28, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 936-3838

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CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.1, §421.3

The Texas Commission on Fire Protection (the Commission) adopts, with changes, the amendments to Chapter 421, Standards for Certification, §421.1, Procedures for Meetings and §421.3, Minimum Standards Set by the Commission. These amendments are adopted with changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4529) and will be republished.

The justification of posting these adopted amendments is to update language, make grammatical and punctuation corrections, capitalize the word "c" in Commission when referring to the Texas Commission on Fire Protection, and establish qualification criteria for fire protection personnel.

No comments were received from the public regarding the proposed amendments.

The purpose of these adopted amendments is to quantify the qualifications for fire protection personnel.

These amendments are adopted under §419.032 of the Texas Government Code, which allows the Commission to establish qualifications for hiring fire protection personnel.

§421.1. Procedures for Meetings.

(a) Time and place. The Fire Fighter Advisory Committee and the Curriculum and Testing Committee shall meet at such time and place in the State of Texas as they deem proper. The Fire Fighter Advisory Committee shall meet at least twice each calendar year.

(b) Meeting called. Meetings shall be called by the chairman, by the Commission, or upon the written request of five members.

(c) Quorum. A majority of members shall constitute a quorum.

(d) Members. The Fire Fighter Advisory Committee shall consist of nine members appointed by the Commission. The Curriculum and Testing Committee shall consist of members appointed by the Commission upon the recommendation of the Fire Fighter Advisory Committee. Committee members serve at the will of the Commission.

(e) Officers. Officers of the Fire Fighter Advisory Committee and the Curriculum and Testing Committee shall consist of a chairman, vice-chairman, and secretary. Each committee shall elect its officers from the appointed members at its first meeting and thereafter at its first meeting following January 1 of each year or upon the vacancy of an office.

(f) Responsibility. The Fire Fighter Advisory Committee shall review Commission rules relating to fire protection personnel and fire departments and recommend changes in the rules to the Commission.

(g) Effective Date. Rules shall become effective no sooner than 20 days after filing with the Texas Register for final adoption. The committee or Commission may recommend a later effective date.

(h) Removal. It is a ground for removal from an advisory committee appointed by the Commission if a member is absent from more than half of the regularly scheduled committee meetings that the member is eligible to attend during a calendar year unless the absence is excused by a majority vote of the committee.

§421.3. Minimum Standards Set by the Commission.

(a) General statement. It shall be clearly understood that the specified minimum standards herein described are designated as a minimum program. Employing entities are encouraged to exceed the minimum program wherever possible. Continuous in-service training beyond the minimum standards for fire protection personnel is strongly recommended. Nothing in these regulations shall limit or be construed as limiting the powers of the Civil Service Commission, or the employing entity, to enact rules and regulations which establish a higher standard of training than the minimum specified, or which provides for the termination of the services of unsatisfactory employees during or upon completion of the prescribed probationary period.

(b) Functional position descriptions.

(1) Structural fire protection personnel. The following general position description for structural fire protection personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the fire fighter operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. Successfully complete a Commission-approved course; achieve a passing score on written and performance certification examinations; must be at least 18 years of age; generally, the knowledge and skills required show the need for a high school education or equivalent; ability to communicate verbally, via telephone and radio equipment; ability to lift, carry, drag, and balance weight equivalent to the average human weight; ability to interpret in English, written and oral instructions; ability to work effectively in high stress situations; ability to work effectively in an environment with loud noises and flashing lights; ability to function through an entire work shift; ability to calculate weight and volume ratios; ability to read and understand English language manuals including chemical, medical and technical terms, and road maps; ability to accurately discern street signs and address numbers; ability to document in English, all relevant information in prescribed format in light of legal ramifications of such; ability to converse in English with coworkers and other emergency response personnel. Good manual dexterity with ability to perform all tasks related to the protection of life and property; ability to bend, stoop, and crawl on uneven surfaces; ability to withstand varied environmental conditions such as extreme heat, cold, and moisture; and ability to work in low or no light, confined spaces, elevated heights and other dangerous environments.

(B) Competency. A basic fire fighter must demonstrate competency handling emergencies utilizing equipment and skills in accordance with the objectives in Chapter 1 of the Commission's Certification Curriculum Manual.

(2) Aircraft rescue fire fighting personnel. The following general position description for aircraft rescue fire fighting personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of aircraft rescue fire fighting personnel operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection personnel: familiarity with geographic and physical components of an airport; ability to use and understand communication equipment, terminology, and procedures utilized by airports; ability and knowledge in the application of fire suppression agents; and ability to effectively perform fire suppression and rescue operations.

(B) Competency. Basic fire fighting and rescue personnel must demonstrate competency handling emergencies utilizing equipment and skills in accordance with the objectives in Chapter 2 of the Commission's Certification Curriculum Manual.

(3) Marine fire protection personnel. The following general position description for marine fire protection personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the marine fire fighter operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection personnel: familiarity with geographic and physical components of a navigable waterway; ability to use and understand communication equipment, terminology, and procedures used by the maritime industry; and knowledge in the operation of fire fighting vessels.

(B) Competency. A marine fire fighter must demonstrate competency in handling emergencies utilizing equipment and skills in accordance with the objectives in Chapter 3 of the Commission's Certification Curriculum Manual.

(4) Fire inspection personnel. The following general position description for fire inspection personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the fire inspector operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. Successfully complete a Commission-approved course; achieve a passing score on certification examinations; must be at least 18 years of age; generally, the knowledge and skills required to show the need for a high school education or equivalent; ability to communicate verbally, via telephone and radio equipment; ability to lift, carry, and balance weight equivalent to weight of common tools and equipment necessary for conducting an inspection; ability to interpret written and oral instructions; ability to work effectively with the public; ability to work effectively in an environment with potentially loud noises; ability to function through an entire work shift; ability to calculate area, weight and volume ratios; ability to read and understand English language manuals including chemical, construction and technical terms, building plans and road maps; ability to accurately discern street signs and address numbers; ability to document, in writing, all relevant information in a prescribed format in light of legal ramifications of such; ability to converse in English with coworkers and other personnel. Demonstrate knowledge of characteristics and behavior of fire, and fire prevention principles. Good manual dexterity with the ability to perform all tasks related to the inspection of structures and property; ability to bend, stoop, and crawl on uneven surfaces; ability to climb ladders; ability to withstand varied environmental conditions such as extreme heat, cold, and moisture; and the ability to work in low light, confined spaces, elevated heights, and other dangerous environments.

(B) Competency. A fire inspector must demonstrate competency in conducting inspections utilizing equipment and skills in accordance with the objectives in Chapter 4 of the Commission's Certification Curriculum Manual.

(5) Fire Investigator personnel. The following general position description for fire investigator personnel serves as a guide for anyone interested in understanding the qualifications, competencies,

and tasks required of the fire investigator operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. Successfully complete a Commission-approved course; achieve a passing score on certification examinations; be at least 18 years of age; generally, the knowledge and skills required to show the need for a high school education or equivalent; ability to communicate verbally, via telephone and radio equipment; ability to lift, carry, and balance weight equivalent to weight of common tools and equipment necessary for conducting an investigation; ability to interpret written and oral instructions; ability to work effectively with the public; ability to work effectively in a hazardous environment; ability to function through an entire work shift; ability to calculate area, weight and volume ratios; ability to read and understand English language manuals including chemical, legal and technical terms, building plans and road maps; ability to accurately discern street signs and address numbers; ability to document, in writing, all relevant information in a prescribed format in light of legal ramifications of such; ability to converse in English with coworkers and other personnel. Good manual dexterity with the ability to perform all tasks related to fire investigation; ability to bend, stoop, and walk on uneven surfaces; ability to climb ladders; ability to withstand varied environmental conditions such as extreme heat, cold and moisture; and the ability to work in low light, confined spaces, elevated heights, and other potentially dangerous environments.

(B) Competency. A fire investigator or arson investigator must demonstrate competency in determining fire cause and origin utilizing equipment and skills in accordance with the objectives in Chapter 5 of the Commission's Certification Curriculum Manual.

(6) Hazardous Materials Technician personnel. The following general position description for hazardous materials personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the hazardous materials technician operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection personnel: successfully complete a Commission-approved course; achieving a passing score on the certification examination; the ability to analyze a hazardous materials incident, plan a response, implement the planned response, evaluate the progress of the planned response, and terminate the incident.

(B) Competency. A hazardous materials technician must demonstrate competency handling emergencies resulting from releases or potential releases of hazardous materials, using specialized chemical protective clothing and control equipment in accordance with the objectives in Chapter 6 of the Commission's Certification Curriculum Manual.

(7) Driver/Operator--Pumper personnel. The following general position description for driver/operator--pumper personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the driver/operator--pumper of a fire department pumper operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection personnel: ability to perform specified routine test, inspection, and maintenance functions; ability to perform practical driving exercises; ascertain the expected fire flow; ability to position a fire department pumper to operate at a fire hydrant; ability to produce effective streams; and supply sprinkler and standpipe systems.

(B) Competency. A driver/operator--pumper must demonstrate competency operating a fire department pumper in accordance with the objectives in Chapter 7 of the Commission's Certification Curriculum Manual.

(8) Fire Officer I personnel. The following general position description for Fire Officer I personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Officer I operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for basic structural fire protection and Fire Instructor I personnel: the ability to supervise personnel, and assign tasks at emergency operations; the ability to direct personnel during training activities; the ability to recommend action for member-related problems; the ability to coordinate assigned tasks and projects, and deal with inquiries and concerns from members of the community; the ability to implement policies; the ability to perform routine administrative functions, perform preliminary fire investigation, secure an incident scene and preserve evidence; the ability to develop pre-incident plans, supervise emergency operations, and develop and implement action plans; the ability to deploy assigned resources to ensure a safe work environment for personnel, conduct initial accident investigation, and document an incident.

(B) Competency. A Fire Officer I must demonstrate competency in handling emergencies and supervising personnel utilizing skills in accordance with the objectives in Chapter 9 of the Commission's Certification Curriculum Manual.

(9) Fire Officer II personnel. The following general position description for Fire Officer II personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Officer II operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to the qualifications for Fire Officer I and Fire Instructor I personnel: the ability to motivate members for maximum job performance; the ability to evaluate job performance; the ability to deliver life safety and fire prevention education programs; the ability to prepare budget requests, news releases, and policy changes; the ability to conduct pre-incident planning, fire inspections, and fire investigations; the ability to supervise multi-unit emergency operations, identify unsafe work environments or behaviors, review injury, accident, and exposure reports.

(B) Competency. A Fire Officer II must demonstrate competency in supervising personnel and coordinating multi-unit emergency operations utilizing skills in accordance with the objectives in Chapter 9 of the Commission's Certification Curriculum Manual.

(10) Fire Service Instructor I personnel. The following general position description for Fire Service Instructor I personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Service Instructor I operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to successfully completing a Commission-approved course and achieving a passing score on the certification examination: must have the ability to deliver instructions effectively from a prepared lesson plan; the ability to use instructional aids and evaluation instruments; the ability to adapt to lesson plans to the unique requirements of both student and the jurisdictional authority; the ability to organize the learning environment to its maxi-

mum potential; the ability to meet the record-keeping requirements of the jurisdictional authority.

(B) Competency. A Fire Service Instructor I must demonstrate competency in delivering instruction in an environment organized for efficient learning while meeting the record-keeping needs of the authority having jurisdiction, utilizing skills in accordance with the objectives in Chapter 8 of the Commission's Certification Curriculum Manual.

(11) Fire Service Instructor II personnel. The following general position description for Fire Service Instructor II personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Service Instructor II operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to successfully completing a Commission-approved course, achieving a passing score on the certification examination, and meeting the qualifications for Fire Service Instructor I: the ability to develop individual lesson plans for a specific topic, including learning objectives, instructional aids, and evaluation instruments; the ability to schedule training sessions based on the overall training plan of the jurisdictional authority; the ability to supervise and coordinate the activities of other instructors.

(B) Competency. A Fire Service Instructor II must demonstrate competency in developing individual lesson plans; scheduling training sessions; and supervising other instructors, utilizing skills in accordance with the objectives in Chapter 8 of the Commission's Certification Curriculum Manual.

(12) Fire Service Instructor III personnel. The following general position description for Fire Service Instructor III personnel serves as a guide for anyone interested in understanding the qualifications, competencies, and tasks required of the Fire Service Instructor III operating in the State of Texas. It is ultimately the responsibility of an employer to define specific job descriptions within each jurisdiction.

(A) Qualifications. In addition to successfully completing a Commission-approved course, achieving a passing score on the certification examination, and meeting the qualifications for Fire Service Instructor II: the ability to develop comprehensive training curricula and programs for use by single or multiple organizations; the ability to conduct organizational needs analysis; and the ability to develop training goals and implementation strategies.

(B) Competency. A Fire Service Instructor III must demonstrate competency in developing comprehensive training curricula and programs; conducting organizational needs analysis; and developing training goals and implementation strategies, utilizing skills in accordance with the objectives in Chapter 8 of the Commission's Certification Curriculum Manual.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 423. FIRE SUPPRESSION
SUBCHAPTER A. MINIMUM STANDARDS FOR STRUCTURE FIRE PROTECTION PERSONNEL CERTIFICATION

37 TAC §423.3, §423.5

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 423, Fire Suppression; Subchapter A, §423.3, Minimum Standards for Basic Structure Fire Protection Personnel Certification; §423.5, Minimum Standards for Intermediate Structure Fire Protection Personnel Certification. Section 423.3 is adopted with changes to the proposed text and will be republished. Section 423.5 is adopted without changes to the proposed text in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4531) and will not be republished.

The purpose of posting these amendments is to establish minimum standards for certification of basic structure fire protection personnel certification, clarify and update language, make grammatical and punctuation corrections, and capitalize the word "c" in Commission when referring to the Texas Commission on Fire Protection.

These adopted amendments ensure that applicants meet the specified medical, fire science and fire technology criteria for basic fire structure fire protection personnel.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.032 of the Texas Government Code, which allows the Commission to establish minimum standards and qualification criteria for fire protection personnel.

§423.3. Minimum Standards for Basic Structure Fire Protection Personnel Certification.

(a) In order to become certified as basic structure fire protection personnel, an individual must:

(1) possess valid documentation of accreditation from the International Fire Service Accreditation Congress as a Fire Fighter I, Fire Fighter II, First Responder Awareness, and First Responder Operations, and meet the medical requirements outlined in §423.1(b) of this title; or

(2) complete a Commission-approved basic structure fire suppression program, meet the medical requirements outlined in §423.1(b), and successfully pass the Commission examination(s) as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved basic structure fire suppression program shall consist of one or any combination of the following:

(A) completion of a Commission-approved Basic Fire Suppression Curriculum, as specified in Chapter 1 of the Commission's Certification Curriculum Manual; or

(B) completion of the five phase levels of the approved Basic Fire Suppression Curriculum, as specified in Chapter 1 of the Commission's Certification Curriculum Manual; or

(C) completion of an out-of-state, and/or military training program deemed equivalent to the Commission-approved Basic Fire Suppression Curriculum; or

(D) documentation of the receipt of an advanced certificate or training records from the State Firemen's and Fire Marshals' Association of Texas, that is deemed equivalent to a Commission-approved Basic Fire Suppression Curriculum.

(b) A basic fire suppression program may be submitted to the Commission for approval by another jurisdiction as required in Texas Government Code, §419.032(d), Appointment of Fire Protection Personnel. These programs include out-of-state and military programs, and shall be deemed equivalent by the Commission if the subjects taught, subject content, and total hours of training meet or exceed those contained in Chapter 1 of the Commission's Certification Curriculum Manual.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. MINIMUM STANDARDS FOR AIRCRAFT RESCUE FIRE FIGHTING PERSONNEL

37 TAC §§423.201, 423.203, 423.209

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 423, Fire Suppression; Subchapter B, §423.201, Minimum Standards for Aircraft Rescue Fire Fighting Personnel; §423.203, Minimum Standards for Basic Aircraft Rescue Fire Fighting Personnel Certification; §423.209, Minimum Standards for Master Aircraft Rescue Fire Fighting Personnel Certification. Section 423.201 is adopted with changes to the proposed text and will be republished. Section 423.203 and §423.209 are adopted without changes to the proposed text as published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4532) and will not be republished.

The purpose of posting these amendments is to establish minimum standards for certification of aircraft rescue fire fighting personnel, clarify and update language, make grammatical and punctuation corrections, and capitalize the word "c" in Commission when referring to the Texas Commission on Fire Protection.

These adopted amendments ensure that applicants meet the specified medical, fire science and fire technology criteria for aircraft rescue fire protection personnel.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.038 of the Texas Government Code, which allows the Commission to establish minimum standards and qualification criteria for appointing individuals to aircraft rescue fire protection appointments.

§423.201. Minimum Standards for Aircraft Rescue Fire Fighting Personnel.

(a) Aircraft rescue fire fighting personnel are employees of a local governmental entity who are appointed to aircraft rescue firefighting duties. These duties may include fighting aircraft fires at airports, standing by for potential crash landings, and performing aircraft rescue and fire fighting duties.

(b) Personnel appointed as for Aircraft Rescue Fire Fighting Personnel must be certified to at least the basic level by the Commission within one year from their employment in an for Aircraft Rescue Fire Fighting Personnel position.

(c) Prior to being appointed to aircraft rescue fire suppression duties, all personnel must:

(1) successfully complete a Commission-approved basic fire suppression course and pass the Commission's examination pertaining to that curriculum; and

(2) successfully complete a Commission-approved basic aircraft rescue fire protection course and pass the Commission's examination pertaining to that curriculum.

(d) "Stand by" means the act of responding to a designated position in the movement area on the airfield at which initial response fire and rescue units will await the arrival of an aircraft experiencing an announced emergency.

(e) "Movement area" is comprised of all runways, taxiways, and other areas of the airport which are used for taxiing or hover taxiing, take-off, and landing of aircraft, exclusive of loading ramps and aircraft parking areas.

(f) Personnel holding any level of aircraft rescue fire fighting personnel certification shall be required to comply with the continuing education specified in §441.9 of this title (relating to Continuing Education for Aircraft Rescue Fire Fighting Personnel).

(g) Aircraft rescue fire fighting personnel that perform structure fire fighting duties must be certified, as a minimum, as basic structural fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. MINIMUM STANDARDS FOR MARINE FIRE PROTECTION PERSONNEL

37 TAC §§423.301, 423.303, 423.305, 423.309

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 423, Fire Suppression; Subchapter C, §423.301, Minimum Standards For Marine Fire Protection Personnel; §423.303, Minimum Standards For

Basic Marine Fire Protection Personnel Certification; §423.305, Minimum Standards For Intermediate Marine Fire Protection Personnel Certification; §423.309, Minimum Standards for Master Marine Fire Protection Personnel Certification. Section 423.301 and §423.303 are adopted with changes to the proposed text and will be republished. Section 423.305 and §423.309 are adopted without changes to the text published in the July 20, 2007, issue of the *Texas Register*(32 TexReg 4533) and will not be republished.

The purpose of posting these amendments is to establish minimum standards for certification of basic, intermediate and master marine fire protection personnel, clarify and update language, make grammatical and punctuation corrections, and capitalize the word "c" in Commission when referring to the Texas Commission on Fire Protection.

These adopted amendments ensure that applicants meet the specified medical, fire science and fire technology criteria for marine fire protection personnel.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.037 of the Texas Government Code, which allows the Commission to establish minimum standards and qualification criteria for marine fire protection personnel.

§423.301. Minimum Standards For Marine Fire Protection Personnel.

(a) Marine fire protection personnel are employees of a local governmental entity who work aboard a fire boat with a minimum pumping capacity of 2,000 gallons per minute, and fight fires that occur on or adjacent to a waterway, waterfront, channel, or turning basin.

(b) Fire protection personnel of any local government entity, who are appointed marine fire protection duties, must be certified by the Commission within one year from the date of their appointment in a marine fire protection personnel position.

(c) Prior to being appointed to marine fire suppression duties, all personnel must:

(1) successfully complete a Commission-approved basic fire suppression course and pass the Commission's examination pertaining to that curriculum; and

(2) successfully complete a Commission-approved basic marine fire suppression course and pass the Commission's examination pertaining to that curriculum.

(d) Personnel holding any level of Marine Fire Protection Personnel certification shall be required to comply with the continuing education specified in §441.11 of this title (relating to Continuing Education for Marine Fire Protection Personnel).

§423.303. Minimum Standards For Basic Marine Fire Protection Personnel Certification.

(a) In order to obtain a basic Marine Fire Protection Personnel Certification the individual must:

(1) hold a Basic Structure Fire Protection Personnel Certification;

(2) complete a training program specific to marine fire protection consisting of one of the following:

(A) complete the Commission-approved Basic Marine Fire Protection Curriculum as specified in Chapter 3, of the Commission's Certification Curriculum Manual.

(B) An out-of-state, and/or military training program that has been submitted to the Commission for evaluation and found to be equivalent to or exceed the Commission-approved Basic Marine Fire Protection Curriculum; or

(3) successfully pass the Commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification) prior to assignment.

(b) A person who holds, or is eligible to hold, a certificate upon employment as a part-time marine fire protection personnel may be certified as a marine fire protection personnel, of the same level of certification, without meeting the applicable examination requirements.

(c) If a person holds a current certification as a part-time marine fire protection personnel, the Texas Department of State Health Services emergency care attendant certification may be satisfied by documentation of equivalent training or certification in lieu of current certification by the Texas Department of State Health Services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 425. FIRE SERVICE INSTRUCTORS

37 TAC §425.7, §425.11

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 425, Fire Service Instructors; §425.7, Minimum Standards for Fire Service Instructor III Certification; §425.11, International Fire Service Accreditation Congress Seal. These amendments are adopted without changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4534) and will not be republished.

The justification for adopting these amendments is to remove outdated expiration dates to individual holders of the IFSAC seal who pass applicable examinations for Fire Instructor I, II and III, and to correct grammar and punctuation, and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of this section is to establish the requirements needed for individual holders of the IFSAC seal.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.032 of the Texas Government Code, which allows the Commission to appoint fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 427. TRAINING FACILITY CERTIFICATION

SUBCHAPTER A. ON-SITE CERTIFIED TRAINING PROVIDER

37 TAC §427.15

The Texas Commission on Fire Protection (the Commission) adopts the repeal of Chapter 427, Training Facility Certification, Subchapter A, On-site Certified Training Provider, consisting of the following section: §427.15, Testing Procedures. This repeal is adopted without changes to the proposal as published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4535) and will not be republished.

The Commission adopts the repeal of §427.15, Testing Procedures, because this rule for on-site training providers has become outdated.

No comments were received from the public regarding this adopted repeal.

This repeal is adopted under Texas Government Code, §419.28, which provides the Commission with the authority to set standards for training programs and instructors.

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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37 TAC §427.18, §427.19

The Texas Commission on Fire Protection (the Commission) adopts amendments to Chapter 427, Subchapter A, §427.18, Live Fire Training Evolutions, and §427.19, General Information, proposed in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4535). Section 427.18 is adopted with changes to the proposal and will be republished. Section 427.19 is adopted without changes and will not be republished.

The justification for adopting these amendments is to correct grammatical and punctuation errors, and to capitalize the letter "c" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to correct grammatical and punctuation errors, and to capitalize the letter "c" when referring to the Texas Commission on Fire Protection.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.082 of the Texas Government Code, which allows the Commission to make nonsubstantive clerical changes to a rule.

§427.18. Live Fire Training Evolutions.

The most current edition of NFPA 1403, Standard on Live Fire Training Evolutions, shall be used as a guide when developing standard operating procedures for conducting live fire training. The following requirements shall apply for all Live Fire Training Evolutions conducted during basic certification training of fire protection personnel.

(1) Prior to being permitted to participate in Live Fire Training Evolutions, the student shall have received training to meet the performance requirements for Fire Fighting I in NFPA 1001, Standard for Fire Fighter Professional Qualifications, related to the following subjects:

(A) safety;

(B) fire behavior;

(C) portable extinguishers;

(D) personal protective equipment;

(E) ladders;

(F) fire hose, appliances, and streams;

(G) overhaul;

(H) water supply;

(I) ventilation; and

(J) forcible entry.

(2) The on-site lead instructor will insure that the water supply rate and duration for each individual Live Fire Training Evolution is adequate to control and extinguish the training fire, the supplies necessary for backup lines to protect personnel, and any water needed to protect exposed property.

(3) The on-site lead instructor will insure that the buildings or props being utilized for live fire training are in a condition that would not pose an undue safety risk.

(4) A safety officer shall be appointed for all Live Fire Training Evolutions. The safety officer shall have the authority, regardless of rank, to intervene and control any aspect of the operations when, in his or her judgment, a potential or actual danger, accident, or unsafe condition exists. The safety officer shall not be assigned other duties that interfere with safety responsibilities. The safety officer shall not be a student.

(5) No person(s) shall play the role of a victim inside the building.

(6) The participating student-to-instructor ratio shall not be greater than five to one.

(7) Prior to the ignition of any fire, instructors shall insure that all personal protective clothing and/or self-contained breathing apparatus are NFPA compliant and being worn in the proper manner.

(8) Prior to conducting any live fire training, a pre-burn briefing session shall be conducted. All participants shall be required to conduct a walk-through of the structure in order to have a knowledge of, and familiarity with, the layout of the building and to be able to facilitate any necessary evacuation of the building.

(9) A standard operating procedure shall be developed and utilized for Live Fire Training Evolutions. The standard operating procedure shall include, but not be limited to:

(A) a Personal Alert Safety System (PASS). A PASS device shall be provided for all students and instructors participating in live fire training and shall meet the requirements in §435.9 of this title (relating to PASS devices). This applies whether the PASS device is provided by the academy or the trainee;

(B) a Personnel Accountability System that complies with §435.13 of this title shall be utilized;

(C) an Incident Management System;

(D) use of personal protective clothing and self-contained breathing apparatus;

(E) an evacuation signal and procedure; and pre-burn, burn and post-burn procedures.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. DISTANCE TRAINING PROVIDER

37 TAC §427.205

The Texas Commission on Fire Protection (the Commission) adopts the repeal of Chapter 427, Training Facility Certification, Subchapter B, Distance Training Provider, consisting of the following section: §427.205, Testing Procedures. This repeal is adopted without changes to the proposal as published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4536) and will not be republished.

The Commission adopts the repeal of §427.205, Testing Procedures, because this rule for on-site training providers has become obsolete.

No comments were received from the public regarding this adopted repeal.

This repeal is adopted under Texas Government Code, §419.28, which provides the Commission with the authority to set standards for training programs and instructors.

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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37 TAC §427.209

The Texas Commission on Fire Protection (the Commission) adopts, without changes, the amendments to Chapter 427, Training Facility Certification; Subchapter B, §427.209, General Information. These amendments are adopted without changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4536) and will not be republished.

The justification for adopting these amendments is to correct grammatical and punctuation errors, and to capitalize the letter "c" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to correct grammatical and punctuation errors, and to capitalize the letter "c" when referring to the Texas Commission on Fire Protection.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.082 of the Texas Government Code, which allows the Commission to make nonsubstantive clerical changes to a rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 429. MINIMUM STANDARDS FOR FIRE INSPECTORS

The Texas Commission on Fire Protection (the Commission) adopts with changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4537), the amendments to Chapter 429, Minimum Standards for Fire Inspectors, Subchapter B, §429.201, Minimum Standards for Fire Inspector Personnel--New Track and will be republished.

Subchapter A, §429.1, Minimum Standards for Fire Inspection Personnel and Subchapter B, §429.203, Minimum Standards for Basic Fire Inspector Certification--New Track of Subchapter B are adopted without changes and will not be republished.

The justification for adopting these amendments is to remove expired or outdated information, correct grammar and punctuation, and capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to assure that the minimum standards are being met for fire protection personnel.

No comments were received from the public regarding the proposed amendments.

SUBCHAPTER A. MINIMUM STANDARDS FOR FIRE INSPECTOR CERTIFICATION BASED ON REQUIREMENTS IN EFFECT PRIOR TO JANUARY 1, 2005

37 TAC §429.1

These amendments are being adopted under §419.032 of the Texas Government Code, which allows the Commission to establish minimum qualifications for fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE INSPECTOR CERTIFICATION

37 TAC §429.201, §429.203

These amendments are being adopted under §419.032 of the Texas Government Code, which allows the Commission to establish minimum qualifications for fire protection personnel.

§429.201. Minimum Standards for Fire Inspector Personnel--New Track.

(a) Fire protection personnel of a governmental entity who are appointed to fire code enforcement duties must be certified, as a minimum, as a basic fire inspector as specified in §429.203 of this title (relating to Minimum Standards for Basic Fire Inspector Certification--New Track) within one year of initial appointment to such position.

(b) Prior to being appointed to fire code enforcement duties, all personnel must complete a Commission-approved basic fire inspection training program and successfully pass the Commission examination pertaining to that curriculum.

(c) Individuals holding any level of fire inspector certification shall be required to comply with the continuing education requirements in §441.13 of this title (relating to Continuing Education for Fire Inspection Personnel).

(d) Code enforcement is defined as the enforcement of laws, codes, and ordinances of the authority having jurisdiction pertaining to fire prevention.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 8, 2007.

TRD-200705458
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Effective date: November 28, 2007
Proposal publication date: July 20, 2007
For further information, please call: (512) 936-3838

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CHAPTER 433. MINIMUM STANDARDS FOR DRIVER/OPERATOR-PUMPER

37 TAC §433.3, §433.5

The Texas Commission on Fire Protection (the Commission) adopts, without changes, the amendments to Chapter 433, Minimum Standards for Driver/Operator-Pumper; §433.3, Minimum Standards for Driver/Operator-Pumper Certification; and §433.5, Examination Requirements. These amendments are adopted without changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4538) and will not be republished.

The justification for adopting these amendments is to correct grammar and punctuation, and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection and to move subsection "(c)" under Examination Requirements, which refers to examinations in the subsection, instead of minimum standards.

The purpose of these adopted amendments is to correct grammar and punctuation, and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection and to move subsection "(c)" under Examination Requirements instead of minimum standards.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.036 of the Texas Government Code, which allows the Commission to establish minimum qualifications and training programs for fire fighter personnel.

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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Gary L. Warren, Sr.
Executive Director
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CHAPTER 435. FIRE FIGHTER SAFETY

37 TAC §435.3

The Texas Commission on Fire Protection (Commission) adopts an amendment to §435.3 pertaining to self-contained breathing apparatus. The amendment was proposed in the July 20, 2007, issue of *Texas Register* (32 TexReg 4539) and is adopted without changes. The rule text will not be republished. An emergency amendment to §435.3, published in the June 22, 2007, issue of the *Texas Register* (32 TexReg 3771), expired on October 4, 2007.

This section establishes requirements for employing entities to ensure that all self-contained breathing apparatus comply with NFPA standards.

This amendment has been adopted in order to ensure the safety of the end user by making sure that all self-contained breathing apparatus is updated and meets the current standards in effect at the time the entity contracts for new, rebuilt or used, self-contained breathing apparatus per the requirements of the National Fire Protection Association's standards.

No comments were received from the public regarding the proposed amendment.

This amendment has been adopted under Texas Government Code §419.041, which provides the Commission with the authority to ensure that the safety standards are met regarding all self-contained breathing apparatus per the requirements of the National Fire Protection Association's standards.

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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For further information, please call: (512) 936-3838

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37 TAC §435.19

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 435, Fire Fighter Safety; §435.19, Enforcement of Commission Rules. These amendments are adopted without changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4540) and will not be republished.

The justification for adopting these amendments is to make it known to fire departments, throughout the state of Texas, that there will be no prior notification regarding inspections; grammatical and punctuation corrections, and capitalize the letter "c" in the word "commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to establish guidelines for fire departments regarding pre-notification of inspections.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.027 of the Texas Government Code, which allows the Commission to at least, biennially, visit and inspect institutions or facilities conducting courses for fire protection personnel.

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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For further information, please call: (512) 936-3838

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CHAPTER 437. FEES

37 TAC §437.13

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 437, Fees; §437.13, Basic Certification Examination Fees. These amendments are adopted without changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4540) and will not be republished.

The justification for adopting these amendments is to clarify and correct grammar and punctuation, and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to clarify the rule exceptions to students who fail the first test and must retake the test the same day.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.082 of the Texas Government Code, which allows the Commission to make non-substantive clerical changes to a rule.

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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Gary L. Warren, Sr.
Executive Director
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For further information, please call: (512) 936-3838

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37 TAC §437.19

The Texas Commission on Fire Protection (the Commission) adopts the repeal of Chapter 437, Fees, consisting of the following section: §437.19, Late Filing Penalty. This repeal is adopted without changes to the proposal as published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4541) and will not be republished.

The Commission adopts the repeal of §437.19, Late Filing Penalty, because there are no late filing penalties.

No comments were received from the public regarding this repeal.

This repeal is adopted under Texas Government Code, §419.026, which provides the Commission with the authority to set fees for examinations and certificates.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 451. FIRE OFFICER

SUBCHAPTER A. MINIMUM STANDARDS FOR FIRE OFFICER I

37 TAC §451.3

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 451, Fire Officer; Subchapter A, §451.3, Minimum Standards for Fire Officer I. These amendments are adopted without changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4541) and will not be republished.

The justification for adopting these amendments is to remove redundant information regarding the completion of a military training program; to correct grammar and punctuation, and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to insure minimum standards are established for Fire Officer I certifications.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.028 of the Texas Government Code, which allows the Commission to certify persons as qualified fire protection personnel instructors.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. MINIMUM STANDARDS FOR FIRE OFFICER II

37 TAC §451.203, §451.207

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 451, Fire Officer; Subchapter B, §451.203, Minimum Standards for Fire Officer II Certification; §451.207, International Fire Service Accreditation Congress (IFSAC) Seal. These amendments are adopted without changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4542) and will not be republished.

The justification for adopting these amendments is to remove redundant information regarding the completion of a military training program; to correct grammar and punctuation, and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to insure minimum standards are established for Fire Officer II certifications and IFSAC Seals.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.028 of the Texas Government Code, which allows the Commission to certify persons as qualified fire protection personnel instructors.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 453. MINIMUM STANDARDS FOR HAZARDOUS MATERIALS TECHNICIAN

37 TAC §§453.1, 453.3, 453.5

The Texas Commission on Fire Protection (the Commission) adopts, with changes, the amendments to Chapter 453, Minimum Standards for Hazardous Materials Technician, §453.1, Hazardous Materials Technician Certification; §453.3, Minimum Standards for Hazardous Materials Technician Certification; and §453.5, Examination Requirements. These amendments are adopted with changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4542) and will be republished.

The justification for adopting these amendments is to clarify minimum standards for hazardous materials technician language, to correct grammar and punctuation, and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to establish minimum standard examination requirements for hazardous materials technician certifications.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.029 of the Texas Government Code, which provides the Commission with the authority to establish curriculum requirements for training fire protection personnel.

§453.1. Hazardous Materials Technician Certification.

(a) A Hazardous Materials Technician is defined as an individual who performs emergency response to an occurrence which results in, or is likely to result in, an uncontrolled release of a hazardous substance where there is a potential safety or health hazard (i.e., fire, explosion, or chemical exposure). A Hazardous Materials Technician responds to such occurrences and is expected to perform work to handle and control (stop, confine, or extinguish) actual or potential leaks or spills. The Hazardous Materials Technician assumes a more aggressive role than a first responder at the operations level, in that the Hazardous Materials Technician will approach the point of release. The Hazardous Materials Technician is expected to use specialized Chemical Protective Clothing (CPC) and specialized control equipment.

(b) All individuals holding a Hazardous Materials Technician Certification shall be required to comply with the continuing education requirements in §441.17 of this title (relating to Continuing Education for Hazardous Materials Technician).

§453.3. Minimum Standards for Hazardous Materials Technician Certification.

(a) In order to be certified as a Hazardous Materials Technician an individual must:

(1) hold certification as Structural Fire Protection Personnel, Aircraft Rescue Fire Fighting Personnel, or Marine Fire Protection Personnel and;

(2) possess valid documentation of accreditation from the International Fire Service Accreditation Congress as a Hazardous Materials Technician; or

(3) complete a Commission-approved Hazardous Materials Technician program and successfully pass the Commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved Hazardous Materials Technician program must consist of one of the following:

(A) completion of a Commission-approved Hazardous Materials Technician Curriculum as specified in Chapter 6 of the Commission's Certification Curriculum Manual.

(B) completion of an out-of-state and/or military training program that has been submitted to the Commission for evaluation and found to be equivalent to, or exceeds the Commission-approved Hazardous Materials Technician Curriculum.

(b) Out-of-state or military training programs which are submitted to the Commission for the purpose of determining equivalency will be considered equivalent if all competencies set forth in Chapter 6 (pertaining to Hazardous Materials Technician) of the Commission's Certification Curriculum Manual are met.

§453.5. Examination Requirements.

(a) The written examination requirements of Chapter 439 of this title (relating to Examinations for Certification) must be met in order to receive a Hazardous Materials Technician Certification.

(b) Performance skills must meet the requirements in Chapter 439.

(c) No individual will be permitted to take the Commission examination for Hazardous Materials Technician unless the individual documents completion of the First Responder Awareness and Operations level training as required by Chapter 1, Basic Fire Suppression, of the Commission's Certification Curriculum Manual.

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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For further information, please call: (512) 936-3838

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CHAPTER 491. VOLUNTARY REGULATION OF STATE AGENCIES AND STATE AGENCY EMPLOYEES

37 TAC §491.1

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 491, Voluntary Regulation of State Agencies and State Agency Employees; §491.1, Election of Components for Voluntary Regulation. These amendments are adopted without changes to the proposed text published in

the July 20, 2007, issue of the *Texas Register* (32 TexReg 4543) and will not be republished.

The justification for adopting these amendments is to simplify references to the Commission's authority regarding voluntary regulation of state agencies and employees; to correct grammatical and punctuation errors and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to establish guidelines and criteria regarding voluntary regulations, and to correct any grammatical or punctuation errors.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.083 of the Texas Government Code, which allows the Commission to prescribe procedures under which a state official, state agency, or an agency employee may apply.

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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For further information, please call: (512) 936-3838

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37 TAC §491.7

The Texas Commission on Fire Protection (the Commission) adopts the repeal of Chapter 491, Voluntary Regulation of State Agencies and State Agency Employees; consisting of the following section, §491.7, Certification. This repeal is adopted without changes to the proposal as published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4544) and will not be republished.

The Commission adopts the repeal of §491.7, Certification because this issue is addressed in individual chapters in our standards manual relating to that part of the certification process.

No comments were received from the public regarding this repeal.

This repeal is adopted under Texas Government Code, §419.083, which allows state agencies/employees to apply to the Commission for regulation of training for fire protection personnel.

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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For further information, please call: (512) 936-3838

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CHAPTER 493. VOLUNTARY REGULATION OF FEDERAL AGENCIES AND FEDERAL FIRE FIGHTERS

37 TAC §493.1

The Texas Commission on Fire Protection (the Commission) adopts the amendments to Chapter 493, Voluntary Regulation of Federal Agencies and Federal Fire Fighters; §493.1, Election of Components for Voluntary Regulation. These amendments are adopted without changes to the proposed text published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4545) and will not be republished.

The justification for adopting these amendments is to simplify references to the Commission's authority regarding voluntary regulation of federal agencies and firefighters; to correct grammatical and punctuation errors and to capitalize the letter "c" in the word "Commission" when referring to the Texas Commission on Fire Protection.

The purpose of these adopted amendments is to establish guidelines and criteria regarding voluntary regulations, and to correct any grammatical or punctuation errors.

No comments were received from the public regarding the proposed amendments.

These amendments are being adopted under §419.084 of the Texas Government Code, which allows the Commission to prescribe procedures under which a federal agency, or a federal fire fighter may apply.

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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Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
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For further information, please call: (512) 936-3838

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37 TAC §493.7

The Texas Commission on Fire Protection (the Commission) adopts the repeal of Chapter 493, Voluntary Regulation of Federal Agencies and Federal Fire Fighters; consisting of the following section, §493.7, Certification. This repeal is adopted without changes to the proposal as published in the July 20,

2007, issue of the *Texas Register* (32 TexReg 4545) and will not be republished.

The Commission adopts the repeal of §493.7, Certification because this issue is addressed in individual chapters in our standards manual relating to that part of the certification process.

No comments were received from the public regarding this repeal.

This repeal is adopted under Texas Government Code, §419.084, which allows federal agencies and federal fire fighters to apply to the Commission for regulation of training for fire protection personnel.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 800. GENERAL ADMINISTRATION
SUBCHAPTER E. SANCTIONS

40 TAC §§800.152, 800.191 - 800.200

The Texas Workforce Commission (Commission) adopts amendments, *without* changes, to the following sections of Chapter 800 relating to General Administration, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4341):

Subchapter E, Sanctions, §800.152 and §800.191

The Commission adopts the following new sections, *without* changes, to Chapter 800, relating to General Administration, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4341):

Subchapter E, Sanctions, §§800.192 - 800.195 and §§800.197 - 800.200

The Commission adopts the following new section, *with* changes, to Chapter 800, relating to General Administration, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4341):

Subchapter E, Sanctions, §800.196

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted rule change is to establish streamlined and administratively efficient appeals procedures for Local Workforce Development Boards (Boards) sanction hearings.

Under a separate, but concurrent rulemaking, the Commission has repealed Chapter 823, General Hearings rules, and adopts new Chapter 823, Integrated Complaints, Hearings, and Appeals rules. Certain sections of repealed Chapter 823 have been modified and incorporated into this chapter, which sets forth procedures for appeals of Board sanction determinations.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(Note: Minor, nonsubstantive editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER E. SANCTIONS

The Commission adopts amendments to Subchapter E, as follows:

§800.152. Definitions.

Section 800.152 adds new definitions, which are retained with minor modifications, from the concurrent repeal of Chapter 823.

Section 800.152(2) defines a "hearing" as an informal, orderly, and readily available proceeding held before an impartial hearing officer at which a party or hearing representative may present evidence to show that the Agency's determination of sanctions shall be reversed, affirmed, or modified.

Section 800.152(3) defines a "hearing officer" as an Agency employee designated to conduct hearings and issue proposals for decisions.

Section 800.152(4) defines a "hearing representative" as any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.

Section 800.152(8) defines a "party" as the person or entity with the right to participate in a hearing authorized by applicable statute or rule.

Certain paragraphs in §800.152 have been renumbered to accommodate additions or deletions.

§800.191. Appeal.

Section 800.191(b) adds that an appeal shall be in writing.

Section 800.191(c) clarifies that the Agency shall refer the request for appeal to an impartial hearing officer. The requirement of the hearing officer to receive oral and written evidence and to prepare a written proposal for a decision to be submitted to the executive director for a final decision is removed and relocated in new §800.197.

Section 800.191(d) states that the decision of the Agency's executive director shall be final. This requirement is removed and relocated in new §800.200.

New §800.191(d) provides that the Agency shall mail a written notice of hearing to the Board (and its representative, if any), which contains:

(1) the date, time, place, and nature of the hearing;

(2) the legal authority under which the hearing is to be held; and

(3) a brief summary of the issues to be considered during the hearing.

§800.192. Hearing Procedures.

New §800.192 sets forth procedures for conducting Board sanction hearings.

Section 800.192(a) provides that the hearing must be held in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.

Section 800.192(b) requires that the hearing be conducted informally to determine the substantial rights of the parties. This subsection also states that all issues relevant to the appeal must be considered and addressed, and may include:

(1) presentation of evidence;

(2) examination of witnesses and parties;

(3) additional evidence; and

(4) appropriate hearing behavior.

Section 800.192(c) states that:

(1) the hearing record must include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and physical evidence entered as exhibits;

(2) the hearing record must be maintained according to federal and state law; and

(3) the confidentiality of information contained in the hearing record must be maintained according to federal and state law.

§800.193. Postponements, Continuances, and Withdrawals.

New §800.193 authorizes the hearing officer to grant a hearing postponement, continuance, or withdrawal.

Section 800.193(a) allows the hearing officer to grant a postponement of the hearing for good cause, at the party's request.

Section 800.193(b) states that a continuance may be ordered at the discretion of the hearing officer to consider additional, necessary evidence or for any other reason the hearing officer deems appropriate.

Section 800.193(c) provides that a Board may withdraw an appeal at any time prior to the issuance of the final decision.

§800.194. Evidence.

New §800.194 sets forth the evidence procedures for hearings.

Section 800.194(a), Evidence Generally, provides that evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

Section 800.194(b), Exchange of Exhibits, states that any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties with a copy given to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.

Section 800.194(c), Stipulations, states that parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal on the basis of such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.

Section 800.194(d), Experts and Evaluations, states that if relevant and useful testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by the hearing officers, on their own motion, or at a party's request. Any such expert or evaluation shall be at the expense of one of the parties.

Section 800.194(e), Subpoenas, states that:

(1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.

(2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.

(3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.

(4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§800.195. Hearing Officer Independence and Impartiality.

New §800.195 relates to the Agency's hearing officers' powers and impartiality and the grounds and process for the disqualification and withdrawal of hearing officers.

Section 800.195(a) provides that a hearing officer has all necessary powers to conduct a full, fair, and impartial hearing. Hearing officers shall remain independent and impartial in all matters regarding handling of any issues during the pendency of a case and in issuing their written proposals for decisions.

Section 800.195(b) specifies that a hearing officer shall be disqualified if the hearing officer has a personal interest in the outcome of the appeal or if the hearing officer directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.

Section 800.195(c) allows the hearing officer to withdraw from a hearing to avoid the appearance of impropriety or partiality.

Section 800.195(d) provides that upon disqualification or withdrawal, the Agency shall assign an alternate hearing officer to the case. This alternate hearing officer is not bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

§800.196. Ex Parte Communications.

New §800.196 is intended to prevent improper communication with hearing officers and to ensure that their decisions are based solely on the evidence and arguments presented at the hearing. The section states that:

(a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

(b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review that communication.

(c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.

(d) The hearing officer may initiate communications with an Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence. Based on a comment received for Chapter 807, Career Schools and Colleges, regarding a hearing officer's communications with an "impartial" Agency employee, language has been added to this subsection specifying that the hearing officer may initiate communications with an impartial Agency employee. This change provides consistency with Chapter 807 regarding ex parte communications.

§800.197. Hearing Decision.

New §800.197 sets out the Agency's procedures related to the preparation of a written proposal for a decision.

Section 800.197(a) requires the hearing officer to promptly prepare a written proposal for decision following the conclusion of the hearing.

Section 800.197(b) provides that the proposal for decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing and state:

(1) a list of individuals who appeared at the hearing;

(2) the findings of fact and conclusions of law reached on the issues; and

(3) the affirmation, reversal, or modification of the sanctions.

Section 800.197(c) provides that the proposal for decision shall be submitted to the Agency's executive director for issuance of a written decision on behalf of the Agency.

Section 800.197(d) provides that unless a party files a timely motion for rehearing, the Agency may assume continuing jurisdiction to modify or correct a decision until the expiration of 30 calendar days from the mailing date of the decision.

§800.198. Motion for Reopening.

New §800.198 sets forth the procedures for requesting a reopening of a hearing if a party is not able to participate in a hearing.

Section 800.198(a) provides that a party who fails to appear at a hearing may request to reopen the hearing within 30 calendar days from the date the decision is mailed.

Section 800.198(b) states that the motion for reopening must be in writing and detail the reason for failing to appear at the hearing.

Section 800.198(c) provides that the hearing officer may schedule a hearing to consider granting the motion for reopening.

Section 800.198(d) allows that if the hearing officer determines the party has shown good cause for failing to appear, the hearing officer may grant the motion.

§800.199. Motion for Rehearing.

New §800.199 sets forth the Agency's procedures for requesting a rehearing and the conditions under which a rehearing may be granted.

Section 800.199(a) provides that a Board may file a motion for rehearing within 30 days from the date the decision is mailed. A rehearing shall be granted only for the presentation of new evidence.

Section 800.199(b) requires that a motion for rehearing be in writing and set forth the new evidence for consideration.

Section 800.199(c) states that if the hearing officer determines a rehearing is warranted, it shall be scheduled at a reasonable time and place.

Section 800.199(d) requires the hearing officer to issue a written proposal for decision in response to a timely filed motion for rehearing. The proposal for decision shall be submitted to the Agency's executive director for issuance of a final decision.

§800.200. Finality of Decision.

New §800.200 sets forth the conditions under which the Agency's decision is finalized.

Section 800.200(a) states that the decision of the executive director is the final administrative decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision unless within that time:

(1) a request for reopening is filed with the Agency;

(2) a request for rehearing is filed with the Agency; or

(3) the Agency assumes continuing jurisdiction to modify or correct the decision.

Section 800.200(b) provides that any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.

No comments were received regarding the proposal.

The amendments and new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Human Resources Code §44.002, regarding Administrative Rules.

The amendments and new rules will affect Texas Labor Code, Title 4, particularly Chapter 301 and 302, as well as Texas Government Code, Chapter 2308.

§800.196. Ex Parte Communications.

(a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

(b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review any such ex parte communication.

(c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.

(d) The hearing officer may initiate communications with an impartial Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705365
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
Effective date: November 26, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 475-0829

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CHAPTER 807. CAREER SCHOOLS AND COLLEGES
SUBCHAPTER T. CAREER SCHOOLS HEARINGS

40 TAC §§807.381 - 807.395

The Texas Workforce Commission (Commission) adopts new Subchapter T, *without* changes to the following sections, relating to Career Schools and Colleges, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4346):

Subchapter T, Career Schools Hearings, §§807.381, 807.383 - 807.386, 807.388, and 807.391 - 807.395

The Commission adopts new Subchapter T, *with* changes to the following sections, relating to Career Schools and Colleges, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4346):

Subchapter T, Career Schools Hearings, §§807.382, 807.387,807.389, and 807.390

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted rule change is to set forth procedures for the appeal and hearing process for those entities and individuals subject to regulation by the Commission under Chapter 132 of the Texas Education Code. Under a separate, but concurrent rulemaking, the Commission has adopted the repeal of Chapter 823, General Hearings rules, containing the hearings and appeals process for career schools and colleges, which has been modified and incorporated into Chapter 807.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

The Commission adopts new Subchapter T, Career Schools Hearings, as follows:

§807.381. Purpose.

Section 807.381 states that the purpose of Subchapter T is to set out the hearings process as authorized by Agency rules and Chapter 132 of the Texas Education Code.

§807.382. Definitions.

Section 807.382 adds definitions, retained with minor modifications from the concurrent repeal of Chapter 823, which are referenced throughout Subchapter T.

Comment: One commenter suggested that the term "Agency" be defined because the term "Commission" is used to refer to the Texas Workforce Commission in Chapter 132, Texas Education Code and Chapter 807, but the term "Agency" is used in the new proposed Subchapter T.

Response: The Commission appreciates the comment and agrees with the suggestion. Therefore, to ensure consistency between Texas Education Code, Chapter 132, and Chapter 807, the definitions of both terms--Agency and Commission, as set forth in §800.2 of this title--are added as §807.382(1) and (3), respectively.

Section 807.382(1) defines "Agency," as set forth in §800.2 of this title, as the unit of state government established under Texas Labor Code Chapter 301 that is presided over by the Commission and administered by the Executive Director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended.

Section 807.382(2) defines "appellant" as a party or the party's authorized hearing representative who files an appeal from an appealable determination or decision.

Section 807.382(3) defines "Commission," as set forth in §800.2 of this title, as the body of governance of the Texas Workforce Commission composed of three members appointed by the Governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers, and one representative of the public.

Section 807.382(4) defines "date of notice" as the date the notice is received--unless good cause exists for the hearing officer to determine otherwise.

Section 807.382(5) defines "date of request of hearing" as the date on which the appellant or the hearing representative filed a written notice of appeal with the Agency by hand delivery, facsimile, or mail. If an appeal is mailed to the Agency, it is completed as of the postmark date on the envelope containing the appeal request, unless good cause exists for the hearing officer to determine otherwise. If an appeal is hand delivered or faxed after 5:00 p.m., the date of request must be the following day.

Section 807.382(6) defines "hearing" as an informal, orderly, and readily available proceeding held before an impartial hearing officer. A party or hearing representative may present evidence to show that the Agency's determination should be reversed, affirmed, or modified.

Section 807.382(7) defines "hearing officer" as an Agency employee designated to conduct impartial hearings and issue final administrative decisions.

Section 807.382(8) defines "hearing representative" as any individual authorized by a party to assist in presenting the party's appeal, including legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.

Section 807.382(9) defines "party" as the person or entity with the right to participate in a hearing authorized in applicable statute or rule.

§807.383. Information on Right of Appeal.

Section 807.383 sets forth that an issuer of a determination shall inform the career school applicant or any party directly aggrieved by the determination of the right to a hearing. The notice shall explain the procedure for an appeal, the applicant's or party's right of appeal, and the right to be represented by others, including legal counsel.

§807.384. Request for Hearing.

Section 807.384 sets forth procedures for requesting a hearing.

Section 807.384(a) provides that the party seeking review of a determination under this subchapter relating to career school hearings shall request a hearing in writing within 15 days after receipt of notice of the determination.

Section 807.384(b) states that the request shall be addressed as provided in the determination, state the nature of the determination, the name and identifying information of the requesting party, and a request that the determination be reviewed.

Section 807.384(c) specifies that the request may include an explanation of why the determination should be changed, although this is not a jurisdictional requirement.

§807.385. Setting of Hearing.

Section 807.385 sets forth the Agency requirements for setting a hearing.

Section 807.385(a) states that upon receipt of the request for a hearing, the Agency shall promptly mail a notice of hearing that sets the hearing for a reasonable time and place within 30 days from the receipt of the request.

Section 807.385(b) requires that the notice of hearing be in writing and include:

(1) a statement of the date, time, place, and nature of the hearing;

(2) a statement of the legal authority under which the hearing will be held; and

(3) a short and plain statement of the issues that will be considered during the hearing.

Section 807.385(c) requires that the notice of hearing be issued at least 10 days before the date of the hearing unless a shorter period is permitted by statute.

Section 807.385(d) provides that the hearing notice shall state whether the hearing will be conducted by telephone or in-person. The notice also shall identify the location of an in-person hearing.

Section 807.385(e) specifies that parties needing special accommodations, including a bilingual or sign language interpreter, may request such before the setting of the hearing, if possible, or as soon as practical.

§807.386. Hearing Officer Independence and Impartiality.

Section 807.386 sets out the powers and independence of hearing officers and the grounds and process for the disqualification and withdrawal of hearing officers.

Section 807.386(a) provides that a hearing officer has all necessary powers to conduct a full, fair, and impartial hearing. Hearing officers are to remain independent and impartial in all matters relating to active cases and in issuing their decisions.

Section 807.386(b) specifies that a hearing officer shall be disqualified if he or she has a personal interest in the outcome of the appeal or directly or indirectly participated in the determination on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.

Section 807.386(c) allows the hearing officer to withdraw from a hearing to avoid the appearance of impropriety or partiality.

Section 807.386(d) provides that upon disqualification or withdrawal, the Agency shall assign an alternate hearing officer. This alternate hearing officer is not bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

§807.387. Hearing Procedures.

Section 807.387 sets out the general procedures for a hearing.

Section 807.387(a) specifies that hearings shall be conducted in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.

Section 807.387(b)(1) - (4) specifies that all hearings shall be conducted informally and in such a manner as to ascertain the substantive rights of the parties. All issues relevant to the appeal shall be considered and addressed, and may include:

(1) presentation of evidence;

(2) examination of parties and witnesses;

(3) additional evidence; and

(4) appropriate hearing behavior.

Comment: One commenter stated that schools as parties should retain the right to object to evidence.

Response: The Commission appreciates the comment and agrees that the right to object to evidence should be explicit in the rule. Therefore, the Commission adds language stating that a party has the right to object to evidence offered at a hearing by the hearing officer or other parties.

Comment: One commenter stated that schools as parties should have an unqualified right to examine and cross-examine parties and witnesses without that right being subject to the discretion of the hearing officer. The commenter also stated that the hearing officer should not be given an absolute right to permit cross-examination of witnesses. The commenter further noted that the regulation should not mandate that the hearing officer "shall" examine parties and any witnesses.

Response: The Commission believes that the primary duty of the presiding hearing officer is to ascertain the substantive rights of the parties. At the same time, the hearing officer has an affirmative duty to develop the record. Therefore, the Commission contends that the hearing officer has the obligation by rule to examine parties and witnesses and that control of the examination and cross-examination should be within the hearing officer's discretion.

Comment: One commenter suggested that parties should be given notice any time additional evidence is presented and af-

forded sufficient time to review and rebut any such additional evidence.

Response: The Commission understands that due process must be afforded to parties under such circumstances. However, the Commission believes that the requirement that a party shall be given the opportunity to rebut such evidence if it is to be used against the party's interest provides sufficient protection for the party's due process rights. As stated previously, the presiding hearing officer's primary duty is to ascertain the substantive rights of the parties.

Section 807.387(c)(1) - (4), Records, states that:

(1) the hearing record shall include the audio recording of the proceedings and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits;

(2) the hearing record shall be maintained in accordance with federal and state law;

(3) confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law; and

(4) upon request, a party has the right to obtain a copy of the hearing record at no charge. However, a party requesting a transcript of the hearing record shall pay the costs of the transcription.

Comment: One commenter stated that the rule should provide that parties have the right to request a copy of the record and the rule should specify the costs and procedures for obtaining the record.

Response: The Commission agrees with the comment and adds §807.387(c)(4).

§807.388. Postponements, Continuances, and Withdrawals

Section 807.388 authorizes the hearing officer to grant a postponement, continuance, or withdrawal.

Section 807.388(a) allows the hearing officer to grant a postponement of a hearing for good cause at a party's request.

Section 807.388(b) states that a continuance may be ordered at the discretion of the hearing officer in order to consider additional, necessary evidence or for any other reason deemed appropriate by the hearing officer.

Comment: One commenter stated that continuances to consider additional, necessary evidence should be mandatory and not at the discretion of the hearing officer.

Response: The Commission disagrees. The hearing officer must determine whether additional evidence is relevant and necessary; therefore, the setting of a continuance must necessarily be within the discretion of the hearing officer.

Section 807.388(c) provides that a party may withdraw its appeal at any time before the final decision is issued.

Comment: One commenter recommended a new provision requiring that witnesses and parties be placed under oath by the hearing officer.

Response: The Commission agrees and has modified §807.387(b)(2) to indicate that witnesses must be placed under oath prior to their examination.

§807.389. Evidence.

Section 807.389 sets forth the evidence procedures for hearings.

Section 807.389(a), Evidence Generally, provides the standard for the admissibility of evidence, specifying that hearsay evidence may be admitted. However, the hearing officer has the authority to exclude relevant evidence to ensure fairness or to prevent undue delay, waste of time, or needless presentation of cumulative evidence.

Section 807.389(b), Exchange of Exhibits, states that any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties with a copy given to the hearing officer in advance of the hearing. Documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.

Section 807.389(c), Stipulations, states that parties to an appeal, with the consent of the hearing officer, may agree in writing to the relevant facts involved. The hearing officer may decide the appeal based on such stipulation or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence deemed necessary.

Comment: One commenter stated that hearing officers should only be allowed to decide the appeal based solely on stipulations if all parties are in agreement.

Response: Section 807.389(c) merely allows the hearing officer to issue a decision based on stipulations if the parties agree to waive their hearing rights. However, the Commission believes that the right to a hearing is sufficiently set forth in §807.387. Therefore, the Commission agrees that parties should have the opportunity for a hearing, even if all facts are stipulated.

Section 807.389(d), Experts and Evaluations, allows the hearing officer to order--or a party may request, if relevant and useful--an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency. Such expert or evaluation shall be at the expense of the party(ies).

Comment: One commenter stated that the costs of experts ordered by the hearing officer on his own motion should be borne equally by the parties.

Response: The Commission agrees and adds a provision stating that if a hearing officer orders testimony from an independent expert or a professional evaluation on his own motion, the cost will be borne equally by the parties.

Section 807.389(e), Subpoenas, provides that:

(1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.

(2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.

(3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.

(4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§807.390. Ex Parte Communications.

Section 807.390(a) provides that the hearing officer shall not participate in ex parte communications, directly or indirectly, in any

matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

Section 807.390(b) provides that if any such ex parte communication is received, the other parties should be given the opportunity to review the ex parte communication.

Section 807.390(c) specifies that hearing officers may communicate with parties or representatives about procedural matters.

Section 807.390(d) provides that a hearing officer may communicate with Agency personnel who are not otherwise involved in a case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

Comment: One commenter stated that the hearing officer should only contact an "impartial" Agency employee to evaluate the evidence if the hearing officer has notified the parties of the name and title of the Agency employee before contact.

Response: While the Commission agrees that the hearing officer should contact only an "impartial" Agency employee, the Commission disagrees with the requirement for notification of the name and address of the employee contacted. As set out in §807.387(b)(1), it is the responsibility of the hearing officer to actively develop the record on the relevant circumstances and facts to resolve all issues. To do so, the hearing officer may communicate only with an Agency employee who has not participated in a hearing or any determination in the case. Language has been added to §807.390(d) specifying that a hearing officer may initiate communications with an impartial Agency employee. A hearing officer may need to use the special skills or knowledge of Agency staff, including individuals in the hearing officer's own management chain. To require notification of the name and title of the employee before contact would be unnecessarily burdensome and would negatively impact a hearing officer's ability to resolve all issues. Further, allowing a hearing officer to have such communications is consistent with general administrative practices.

§807.391. Change in Determination.

Section 807.391 sets out that the original issuer of the determination, which a party has appealed, may change the determination that is the basis of the appeal at any time up to the issuance of a decision by the hearing officer.

§807.392. Hearing Decision.

Section 807.392 sets forth the time frame for and the content of a decision issued by a hearing officer under this subchapter.

Section 807.392(a) requires the hearing officer to prepare a written decision promptly after the hearing ends on behalf of the Agency.

Section 807.392(b)(1) - (3) provides that the decision shall be based exclusively on the evidence of record in the hearing and matters officially noticed in the hearing, and shall include:

(1) a list of the individuals who appeared at the hearing;

(2) the findings of fact and conclusions of law reached on the issues; and

(3) the affirmation, reversal, or modification of the determination.

Section 807.392(c) states that unless a party files a timely motion for a rehearing, the Agency may assume continuing jurisdiction to modify or correct a hearing decision until the expiration of 30 calendar days from the mailing date of the hearing decision.

§807.393. Motion for Reopening.

Section 807.393 sets forth the time frame and requirements for a motion for the reopening of a hearing.

Section 807.393(a) provides that if a party does not appear for a hearing, the party may request the reopening of the hearing within 30 calendar days from the date the decision is mailed.

Section 807.393(b) states that the motion shall be in writing and detail the reason for failing to appear at the hearing.

Section 807.393(c) provides that the Agency may schedule a hearing on whether to grant the reopening.

Section 807.393(d) allows that a motion may be granted if the hearing officer determines that the party has shown good cause for failing to appear at the hearing.

§807.394. Motion for Rehearing.

Section 807.394 sets forth the time frame and requirements for a motion for rehearing.

Section 807.394(a) states that a party has 30 calendar days from the date the decision is mailed to file a motion for rehearing. A rehearing may be granted only for the presentation of new evidence.

Section 807.394(b) requires that a motion for rehearing be in writing and allege the new evidence to be considered. The party must show a compelling reason why the evidence was not presented at the hearing.

Section 807.394(c) states that if the hearing officer determines that the alleged, new evidence warrants a rehearing, a hearing shall be scheduled at a reasonable time and place.

Section 807.394(d) requires that the hearing officer issue a written decision in response to a timely filed motion for rehearing.

Section 807.394(e) states that the Agency may assume continuing jurisdiction to modify, correct, or reform a decision until the expiration of 30 calendar days from the mailing date of the hearing decision.

§807.395. Finality of Decision.

Section 807.395 sets forth the conditions under which the decision of the hearing officer is the final decision of the Agency, and gives the Agency the discretion to assume continuing jurisdiction.

Section 807.395(a) states that the decision of the hearing officer becomes the final decision of the Agency after the expiration of 30 calendar days from the mailing date of the decision unless within that time:

(1) a request for reopening is filed with the Agency;

(2) a request for rehearing is filed with the Agency; or

(3) the Agency assumes continuing jurisdiction to modify or correct the decision.

Section 807.395(b) provides that any decision issued in response to a request for a reopening or rehearing or a modification or correction issued by the Agency shall be final on the expiration of 30 calendar days from the mailing date of the decision, modification, or correction.

Comment: One commenter suggested that a school's right to appeal the Agency's final decision should be recognized in a rule.

Response: The Commission does not believe it is necessary to establish such a rule because it is stipulated in state statute. A decision, when issued, includes a notification to the parties of their appeal rights. Schools that disagree with the Agency's final decision have the right to appeal to a district court in Travis County, pursuant to the provisions of Chapter 132 of the Texas Education Code. This right to appeal is derived from the Texas Legislature and is not granted by the Commission.

COMMENTS WERE RECEIVED FROM:

Sadie Harrison-Fincher, Whitaker, Chalk, Swindle & Sawyer, L.L.P., attorneys for Career Education Corporation

The new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The new rules affect Title 4, Texas Labor Code, particularly Chapters 301 and 302, as well as Texas Education Code, Chapter 132.

§807.382. Definitions.

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

(1) Agency--The unit of state government established under Texas Labor Code Chapter 301 that is presided over by the Commission and administered by the Executive Director to operate the integrated workforce development system and administer the unemployment compensation insurance program in this state as established under the Texas Unemployment Compensation Act, Texas Labor Code Annotated, Title 4, Subtitle A, as amended. The definition of "Agency" shall apply to all uses of the term in rules contained in this subchapter.

(2) Appellant--The party or the party's authorized hearing representative who files an appeal from an appealable determination or decision.

(3) Commission--The body of governance of the Texas Workforce Commission composed of three members appointed by the Governor as established under Texas Labor Code §301.002 that includes one representative of labor, one representative of employers, and one representative of the public. The definition of "Commission" shall apply to all uses of the term in rules contained in this subchapter.

(4) Date of notice--The date the notice is received, unless good cause exists for the hearing officer to determine otherwise.

(5) Date of request of hearing--The date on which the appellant or the hearing representative filed a written notice of appeal with the Agency by hand delivery, facsimile, or mail. If an appeal is mailed to the Agency, then the appeal is perfected as of the postmark date on the envelope containing the appeal request unless good cause exists for the hearing officer to determine otherwise. If an appeal is delivered by hand or facsimile after 5 p.m., the date of request shall be the next day.

(6) Hearing--An informal, orderly, and readily available proceeding held before an impartial hearing officer. A party or hearing representative may present evidence to show that the Agency's determination should be reversed, affirmed, or modified.

(7) Hearing officer--An Agency employee designated to conduct impartial hearings and issue final administrative decisions.

(8) Hearing representative--Any individual authorized by a party to assist the party in presenting the party's appeal. A hearing representative may be legal counsel or another individual. Each party may have a hearing representative to assist in presenting the party's appeal.

(9) Party--The person or entity with the right to participate in a hearing authorized in applicable statute or rule.

§807.387. Hearing Procedures.

(a) The hearing shall be conducted in person in Austin, Texas, unless the parties agree to a telephonic hearing or request a different location.

(b) The hearing shall be conducted informally and in such a manner as to ascertain the substantive rights of the parties. All issues relevant to the appeal shall be considered and addressed, and may include:

(1) Presentation of Evidence. The parties to an appeal may present evidence that is material and relevant, as determined by the hearing officer. In conducting a hearing, the hearing officer shall actively develop the record on the relevant circumstances and facts to resolve all issues. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. A party has the right to object to evidence offered at the hearing by the hearing officer or other parties.

(2) Examination of Parties and Witnesses. After placing the witnesses under oath, the hearing officer shall examine parties and any witnesses and shall allow cross-examination to the extent the hearing officer deems necessary to afford the parties due process.

(3) Additional Evidence. The hearing officer, with or without notice to any of the parties, may take additional evidence as deemed necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.

(4) Appropriate Hearing Behavior. All parties shall conduct themselves in an appropriate manner. The hearing officer may expel any individual or party who fails to correct behavior the hearing officer identifies as disruptive. After expulsion, the hearing officer may proceed with the hearing and render a decision.

(c) Records

(1) The hearing record shall include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.

(2) The hearing record shall be maintained in accordance with federal and state law.

(3) Confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law.

(4) Upon request, a party has the right to obtain a copy of the hearing record at no charge. However, a party requesting a transcript of the hearing record shall pay the costs of the transcription.

§807.389. Evidence.

(a) Evidence Generally. Evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

(b) Exchange of Exhibits. Any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties and a copy shall be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.

(c) Stipulations. The parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal based on such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.

(d) Experts and Evaluations. If relevant and useful, testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by hearing officers, on their own motion or at a party's request. The cost of any such expert or evaluation ordered by the hearing officer shall be borne equally by the parties.

(e) Subpoenas.

(1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.

(2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.

(3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.

(4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§807.390. Ex Parte Communications.

(a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

(b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review any such ex parte communication.

(c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.

(d) The hearing officer may initiate communications with an impartial Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 6, 2007.

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Texas Workforce Commission

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For further information, please call: (512) 475-0829

CHAPTER 809. CHILD CARE SERVICES

The Texas Workforce Commission (Commission) adopts amendments, *without* changes, to the following section of Chapter 809, relating to Child Care Services, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4351):

Subchapter D, Parent Rights and Responsibilities, §809.74

The Commission adopts the repeal of the following subchapter of Chapter 809, relating to Child Care Services, in its entirety, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4351):

Subchapter G, Appeal Procedures, §809.131 and §809.132

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted rule change is to establish detailed and consistent procedures for complaints, hearings, and appeals related to workforce services administered by Local Workforce Development Boards (Boards). Texas Labor Code §302.065 directs the Commission to integrate the administration of four federal block grant programs with the goal of streamlining the delivery of services provided in the local career development one-stops. The Commission expanded this integration to state-funded workforce services, including examining the existing complaints and appeals processes for workforce services administered by the Boards. An absence of unified and integrated rules on complaints, hearings, and appeals related to workforce services makes the existing rules difficult to understand or interpret consistently and works as a barrier to integrating workforce services.

To maintain uniformity and consistency across all Board-administered workforce services and to protect due process rights of Texas Workforce Center customers, in a separate, but concurrent rulemaking, the Commission has adopted the repeal of Chapter 823, General Hearings rules, and adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals rules. New Chapter 823 requires Boards to establish local policies for filing complaints, to provide opportunities for informal resolutions, and to establish procedures for Board hearings and appeals.

The Commission has reviewed sections of Chapter 809, relating to complaints or grievances, local-level appeals, and state-level hearings. The Commission adopts the repeal of these sections and incorporates similar processes related to complaints, hearings, and appeals in new Chapter 823.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

The Commission adopts amendments to Subchapter D, as follows:

§809.74. Parent Appeal Rights.

Under a separate, but concurrent rulemaking, the Commission has adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals, which comprises the complaint, hearing, and appeal procedures for all Board-administered workforce services, including appeal procedures set forth in Subchapter G of this chapter. Therefore, references to "Subchapter G of this chapter" contained in §809.74(a), (c), (d), and (e) are removed and replaced by references to "Chapter 823 of this title."

SUBCHAPTER G. APPEAL PROCEDURES

The Commission adopts the repeal of Subchapter G, as follows:

Under a separate, but concurrent rulemaking, the Commission has adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals, which comprises the complaint, hearing, and appeal procedures for all Board-administered workforce services, including the information in the following sections.

§809.131. Board Review.

Section 809.131 is repealed and the information is relocated in new Chapter 823.

§809.132. Appeals to the Commission.

Section 809.132 is repealed and the information is relocated in new Chapter 823.

No comments were received.

SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

40 TAC §809.74

The amendments are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted amendments affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 6, 2007.

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Reagan Miller

Deputy Division Director, Workforce Policy and Service Delivery Branch

Texas Workforce Commission

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For further information, please call: (512) 475-0829

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SUBCHAPTER G. APPEAL PROCEDURES

40 TAC §809.131, §809.132

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 811. CHOICES
SUBCHAPTER F. APPEALS

40 TAC §§811.71 - 811.73

The Texas Workforce Commission (Commission) adopts the repeal of the following subchapter of Chapter 811, relating to Choices, in its entirety, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4353):

Subchapter F, Appeals, §§811.71 - 811.73

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted rule change is to establish detailed and consistent procedures for complaints, hearings, and appeals related to workforce services administered by Local Workforce Development Boards (Boards). Texas Labor Code §302.065 requires that the Commission integrate the administration of multiple federal block grant programs and identify policy changes that support this integration. The Commission expanded this integration to state-funded workforce services, including examining the existing complaints and appeals processes for workforce services administered by the Boards. An absence of unified and integrated rules on complaints, hearings, and appeals related to workforce services makes the existing rules difficult to understand or interpret consistently and works as a barrier to integrating workforce services.

To maintain uniformity and consistency across all Board-administered workforce services and to protect due process rights of Texas Workforce Center customers, in a separate, but concurrent, rulemaking, the Commission has adopted the repeal of Chapter 823, General Hearings rules, and adopted new Chapter

823, Integrated Complaints, Hearings, and Appeals rules. New Chapter 823 requires Boards to establish local policies related to filing complaints, to provide opportunities for informal resolutions, and to establish procedures for Board hearings and appeals.

The Commission has reviewed sections of Chapter 811 relating to complaints or grievances, local-level appeals, and state-level hearings. The Commission adopts the repeal of these sections and incorporates similar processes related to complaints, hearings, and appeals in new Chapter 823.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

SUBCHAPTER F. APPEALS

The Commission adopts the repeal of Subchapter F, as follows:

Under a separate, but concurrent rulemaking, the Commission has adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals, which comprises the complaint, hearing, and appeal procedures for all Board-administered workforce services, including the information in the following sections.

§811.71. Board Review.

Section 811.71 is repealed and the information is relocated in new Chapter 823.

§811.72. Appeals to the Commission.

Section 811.72 is repealed and the information is relocated in new Chapter 823.

§811.73. Appeals to the Texas Department of Human Services (TDHS).

Section 811.73 is repealed and the information is relocated in new Chapter 823.

No comments were received.

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code, Chapters 31 and 34.

The adopted repeals affect Texas Labor Code, Title 4, and Texas Human Resources Code, Chapters 31 and 34.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 813. FOOD STAMP EMPLOYMENT AND TRAINING

SUBCHAPTER F. COMPLAINTS AND APPEALS

40 TAC §813.51, §813.52

The Texas Workforce Commission (Commission) adopts the repeal of the following sections of Chapter 813, relating to Food Stamp Employment and Training, as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4354):

Subchapter F, Complaints and Appeals, §813.51 and §813.52

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted rule change is to establish detailed and consistent procedures for complaints, hearings, and appeals related to workforce services administered by Local Workforce Development Boards (Boards). Texas Labor Code §302.065 requires that the Commission integrate the administration of multiple federal block grant programs and identify policy changes that support this integration. The Commission expanded this integration to state-funded workforce services, including examining the existing complaints and appeals processes for workforce services administered by the Boards. An absence of unified and integrated rules on complaints, hearings, and appeals related to workforce services makes the existing rules difficult to understand or interpret consistently and works as a barrier to integrating workforce services.

To maintain uniformity and consistency across all Board-administered workforce services and to protect due process rights of Texas Workforce Center customers, in a separate, but concurrent rulemaking, the Commission has adopted the repeal of Chapter 823, General Hearings rules, and has adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals rules. New Chapter 823 requires Boards to establish local policies for filing complaints, to provide opportunities for informal resolutions, and to establish procedures for Board hearings and appeals.

The Commission has reviewed sections of Chapter 813, relating to complaints or grievances, local-level appeals, and state-level hearings. The Commission adopts the repeal of these sections and incorporates similar processes related to complaints, hearings, and appeals in new Chapter 823.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

SUBCHAPTER F. COMPLAINTS AND APPEALS

The Commission adopts amendments to Subchapter F, as follows:

Under a separate, but concurrent rulemaking, the Commission has adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals, which comprises the complaint, hearing, and appeal procedures for all Board-administered workforce services, including the information in the following sections.

§813.51. Appeals of Decisions Made on Food Stamp Applications and Benefits.

Section 813.51 is repealed and the information is relocated in new Chapter 823.

§813.52. Appeals of E&T Activities and Support Services Decisions.

Section 813.52 is repealed and the information is relocated in new Chapter 823.

No comments were received.

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 823. GENERAL HEARINGS

The Texas Workforce Commission (Commission) adopts the repeal of Chapter 823, §§823.1 - 823.3, 823.11 - 823.15, 823.31 - 823.34, and 823.41 - 823.44, relating to General Hearings, *without* changes to the proposal as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4355).

The Commission adopts new Chapter 823, relating to Integrated Complaints, Hearings, and Appeals, *without* changes to the following sections as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4355):

Subchapter A, General Provisions, §§823.1 - 823.4

Subchapter B, Board Complaint and Appeal Procedures, §§823.10 - 823.14

Subchapter C, Agency Complaint and Appeal Procedures, §§823.20 - 823.22, 823.25, and 823.26

Subchapter D, Agency-Level Decisions, Reopenings, and Rehearings, §§823.30 - 823.33

The Commission adopts new Chapter 823, relating to Integrated Complaints, Hearings, and Appeals, *with* changes to the following sections as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4355):

Subchapter C, Agency Complaint and Appeal Procedures, §§823.23, 823.24, and 823.27

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted repeal of Chapter 823 and adopted new Chapter 823 is to:

--establish uniform procedures and time frames;

--clarify additional Local Workforce Development Board (Board) responsibilities relating to appeals of Board decisions;

--simplify rule language and definitions;

--remove obsolete provisions; and

--promote operational efficiencies.

Texas Government Code §2001.039 requires that each state agency review and consider for readoption each rule adopted by that agency every four years. The Commission's General Hearings Rules, Chapter 823, were reviewed in 2006 with the goals of:

--promoting integrated workforce services;

--simplifying rule language;

--streamlining Board appeals processes and responsibilities;

--updating terminology and definitions; and

--removing obsolete provisions.

Texas Labor Code §302.065 directs the Commission to integrate the administration of four federal block grant programs with the goal of streamlining the delivery of services provided in the local career development one-stops. These programs include child care, Temporary Assistance for Needy Families (TANF), Food Stamp Employment and Training (FSE&T), and Workforce Investment Act (WIA). The Commission expanded this integration to include all Board-administered workforce services. Furthermore, the law directs the Commission to conduct a review of its programs, rules, policies, procedures, and organizational structure to identify specific barriers to the integration. The Commission has identified policy changes that support this integration by examining the existing complaints and appeals processes for workforce services administered by the Boards. The absence of unified and integrated rules on complaints, hearings, and appeals related to workforce services makes the existing rules difficult to understand or to interpret consistently and works as a barrier to integrating workforce services.

Moreover, the existing rules do not fully reinforce the principles of local flexibility and, instead, shift appeals processes from the local to the state level. The Commission has identified policy changes that enhance local flexibility by vesting local Boards with responsibility to provide opportunity for informal resolution, as well as conducting hearings, as necessary. These modifications will primarily affect child care complaints, as most Boards currently address most other complaints under WIA.

The Commission has reviewed the following rules governing complaints, hearings, and appeals for workforce services administered by the Boards:

--Child Care Services Rules: 40 TAC Chapter 809, Subchapters D and G

--Choices Rules: 40 TAC Chapter 811, Subchapter F

--Food Stamp Employment and Training Rules: 40 TAC Chapter 813, Subchapter F

--Workforce Investment Act Rules: 40 TAC Chapter 841, Subchapters C, D, and E

While the chapters are similar in scope, each one established different procedures for individuals who wish to file a complaint, with inconsistent instructions regarding filing complaints, opportunities for informal reviews, and the right to file an appeal. The lack of continuity among the chapters complicates co-enrollment and service integration. In addition, the timelines for these procedures are inconsistent across the chapters.

Additionally, the Project Reintegration of Offenders (Project RIO) rules, 40 TAC Chapter 847, do not address Board review or notice of the right to file a complaint. Therefore, the new Chapter 823 rules include processes for Board hearings and notices of the right to file a complaint under the Project RIO rules.

New Chapter 823 follows the complaints and appeals process established in WIA regulations, 20 C.F.R. §667.600 and §667.640, which provide federally mandated procedures and time frames for complaints and appeals. The WIA procedures in Chapter 841 of this title are the only rules that have federal requirements; other Board-administered workforce services are not federally guided, but instead are governed by Commission rules.

To maintain uniformity and consistency across all Board-administered workforce services and to protect due process rights, the new Chapter 823 rules require Boards to establish local policy to ensure that Texas Workforce Center customers are notified, in writing, of any adverse actions and are provided with information on appeal rights and the right to file a complaint regarding their workforce services. Boards that do not advise Texas Workforce Centers of the requirement to inform customers of their right to file a complaint or to appeal the written notice of an adverse action risk violating due process principles, which require notice of these rights.

This chapter establishes a dispute resolution process that can be started in one of two ways. The first allows a person to file an appeal following a written determination issued by a Board or its designee. If a written determination has been issued, an appeal must be filed with the Board within 14 calendar days. The other method of initiating the process is for a person to complain of alleged violations of any law, rule, or regulation relating to any federal or state-funded workforce service. If no written determination is issued regarding an adverse action or perceived violation, a person may file a complaint within 180 days of the adverse action or violation.

Under the processes set forth in this chapter, following the receipt of an appeal or a complaint at the Board level, the Board will provide an opportunity for informal resolution. In the informal resolution process, Boards will have the flexibility to utilize such diverse procedures as informal meetings with case managers, reviews of case files, conference calls, interviews, or written explanations, as appropriate for the situation. While this may represent additional responsibilities for some Boards, it is the intent and expectation of the Commission that the majority of appeals and complaints will be resolved informally in this manner, without the necessity of holding a hearing.

However, if no successful informal resolution can be reached, the Board shall hold a hearing and issue a written decision that includes information about filing an appeal with the Agency. If a Board's written decision is appealed to the Agency, an Agency hearing officer will conduct a hearing and issue a decision on behalf of the Agency. Although requiring Boards to issue written decisions may result in supplementary efforts by Boards initially, the Commission expects greater customer satisfaction at the local level and potentially system-wide savings as formal proceedings at the state level are minimized.

There also may be circumstances in which an appeal or complaint may be filed directly with the Agency. In such a case, the Agency has the discretion to refer the appeal or complaint back to the Board, if appropriate. If an appeal is based on a determination issued by the Agency itself, however, or if a complaint is about the statewide provision of services rather than a local service issue, the Agency will provide an opportunity for informal resolution and a hearing, following the same kind of procedure as the Boards.

To assist Boards with the implementation of these rules, the Commission intends to provide training for Board personnel and support for development of Board processes. This technical assistance may include training on informal resolution procedures, hearing officer training, sample forms for Boards to use for complaints or determinations, and other assistance as needed to enable Boards to develop their own procedures.

The Commission retains the requirement that the Agency hearing officer shall be the final decision maker for state-level appeals. Federal WIA regulations require the Agency to complete its decision within 60 days of receipt of an appeal or complaint, leaving little time for an appeal process within the Agency. Therefore, pursuant to 20 C.F.R. §667.610, if a party wishes to appeal a decision of an Agency hearing officer under the federal WIA regulations, the appeal must be filed with the U.S. Department of Labor (DOL).

The Commission maintains separate procedures to resolve complaints concerning the basic labor exchange, as those procedures and timelines are dictated by 20 C.F.R. Part 658, Subpart E, §§400 - 418 and federal Employment Service law. Basic labor exchange complaints include those related to:

--violations of the terms and conditions of a job order;

--noncriminal complaints alleging acts or omissions by Texas Workforce Center staff; and

--complaints affecting migrant and seasonal farmworkers (MSFWs).

The Commission also maintains separate procedures for hearings and appeals under Chapter 807, relating to Career Schools and Colleges, and under Chapter 800, the General Administration rules relating to Board Sanctions. Hearings and appeals for Agency-administered programs are determined separately and distinctly from Board-administered workforce services. The repeal of Chapter 823 affects the hearings and appeals processes for each of these chapters; therefore, in separate, but concurrent, rulemaking adoptions, certain sections of repealed Chapter 823 have been modified and incorporated into Chapter 800 and Chapter 807.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

SUBCHAPTER A. GENERAL PROVISIONS

The Commission adopts new Subchapter A, General Provisions, as follows:

Subchapter A contains the general provisions of the Integrated Complaints, Hearings, and Appeals rules, which include the

short title and purpose; definitions of terms used throughout Chapter 823; and provisions related to appeal representation.

Subchapter A also adds a detailed process related to deadlines after a determination is mailed to each party to a complaint or appeal. This provision applies to Boards, their designees, and the Agency.

§823.1. Short Title and Purpose.

Section 823.1(a) states that Chapter 823 provides for an appeals process to the extent authorized by federal and state law, by rules administered by the Commission. The purpose remains the same as the purpose stated in repealed Chapter 823.

Section 823.1(b) specifically lists the types of complaints or determinations that are covered by Chapter 823. These pertain only to federal- or state-funded workforce services administered by the Agency or the Boards. These services include child care; TANF Choices; FSE&T Project RIO; WIA Adult, Dislocated Worker, and Youth; and Eligible Training Providers receiving WIA funds or other funds for training services.

Section 823.1(c)(1) - (7) lists determinations or complaints that are not covered under new Chapter 823, including:

(1) Across-the-board reductions in services, benefits, or assistance to a class of recipients.

(2) Matters governed by hearings procedures otherwise provided for in this title. This includes Board sanction hearings under Chapter 800, Subchapter E; hearings resulting from Agency monitoring activities under Chapter 800, Subchapter H; hearings regarding alleged breach of contract under Chapter 800, Subchapter K; career school cease and desist order hearings under Chapter 807, Subchapter S; career school licensing hearings under adopted Chapter 807, Subchapter T; Unemployment Insurance (UI) hearings under Chapter 815; child labor hearings under Chapters 815 and 817; Fair Housing Act hearings under Chapter 819; wage claim hearings under Chapters 815 and 821; and hearings regarding Trade Act activities or services under Chapter 815 and Chapter 849, Subchapter E.

(3) Alleged violations of nondiscrimination and equal opportunity requirements. Complaints regarding alleged violations of the nondiscrimination and equal opportunity requirements of WIA are handled by the Equal Opportunity Compliance Section of the Commission under Chapter 841, Subchapter F.

(4) Denial of benefits as it relates to mandatory work requirements for individuals receiving Choices and FSE&T services administered through the Texas Health and Human Services Commission (HHSC).

(5) Matters governing job service-related complaints as referenced in 20 C.F.R. Part 658, Subpart E, §§400 - 418 and federal Employment Service law.

(6) Services provided by the Agency pursuant to Texas Labor Code §301.023, Complaints Against the Commission.

(7) Alleged criminal violations of any services referenced in §823.1(b).

§823.2. Definitions.

Section 823.2 sets forth the definitions for terms used throughout Chapter 823. The section incorporates definitions from repealed Chapter 823, and adds new terms and definitions.

Section 823.2(1) defines "Adverse action" as any denial or reduction of benefits or services to a party. This definition applies to individuals who are adversely affected by the type or level of services received from a Board or statewide One-Stop Service Delivery Network, including those individuals displaced from current employment by Texas Workforce Center customers.

Section 823.2(2) defines "Agency decision" as a written finding issued by an Agency hearing officer following a hearing before that hearing officer. The intent is to distinguish in rule, when necessary, the difference between a Board decision and an Agency decision.

Section 823.2(3) defines "Appeal" as a written request for a review filed with the Board or Agency by a person in response to a determination or decision. The intent of this definition is to be consistent with other Commission rules that govern hearings and appeals.

Section 823.2(4) defines "Board decision" as a written finding issued by a Board following a hearing by a Board hearing officer. The intent is to distinguish in rule, when necessary, the difference between a Board decision and an Agency decision.

Section 823.2(5) defines "Complaint" as a written statement alleging a violation of any law, regulation, or rule relating to any federal- or state-funded workforce service. This definition is consistent with other definitions of complaint in this title. Boards also may receive objections regarding direct provision of workforce-related services that do not allege a violation of law or regulations, but rather concern dissatisfaction with the behavior of Board or contractor employees, or other matters not concerning the services themselves. These objections are handled through informal resolutions at the Board and contractor levels; they are not covered under this chapter and are not appealable to the Agency.

Section 823.2(6) defines "Determination" as a written statement issued by a Board, its designee, or the Agency relating to an adverse action, or to a provider or a contractor relating to denial or termination of eligibility, under programs administered by the Agency or Boards listed in §823.1(b).

Section 823.2(7) defines "Hearing officer" as an impartial individual designated by either the Board or the Agency to conduct hearings and issue administrative decisions. This new definition provides for the designation of hearing officers by both the Board and the Agency and is similar to the definition in repealed Chapter 823. A hearing officer need not be an attorney.

Comment: One commenter requested clarification about who may be a hearing officer and whether a hearing officer could be a Board staff member.

Response: The Commission appreciates the request for clarification. In addition to having the qualifications and training necessary to conduct hearing proceedings in accordance with these rules and Board procedures, a hearing officer must be impartial. To be considered impartial, a hearing officer must not have previously participated in any decision relating to the complaint or appeal, including an informal resolution. Boards may contract out hearing officer functions or, if the Board has sufficiently trained personnel insulated from a particular matter, the Board may choose to use a Board staff person as the hearing officer. The Agency will provide training on hearing officer functions, as well as on procedures designed to maintain impartiality among Board staff.

Section 823.2(8) defines "Informal resolution" as any procedure that results in an agreed final settlement between all parties to a complaint or an appeal. The Commission adds rules in new

Subchapters B and C requiring the Boards and the Agency to provide an opportunity for informal resolution to resolve disputes resulting from either a complaint or an appeal to a determination.

Comment: One commenter asked whether an informal resolution is similar to what is currently part of the Board review process in the Child Care Services rules §809.131.

Response: The Board review process set forth in §809.131 of the Commission's Child Care Services rules is not an informal resolution. Rather, it is a formal review process that results in a written notification and is a prerequisite to an appeal. An informal resolution, on the other hand, is an attempt to resolve a complaint informally by either Board or contractor employees, does not necessarily produce a written response, and takes place prior to a Board hearing. Thus, these are separate and different processes. Under a separate, but concurrent rulemaking, §809.131 of the Child Care Services rules is being repealed and will be replaced by the new streamlined procedures in Chapter 823. Therefore, the step-by-step sequence applicable to all complaints and appeals will be clarified in Chapter 823.

Section 823.2(9) defines "Party" as a person who files a complaint or who appeals a determination, or the entity against which the complaint is filed or that issued the determination. This definition is found in repealed Chapter 823 but has been modified to reflect other changes in new Chapter 823.

§823.3. Agency and Board Timeliness.

Section 823.3 provides an efficient context, based on established principles of due process, for adjudicating late appeals and holding some late appeals timely. The principles are drawn from Chapter 815 of this title, related to UI, case law, and experience.

Section 823.3 also adds a detailed process related to deadlines after a determination is mailed to a party. This provision applies to Boards, their designees, and the Agency.

Section 823.3(a) states that a properly addressed determination or decision is final for all purposes unless the party to whom it is mailed files an appeal no later than the fourteenth calendar day after the mailing date.

Section 823.3(b) states that each party to a complaint or an appeal must promptly notify, in writing, the Board, Board's designee, or the Agency with which the complaint or appeal was filed of any change of mailing address. Determinations and decisions shall be mailed to this address.

Section 823.3(b)(1) states that a copy of the determination or decision must be mailed to a properly designated party representative in order for it to become final.

Section 823.3(b)(2) states that the Board or Agency is responsible for making an address change only if the Board or Agency is specifically directed by the party to mail subsequent correspondence to the new address.

Section 823.3(b)(3) states that if the Board, Board's designee, or Agency addresses a document incorrectly, but the party receives the document, the time frame for filing an appeal shall begin as of the actual date of receipt by the party, whether or not the party receives the document within the appeal time frame set forth in §823.3(a). However, this requirement does not apply if the party fails to provide a current address or provides an incorrect address.

Section 823.3(c) states that a determination or decision mailed to a party shall be presumed to have been delivered if the document was mailed as specified in §823.3(b).

Section 823.3(c)(1) states in subparagraphs (A) and (B) that the determination or decision shall not be presumed to have been delivered:

(A) if there is tangible evidence of nondelivery, such as being returned to sender by the U.S. Postal Service; or

(B) if credible and persuasive evidence is submitted to establish nondelivery or delayed delivery to the proper address.

Section 823.3(c)(2) states that if a party provides the Board or Agency with an incorrect mailing address, a mailing to that address must be considered a proper mailing, even if there is proof that the party never received the document.

Section 823.3(d) states that a complaint or an appeal must be in writing. Complaints or appeals may be filed electronically only if filed in a form approved by the Agency in writing.

Section 823.3(d)(1) - (7) specifies that the filing date for a complaint or an appeal is:

(1) the postmarked date or the postal meter date (where there is only one or the other);

(2) the postmarked date, if there is both a postmarked date and a postal meter date;

(3) the date the document was delivered to a common carrier, which is equivalent to the postmarked date;

(4) three business days before receipt by the Board or Agency, if the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;

(5) the date of the document itself, if the document date is fewer than three days earlier than the date of receipt and the document was received in an envelope bearing no legible postmark, postal meter date, or date of delivery by a common carrier;

(6) the date of the document itself, if the mailing envelope containing the complaint or appeal is lost after delivery to the Board or Agency. If the document is undated, the filing date must be deemed to be three business days before receipt by the Board or Agency; or

(7) the date of receipt by the Board or Agency, if the document was filed by fax.

Section 823.3(e) states that credible and persuasive testimony under oath, subject to cross-examination, may establish a filing date that is earlier than the dates established under §823.3(d). A party may be allowed to establish a filing date earlier than a postal meter date or the date of the document itself only upon a showing of extremely credible and persuasive evidence. Likewise, when a party alleges that a complaint or appeal has been filed that the Board or Agency has never received, the party must present extremely credible and persuasive evidence to support the allegation.

Section 823.3(f)(1) and (2) states that a decision or determination shall not be deemed final if a party shows that a representative of the Board, Board's designee, or Agency has given misleading information on appeal rights to the party. The party shall specifically establish:

(1) how the party was misled; or

(2) what misleading information the party was given, and, if possible, by whom the party was misled.

Section 823.3(g) states that there is no good cause exception to the timeliness rules.

§823.4. Representation.

Section 823.4 states that each party may authorize a hearing representative to assist in presenting a complaint or an appeal on behalf of the party under this chapter. The Agency or Board may require authorization to be in writing. On behalf of the party, the representative may exercise any of a party's rights under this chapter. Information from repealed Chapter 823 relating to Information on Right of Appeal is incorporated throughout new Chapter 823, where appropriate.

SUBCHAPTER B. BOARD COMPLAINT AND APPEAL PROCEDURES

The Commission adopts new Subchapter B, Board Complaint and Appeal Procedures, as follows:

Subchapter B contains Board-level complaint and appeal procedures related to all workforce services administered by the Boards.

The WIA regulations require that procedures be developed related to processes dealing with complaints, appeals, and hearings at both the local level and the state level. In addition, WIA also provides that eligible training providers denied WIA funding for training services be given the right to appeal the denial to the Board or the Agency. These procedures are currently set forth in Chapter 841 of this title. Under a separate, but concurrent, rulemaking, the Commission has adopted the repeal of the Chapter 841 rules related to local and state appeals; local-level complaint procedures; and state-level hearing procedures. The repealed Chapter 841 sections have been incorporated in new Chapter 823. This new provision related to processes dealing with complaints, appeals, and hearings applies to the workforce services administered by the Agency or Board as listed in §823.1(b).

Subchapter B includes a new provision related to informal resolution. Once a complaint has been filed, an opportunity for informal resolution will be offered by the Board or its designee and the Agency. This provision is currently located in Chapter 841 of this title relating to complaints filed with the Board; however, there is no informal resolution provision offered by the Agency. New Chapter 823 allows the Boards and the Agency to resolve customers' issues in an informal manner in advance of a Board or Agency hearing. Under a separate, but concurrent rulemaking, the Commission has adopted the repeal of the Chapter 841 rules related to local-level informal resolution. New Chapter 823 modifies and incorporates these repealed Chapter 841 rules. The informal resolution provision applies to workforce services administered by the Boards or the Agency as listed in §823.1(b).

Subchapter B also adds a new provision that incorporates similar information related to determinations found throughout repealed Chapter 823. A determination is provided to any person affected by a Board or Board contractor's adverse action. Boards will be required to establish policies to ensure Texas Workforce Center customers receive a written determination notifying them of any adverse actions and to provide these customers with information on complaints and appeal rights. The intent of the Commission is to ensure the protection of the due process rights of Texas Workforce Center customers.

Subchapter B includes a new provision related to Board hearings. Board hearings or "Board reviews" are addressed in Chapters 809, 811, and 841. The sections in each of these chapters related to Board reviews have been repealed under separate, but concurrent, rulemaking adoptions. New Chapter 823 contains a single process for Board hearings and provides specific and consistent guidance for Boards to conduct hearings when a customer or provider appeals a determination.

§823.10. Board-Level Complaints.

Section 823.10 contains specific responsibilities regarding filing complaints with a Board.

Section 823.10(a)(1) - (3) identifies persons who may file a complaint, including:

(1) Texas Workforce Center customers. These are individuals who have applied for or are eligible to receive federal- and state-funded workforce services administered by the Agency or Boards listed in §823.1(b).

(2) other interested persons affected by the One-Stop Service Delivery Network, including subrecipients. These persons may include child care or other service providers that have received a determination issued by a Board.

(3) previously employed individuals who believe they were displaced by a Texas Workforce Center customer participating in work-based services such as subsidized employment, work experience, or workfare. This subparagraph complies with the nondisplacement rules required by several federal agencies.

The U.S. Department of Health and Human Services (DHHS) regulations at 45 C.F.R. §261.70 require that safeguards be in place to ensure that TANF individuals do not displace other workers. In addition, states must establish and maintain procedures to resolve complaints of alleged violations of the displacement rule.

DOL regulations at 20 C.F.R. §667.270(a) require that safeguards be in place to ensure that participants in WIA employment and training activities do not displace other employees. Both regular employees and program participants may file a complaint.

The U.S. Department of Agriculture (USDA), Food and Nutrition Service (FNS) requires states to have a nondisplacement rule. The statute at 7 C.F.R. §273.7(m)(6)(i)(H) states that agencies must not place an FSE&T workfare participant in a work position that has the effect of replacing or preventing the employment of an individual not participating in the workfare program. In addition, 7 C.F.R. §273.7(e)(1)(iv)(A) and (B) states that agencies must not place FSE&T individuals participating in workfare or work experience in an employment and training activity that has the effect of replacing the employment of an individual not participating in the employment and training experience program. The regulations go on to state that employers must provide the same benefits and working conditions that are provided at the job site to employees performing comparable work for comparable hours. Although FNS does not require states to establish procedures to resolve complaints alleging violations of the displacement rule, the Commission includes the FNS displacement rule as part of service integration for workforce services.

Section 823.10(b) states that a complaint is required to be in writing and to be filed within 180 days of the alleged violation. This requirement, located in §841.63, Time Limitations at Local

Level, which has been concurrently repealed, is modified and incorporated in new Chapter 823.

Section 823.10(c) requires the complaint to contain the party's name, current mailing address, and a brief statement of the alleged violation identifying the facts on which the complaint is based. Portions of this requirement are found in §841.62, Grievance Filing Procedures at the Local Level, which has been concurrently repealed. The requirement is modified and incorporated in new Chapter 823.

Section 823.10(d)(1) - (4) requires Boards to ensure that information about complaint procedures is provided to individuals, eligible training providers, and subrecipients. Information must be presented in a manner that is easily understood by the affected individuals, including youth, individuals with disabilities, and individuals with limited English proficiency, and must be:

(1) posted in a conspicuous public location at each Texas Workforce Center;

(2) provided in writing to any customer;

(3) made available in writing to any individual upon request; and

(4) placed in each Texas Workforce Center customer's file.

This provision follows federal WIA requirements set forth in §841.64, LWDB Responsibilities, which has been concurrently repealed, and is modified and incorporated in new Chapter 823.

Comment: One commenter requested clarification of §823.10(a)(3) regarding complaints filed by previously employed individuals who believe they were displaced by a Texas Workforce Center customer participating in work-based services and §823.10(d) regarding the requirement that Boards ensure that information about complaint procedures is provided to individuals, eligible training providers, and subrecipients. Specifically, the commenter asked whether Boards are responsible for notifying such previously employed individuals of the Boards' complaint procedures, and if so, how.

Response: The Commission recognizes that identifying such individuals would be extremely difficult because they are not Texas Workforce Center customers. However, the federal WIA regulations provide that such displaced individuals have the right to file a complaint. Section 823.10(d) provides that the complaint information is to be posted conspicuously in each Texas Workforce Center and provided to any person upon request. Therefore, if an individual contacts a Texas Workforce Center and alleges that he or she has been displaced, the individual should be provided with the information about the Board's complaint procedures.

§823.11. Determinations.

Section 823.11 relates to Boards and their designees issuing determinations regarding actions that affect the type and level of workforce services provided. This section includes the information required when issuing a determination to training providers found by the Boards to be ineligible to receive WIA funding for training services. Additionally, this section retains provisions from §841.48, Local Appeals, concurrently repealed, which requires that a written decision on an appeal be provided to an eligible training provider whose eligibility has been terminated.

Section 823.11(a) requires that a Board or its designee must promptly issue a written determination regarding any action adversely affecting the type and level of services to any person directly affected. The intent of the Commission is to ensure the protection of due process and other legal rights of Texas Workforce Center customers and other persons.

Section 823.11(b)(1) - (6) requires that the determination include the following information:

(1) A brief statement of the adverse action;

(2) The mailing date of the determination;

(3) An explanation of the individual's right to an appeal;

(4) The procedures for filing an appeal to the Board, including applicable time frames as required in §823.3;

(5) The right to have a hearing representative, including legal counsel; and

(6) The address or fax number to which the appeal must be sent.

This subsection incorporates similar provisions related to determinations found throughout repealed Chapter 823.

Section 823.11(c)(1) - (3) requires Boards to allow providers of training services the opportunity to appeal a determination related to the:

(1) denial of eligibility as a training provider under WIA §122(b), §122(c), or §122(e);

(2) termination of eligibility as a training provider or other action under WIA §122(f); or

(3) denial of eligibility as a training provider of on-the-job or customized training by the operator of a Texas Workforce Center under WIA §122(h).

This section retains certain provisions from §841.48, Local Appeals, which has been concurrently repealed. In addition, this provision references the WIA requirements at 20 C.F.R. §667.640(b) relating to "denial or termination of eligibility as a training provider." States are required to provide an opportunity to appeal a denial or termination of eligibility by Boards.

Section 823.11(d) states that a person who receives a determination from a Board or a Board's designee may file an appeal with the Board requesting a review of the determination. The appeal must be submitted in writing and filed within 14 calendar days of the mailing date of the determination. The appeal must include the party's proper mailing address. This provision was located in the Commission's Child Care Services, Choices, and WIA rules in §809.131 and §809.132; §§811.71 - 811.73; and §§841.48, 841.49, 841.61 - 841.69, 841.91 - 841.93, 841.95, and 841.96, respectively. These sections are concurrently repealed, and one single uniform procedure for appealing a determination is included in new Chapter 823.

§823.12. Board Informal Resolution Procedure.

Section 823.12 identifies the specific responsibilities of a Board to conduct informal resolution. This new provision also includes recommendations on how to conduct informal resolution.

Section 823.12(a) states that a Board shall provide the opportunity for informal resolution of a complaint or appeal. This provision allows Boards or their designees the opportunity to resolve customers' issues in an informal manner in lieu of a Board hearing. This subsection follows federal WIA requirements set forth in §841.65, Local Level Informal Conference Procedure, which has been concurrently repealed. This information is modified and incorporated in new Chapter 823.

Section 823.12(b)(1) - (5) provides recommendations on how informal resolution may be conducted, including but not limited to:

(1) informal meetings with case managers or their supervisors;

(2) second reviews of the case file;

(3) telephone calls or conference calls to the affected parties;

(4) in-person interviews with all affected parties; or

(5) written explanations or summaries of the laws or regulations involved in the complaint.

This provision allows Boards or their designees to determine the most expeditious and practical method of resolving complaints or appeals in an informal manner, thereby possibly precluding the necessity of a Board hearing.

Comment: One commenter asked whether an informal resolution is similar to what is currently part of the Board review process in the Child Care Services rules §809.131.

Response: As previously noted, the Board review process set forth in §809.131 of the Commission's Child Care Services rules, which is being repealed and replaced with a uniform procedure in this new chapter, is not an informal resolution. An informal resolution is an attempt to resolve a complaint informally by either Board or contractor employees and is conducted prior to a Board hearing. A Board review follows an adverse action, and is a prerequisite to an appeal. Therefore, the Board review process referenced in the Child Care Services rules is considered a Board hearing.

§823.13. Board Hearings.

Section 823.13 provides the requirements for Board hearings for resolving complaints or appeals filed from a determination. The provisions in this section are retained, with modifications, from certain rules in Chapters 809, 811, 813, and 841 of this title, which have been concurrently repealed.

Section 823.13(a) states that if the parties reach a final agreement through informal resolution, no hearing shall be held. It is not necessary for a complaint or appeal to proceed to a Board hearing if all parties reach an agreement through the informal resolution procedure.

Section 823.13(b) requires Boards to provide an opportunity for a hearing to resolve an appeal or complaint, if not successfully resolved through the informal resolution procedure. This provision was found in §841.66, Local Level Hearing Procedure, which has been concurrently repealed. The language is modified and included in new Chapter 823.

Section 823.13(c) requires Boards to complete either an agreement resulting from informal resolution or a hearing and Board decision within 60 calendar days of the original filing of an appeal or complaint. This follows federal WIA requirements, set forth in §841.66, Local Level Hearing Procedure, which has been concurrently repealed. The language is modified and incorporated in new Chapter 823.

Section 823.13(d) requires Boards to provide a process that allows an individual alleging a labor standards violation to submit a complaint through a binding arbitration procedure. Examples of labor standards violations might include infringement on the right to collective bargaining, pay disputes, employment discrimination, or disputes as to employee benefits. Most collective bargaining agreements have specific provisions covering such violations and specific grievance procedures to address them. These procedures frequently include binding arbitration under the Federal Arbitration Act (Title 9, U.S.C., §§1 - 16) in which both parties agree to submit the dispute to a neutral arbitrator. The arbitrator's decision is final and binding upon both parties. This section follows federal WIA requirements to ensure that arbitration rights under collective bargaining agreements are enforced. In such a case, the Board may be required to follow the provisions of the applicable collective bargaining agreement with respect to its arbitration procedure.

Comment: One commenter requested clarification on labor standards violations and binding arbitration procedures that previously have not been a responsibility of the Boards and noted that Boards should not be responsible for those types of violations or not involved in an arbitration process.

Response: Historically, Boards have rarely, if ever, received complaints involving labor standards violations subject to collective bargaining agreements. But existing federal WIA regulations specifically require that local workforce development area complaint procedures must provide a process that allows an individual alleging a labor standards violation to submit the grievance to a binding arbitration procedure, if a collective bargaining agreement covering the parties so provides. This is referenced in 20 C.F.R. §667.600(c)(3). To further clarify, WIA regulations at 20 C.F.R. §667.272 provide that wage and labor standards are applicable to individuals in on-the-job training or employed in activities under Title 1 of WIA and must be compensated at the same rates as other similar employees, and paid not less than is provided by applicable federal, state, or local minimum wage laws. Also, these same individuals must be provided equivalent benefits and working conditions as other similar employees. Boards should be aware of these requirements and ensure that their procedures do not interfere with any party's right to binding arbitration under a collective bargaining agreement. To those ends, the Commission will work with Boards to provide technical assistance as needed.

Section 823.13(e) states that within 60 calendar days of the filing of the appeal or complaint, the Board shall send the parties a decision setting forth the results of the Board hearing. This decision shall be issued by a Board hearing officer, shall include findings of fact and conclusions of law, and shall provide information about appeal rights. This requirement follows federal WIA requirements and was located in §841.66, Local Level Hearing Procedure, which has been concurrently repealed. This language is modified and incorporated in new Chapter 823.

Section 823.13(f) provides that a party may file an appeal with the Agency if a Board decision is not mailed within the 60-calendar-day time frame described in subsection (e) of this section or if any party disagrees with a timely Board decision. This follows federal WIA requirements and is contained in the adopted repeal of §841.66, Local Level Hearing Procedure. The language is modified and incorporated in new Chapter 823.

Section 823.13(g) notifies parties that an appeal to the Agency must be filed in writing with TWC Appeals, Texas Workforce Commission, 101 East 15th Street, Room 410, Austin, Texas 78778-0001, within 14 calendar days after the mailing date of the Board's decision. If the Board does not issue a decision within 60 calendar days of the date of the filing of the original appeal or complaint, an appeal to the Agency must be filed no later than 90 calendar days after the filing date of the original appeal or complaint. This requirement was found in §841.69, Appeal, which

has been concurrently repealed. The language is modified and incorporated in new Chapter 823.

§823.14. Board Policies for Resolving Complaints and Appeals of Determinations.

Section 823.14 relates to Boards' policies for complaints and appeals of determinations, informal resolution, and hearings at the Board level. This requirement was located in Chapter 841, Subchapter D, which has been concurrently repealed, is modified and incorporated in new Chapter 823.

Section 823.14(a) requires Boards to develop written policies to handle complaints and appeals, provide the opportunity for informal resolution, and conduct hearings in accordance with this subchapter for individuals, eligible training providers, and other persons affected by the One-Stop Service Delivery Network, including subrecipients.

Section 823.14(b) requires a Board and its subrecipients to maintain written copies of these policies and make them available to the Agency, Texas Workforce Center customers, and other interested persons upon request. This provision is modified and retained from Chapter 841, Subchapter D, which has been concurrently repealed.

Section 823.14(c)(1) - (8) lists the minimum requirements for Board policies relating to complaints, informal resolution, and hearings. Required Board policies are found throughout other referenced rules, which have been concurrently repealed. New §823.14(c) provides an itemized list of required policies in one subsection. Boards must develop and approve policies to:

(1) ensure that determinations are provided as specified in §823.11;

(2) ensure that information about complaint procedures is available as described in §823.10(d);

(3) notify persons that complaints must be submitted in writing and set forth the facts on which the complaint is based, and notify individuals of the time limit in which to file a complaint;

(4) maintain a complaint log and all complaint-related materials in a secure file for a period of three years;

(5) designate an individual to be responsible for investigating, documenting, monitoring, and following up on complaints;

(6) inform persons of the:

(A) right to file a complaint;

(B) right to appeal a determination;

(C) opportunity for informal resolution and a Board hearing;

(D) Boards' time frames for either reaching informal resolution or issuing a decision; and

(E) right to file an appeal to the Agency, including information on where to file the appeal;

(7) designate hearing officers to conduct Board hearings, document actions taken, and render decisions; and

(8) ensure that complaints remanded from the Agency to the Board for resolution are handled in a timely fashion and follow established Board policies and time frames.

Section 823.14(d) notifies Boards that complaints filed directly with the Agency may be remanded to the appropriate Board to be processed in accordance with the Board's policies for resolving complaints. The new subsection, which complies with WIA regulations allowing complaints to be remanded first to the appropriate Board for resolution, provides that a customer can file a complaint directly with the Agency and that the Agency then may choose to remand a complaint to the Board for resolution.

SUBCHAPTER C. AGENCY COMPLAINT AND APPEAL PROCEDURES

The Commission adopts new Subchapter C, Agency Complaint and Appeal Procedures, as follows:

Subchapter C contains the Agency's complaint and appeal procedures. Similar to repealed Subchapters B and C, new Subchapter C contains rule provisions related to the setting of hearings, postponement and continuance of hearings, evidence presented for hearings, hearing officer disqualification, recusal and reassignment, hearing procedures, and withdrawal of complaints and appeals. New Subchapter C contains many of the provisions related to general hearings found throughout repealed Chapter 823.

Subchapter C adds a new provision related to state-level complaints. WIA regulations require that procedures be developed related to processes for complaints, hearings, and appeals at the state level. The Commission's WIA rules, Chapter 841, currently do not specify that a customer can file a complaint directly with the Agency, nor do these rules specify that the Agency may remand a complaint to the Boards for resolution. Instead, Chapter 841 indicates that complaints first must be addressed by the Boards before an appeal may be made to the Agency. This new Chapter 823 provision complies with WIA regulations and provides specific processes related to complaints filed directly with the Agency.

§823.20. State-Level Complaints.

Section 823.20 relates to the responsibilities of the Agency to establish procedures regarding complaints received at the state level. The provisions in this section are retained and modified from other rules in this title, which have been concurrently repealed.

Section 823.20(a) specifies that a Texas Workforce Center customer or other interested person affected by the statewide One-Stop Service Delivery Network, including service providers alleging a noncriminal violation of the requirements of any federal or state-funded workforce services, may file a complaint with the Agency. WIA regulations require states to develop procedures to deal with complaints from participants and other interested persons affected by the statewide workforce system. This new provision complies with federal WIA regulations and includes the workforce services referenced in §823.1(b).

Section 823.20(b) states that complaints shall be in writing and filed within 180 calendar days of the alleged violation. The complaint shall include the party's name, current mailing address, and a brief statement of the alleged violation identifying the facts on which the complaint is based. To maintain consistency for deadlines to file complaints, the Commission has aligned the complaint filing deadlines with the Board filing deadlines set forth in new Chapter 823.

Section 823.20(c) states that the complaint must be filed with TWC Appeals, Texas Workforce Commission, 101 East 15th Street, Room 410, Austin, Texas 78778-0001. This subsection retains language from the concurrent repeal of certain sections of the Commission's Child Care Services, Choices, FSE&T, and WIA rules.

Section 823.20(d) requires the Agency to provide an opportunity for informal resolution. This provision allows the Agency to resolve customers' issues in an informal manner in advance of the Agency's appeal procedures. This follows federal WIA requirements and also was located in §841.93, State Level Informal Resolution and Hearing for Alleged Violations of the Requirements of WIA by the State or for Complaints by Individuals Affected by the Statewide Program, which has been concurrently repealed.

Section 823.20(e) provides that if the informal resolution procedure results in a final agreement between the parties, no hearing is required.

Section 823.20(f) states that a complaint not resolved by the informal resolution procedure shall be set for a hearing and a decision shall be issued in accordance with procedures for appeals under this subchapter. This provision is similar to language in the prehearing procedures section in repealed Chapter 823.

Section 823.20(g) notifies Boards that complaints filed directly with the Agency may be returned to the appropriate Board to be processed in accordance with the Board's hearing policies. The new subsection, which complies with WIA regulations allowing complaints to be remanded first to the appropriate Board for resolution, provides that a customer can file a complaint directly with the Agency and that the Agency may remand the complaint to the Board for resolution. Thus, if a person files a complaint directly with the Agency regarding a concern with the local provision of services as opposed to the statewide service network, the Agency has the discretion to send the complaint to the appropriate Board.

§823.21. Setting a Hearing.

Section 823.21 identifies the necessary requirements to set an Agency hearing. The provisions in this section are retained from the repealed Chapter 823 with minor modifications.

Section 823.21(a) states that a WIA-funded training provider or other provider certified by the Agency and later found to be ineligible to receive funding as a training provider may file an appeal directly with the Agency. Section 823.21(a) retains certain provisions from §841.49, State Level Appeals, which has been concurrently repealed. WIA regulations at 20 C.F.R. §667.640 require states to develop a written appeals process for appeals requested by providers found by the Agency to be ineligible to receive WIA funding for training services.

Section 823.21(b) states that upon receipt of the appeal from a Board decision, an appeal from a WIA-funded training provider found to be ineligible by the Agency, or if no informal resolution of a complaint is successfully reached, the Agency shall promptly assign a hearing officer and mail a notice of hearing to the parties and/or their designated representatives. The hearing shall be set and held promptly and in no case later than as provided by applicable statute or rule.

Section 823.21(c)(1) - (3) states that the notice of hearing shall be in writing and include:

(1) a statement of the date, time, place, and nature of the hearing;

(2) a statement of the legal authority under which the hearing is to be held; and

(3) a short and plain statement of the issues to be considered during the hearing.

Section 823.21(d) provides that the notice of hearing shall be issued at least 10 calendar days before the date of the hearing unless a shorter period is permitted by statute.

Section 823.21(e) states that hearings shall be conducted by telephonic means, unless an in-person hearing is required by applicable statute or the Agency determines that an in-person hearing is necessary.

Section 823.21(f) states that parties needing special accommodations, including the need for a bilingual or sign language interpreter, shall make this request before the hearing is set, if possible, or as soon as practical.

§823.22. Postponement and Continuance.

Section 823.22 relates to the Agency's policies regarding the postponement and continuance of an Agency hearing. The provisions in this section are retained from the repealed Chapter 823 with minor modifications.

Section 823.22(a) states that the hearing officer may grant a postponement of a hearing for good cause at a party's request. Except in emergencies or unusual circumstances confirmed by a telephone call or other means, postponements shall not be granted within two days of the scheduled hearing.

Section 823.22(b)(1) - (5) provides that a continuance of a hearing may be ordered at the discretion of the hearing officer if:

(1) there is insufficient evidence upon which to make a decision;

(2) a party needs additional time to examine evidence presented at the hearing;

(3) the hearing officer considers it necessary to enter into evidence additional information or testimony;

(4) an in-person hearing is necessary for proper presentation of the evidence; or

(5) any other reason deemed appropriate by the hearing officer.

Section 823.22(c) states that the hearing officer shall advise the parties of the reason for the continuance and of any additional information required. At the continuance, the parties shall have an opportunity to rebut any additional evidence.

§823.23. Evidence.

Section 823.23 relates to the Agency's evidence procedures for hearings. The provisions in this section are retained from repealed Chapter 823 rules with minor modifications.

Section 823.23(a), Evidence Generally, states that evidence, including hearsay evidence, shall be admitted if it is relevant and if, in the judgment of the hearing officer, it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

Section 823.23(b), Exchange of Exhibits, states that to be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. Any documentary evidence to be presented during a telephonic hearing must be exchanged with all parties and a copy must be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing must be exchanged at the hearing.

Section 823.23(c), Stipulations, states that the parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal on the basis of such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.

Section 823.23(d), Experts and Evaluations, states that if relevant and useful, testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by hearing officers, on their own motion, or at a party's request. The Commission adds language to clarify that the cost of any such expert or evaluation ordered by the hearing officer shall be borne equally by the parties.

Section 823.23(e), Subpoenas, states that:

(1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.

(2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.

(3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.

(4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§823.24. Hearing Procedures.

Section 823.24 describes the Agency's hearing procedures, which include the presentation of evidence, examination of witnesses and parties, additional evidence, and appropriate hearing behavior. The provisions in this section are retained from the repealed rules and have not substantially changed.

Section 823.24(a)(1) - (4), General Procedure, states that all hearings shall be conducted informally and in such manner as to ascertain the substantive rights of the parties. The hearing shall be conducted de novo, that is, a new hearing without regard to any previous determinations or decisions issued by a Board. The hearing officer shall develop the evidence. All issues relevant to the appeal shall be considered and addressed, including:

(1) presentation of evidence;

(2) examination of witnesses and parties;

(3) additional evidence; and

(4) appropriate hearing behavior.

The Commission adds language to §823.24(a)(1) to further specify that a party has the right to object to evidence offered at the hearing by the hearing officer or other parties. The Commission also clarifies in §823.24(a)(2) that the hearing officer shall examine parties and any witnesses "under oath."

Section 823.24(b)(1) - (4), Records, identifies the records procedures required for an Agency hearing, including:

(1) The hearing record must include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.

(2) The hearing record must be maintained in accordance with federal or state law.

(3) Confidentiality of information contained in the hearing record must be maintained in accordance with federal and state law.

The Commission adds §823.24(b)(4) to clarify that, upon request, a party has the right to obtain a copy of the hearing record at no charge. However, a party requesting a transcript of the hearing record shall pay the costs of the transcription.

§823.25. Withdrawal of Complaint or Appeal.

Section 823.25 states a party may request a withdrawal of its own complaint or appeal at any time before a final Agency decision is issued. The hearing officer may grant the request for withdrawal in writing and issue an order of dismissal. Provisions in this section are retained from the repealed rules and have not substantially changed.

§823.26. Hearing Officer Independence and Impartiality.

Section 823.26 relates to the Agency hearing officers' powers and impartiality. The provisions in this section are in part retained from the repealed rules.

Section 823.26(a) provides that a hearing officer presiding over a hearing shall have all powers necessary and appropriate to conduct a full, fair, and impartial hearing. Hearing officers shall remain independent and impartial in all matters regarding the handling of any issues during the pendency of a case and in issuing their written decisions.

Section 823.26(b) provides that a hearing officer shall be disqualified if the hearing officer has a personal interest in the outcome of the appeal or if the hearing officer directly or indirectly participated in the determination or Board decision on appeal. Any party may present facts to the Agency in support of a request to disqualify a hearing officer.

Section 823.26(c) states that a hearing officer may withdraw from a hearing to avoid the appearance of impropriety or partiality.

Section 823.26(d) states that following any disqualification or withdrawal of a hearing officer, the Agency shall assign an alternate hearing officer to the case. The alternate hearing officer shall not be bound by any findings or conclusions made by the disqualified or withdrawn hearing officer.

§823.27. Ex Parte Communications.

Section 823.27 is intended to prevent improper communication with hearing officers, to ensure that their decisions are based solely on the evidence and arguments presented at the hearing. The section states that:

(a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

(b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review that communication.

(c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.

(d) The hearing officer may initiate communications with an Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence. Based on a comment received for Chapter 807, Career Schools and Colleges, regarding a hearing officer's communications with an "impartial" Agency employee, language has been added to this subsection specifying that the hearing officer may initiate communications with an impartial Agency employee. This change provides consistency with Chapter 807 regarding ex parte communications.

SUBCHAPTER D. AGENCY-LEVEL DECISIONS, REOPENINGS, AND REHEARINGS

The Commission adopts new Subchapter D, Agency-Level Decisions, Reopenings, and Rehearings, as follows:

Subchapter D identifies and contains rule provisions related to the Agency's specific responsibilities for Agency decisions, motions to request the reopening of hearings, and motions for rehearings. Subchapter D is similar to the repealed Subchapter D and retains many of the provisions related to General Hearings found throughout repealed Chapter 823.

§823.30. Hearing Decision.

Section 823.30 describes the Agency's procedures related to its hearing decisions. The provisions in this section are retained from repealed Chapter 823 rules with minor modifications.

Section 823.30(a) states that following the conclusion of the hearing, the hearing officer shall promptly issue a written decision on behalf of the Agency.

Section 823.30(b)(1) - (3) states that the hearing decision shall be based exclusively on the evidence of record in the hearing and on matters officially noticed in the hearing and shall include:

(1) a list of the individuals who appeared at the hearing;

(2) the findings of fact and conclusions of law reached on the issues; and

(3) the affirmation, reversal, or modification of a determination or Board decision.

Section 823.30(c) states that the Agency may assume continuing jurisdiction to modify or correct a hearing decision until the expiration of 14 calendar days from the mailing date of the hearing decision unless a party files a timely motion for rehearing.

§823.31. Motion for Reopening.

Section 823.31 describes the Agency's procedures to request a reopening of a hearing. The provisions in this section are retained from repealed rules with minor modifications.

Section 823.31(a) states that if a party does not appear for an Agency hearing, the party has the right to request a reopening of the hearing within 14 calendar days from the date the Agency decision is mailed.

Section 823.31(b) states that the motion shall be in writing and detail the reason for failing to appear at the hearing.

Section 823.31(c) states that the hearing officer may schedule a hearing on whether to grant the reopening.

Section 823.31(d) states the motion may be granted if it appears to the hearing officer that the party has shown good cause for failing to appear at the hearing.

§823.32. Motion for Rehearing and Decision.

Section 823.32 describes the Agency's procedures regarding motions for rehearings and decisions related to rehearings. The provisions in this section are retained from repealed rules and have not substantially changed.

Section 823.32(a) states that a party has 14 calendar days from the date the Agency decision is mailed to file a motion for rehearing. A rehearing may be granted only for the presentation of new evidence.

Section 823.32(b) states that motions for rehearing must be in writing and allege the new evidence to be considered. The appellant must show a compelling reason why the evidence was not presented at the hearing.

Section 823.32(c) states that if the hearing officer determines that the alleged, new evidence warrants a rehearing, a rehearing must be scheduled at a reasonable time and place.

Section 823.32(d) states that the hearing officer shall issue a written decision following the hearing.

Section 823.32(e) states that the hearing officer may also issue a decision denying a motion for rehearing.

§823.33. Finality of Decision.

Section 823.33 describes when the Agency hearing officer's decision becomes final. Certain provisions in this section are retained, substantially unchanged, from the repealed rules.

Section 823.33(a)(1) - (3) states the decision of the hearing officer is the final decision of the Agency after the expiration of 14 calendar days from the mailing date of the decision, unless within that time:

(1) a request for reopening is filed with the Agency;

(2) a request for rehearing is filed with the Agency; or

(3) the Agency assumes continuing jurisdiction to modify or correct a decision.

Section 823.33(b) states any decision issued in response to a request for reopening or rehearing or a modification or correction issued by the Agency must be final on the expiration of 14 calendar days from the mailing date of the decision, modification, or correction.

COMMENTS WERE RECEIVED FROM:

Marsha Lindsey, QA/EO Manager, Texoma Workforce Development Board

Concho Valley Workforce Board

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§823.1 - 823.3

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as the Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 6, 2007.

TRD-200705372
Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
Effective date: November 26, 2007
Proposal publication date: July 13, 2007
For further information, please call: (512) 475-0829

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SUBCHAPTER B. PRE-HEARING PROCEDURE

40 TAC §§823.11 - 823.15

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as the Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER C. CONDUCT OF HEARING

40 TAC §§823.31 - 823.34

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as the Texas Government Code, Chapter 2308.

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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For further information, please call: (512) 475-0829

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SUBCHAPTER D. DECISIONS, NON-APPEARANCES, AND REHEARINGS

40 TAC §§823.41 - 823.44

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and the Texas Human Resources Code §44.002, regarding Administrative Rules.

The adopted repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as the Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Texas Workforce Commission
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For further information, please call: (512) 475-0829

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CHAPTER 823. INTEGRATED COMPLAINTS, HEARINGS, AND APPEALS

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §§823.1 - 823.4

The new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The new rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER B. BOARD COMPLAINT AND APPEAL PROCEDURES

40 TAC §§823.10 - 823.14

The new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The new rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER C. AGENCY COMPLAINT AND APPEAL PROCEDURES

40 TAC §§823.20 - 823.27

The new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The new rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§823.23. Evidence.

(a) Evidence Generally. Evidence, including hearsay evidence, shall be admitted if it is relevant and if in the judgment of the hearing officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, the hearing officer may exclude evidence if its probative value is outweighed by the danger of unfair prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

(b) Exchange of Exhibits. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. Any documentary evidence to be presented during a telephonic hearing shall be exchanged with all parties and a copy shall be provided to the hearing officer in advance of the hearing. Any documentary evidence to be presented at an in-person hearing shall be exchanged at the hearing.

(c) Stipulations. The parties, with the consent of the hearing officer, may agree in writing to relevant facts. The hearing officer may decide the appeal on the basis of such stipulations or, at the hearing officer's discretion, may set the appeal for hearing and take such further evidence as the hearing officer deems necessary.

(d) Experts and Evaluations. If relevant and useful, testimony from an independent expert or a professional evaluation from a source satisfactory to the parties and the Agency may be ordered by hearing officers, on their own motion or at a party's request. The cost of any such expert or evaluation ordered by the hearing officer shall be borne equally by the parties.

(e) Subpoenas.

(1) The hearing officer may issue subpoenas to compel the attendance of witnesses and the production of records. A subpoena may be issued either at the request of a party or on the hearing officer's own motion.

(2) A party requesting a subpoena shall state the nature of the information desired, including names of any witnesses and the records that the requestor feels are necessary for the proper presentation of the case.

(3) The request shall be granted only to the extent the records or the testimony of the requested witnesses appears to be relevant to the issues on appeal.

(4) A denial of a subpoena request shall be made in writing or on the record, stating the reasons for such denial.

§823.24. Hearing Procedures.

(a) General Procedure. All hearings shall be conducted de novo. The hearing shall be conducted informally and in such manner as to ascertain the substantive rights of the parties. The hearing officer shall develop the evidence. All issues relevant to the appeal shall be considered and addressed.

(1) Presentation of Evidence. The parties to an appeal may present evidence that is material and relevant, as determined by the hearing officer. In conducting a hearing, the hearing officer shall actively develop the record on the relevant circumstances and facts to resolve all issues. To be considered as evidence in a decision, any document or physical evidence must be entered as an exhibit at the hearing. A party has the right to object to evidence offered at the hearing by the hearing officer or other parties.

(2) Examination of Witnesses and Parties. The hearing officer shall examine parties and any witnesses under oath and shall allow cross-examination to the extent the hearing officer deems necessary to afford the parties due process.

(3) Additional Evidence. The hearing officer, with or without notice to any of the parties, may take additional evidence deemed

necessary, provided that a party shall be given an opportunity to rebut the evidence if it is to be used against the party's interest.

(4) Appropriate Hearing Behavior. All parties shall conduct themselves in an appropriate manner. The hearing officer may expel any individual, including a party, who fails to correct behavior the hearing officer identifies as disruptive. After an expulsion, the hearing officer may proceed with the hearing and render a decision.

(b) Records.

(1) The hearing record shall include the audio recording of the proceeding and any other relevant evidence relied on by the hearing officer, including documents and other physical evidence entered as exhibits.

(2) The hearing record shall be maintained in accordance with federal or state law.

(3) Confidentiality of information contained in the hearing record shall be maintained in accordance with federal and state law.

(4) Upon request, a party has the right to obtain a copy of the hearing record at no charge. However, a party requesting a transcript of the hearing record shall pay the costs of the transcription.

§823.27. Ex Parte Communications.

(a) The hearing officer shall not participate in ex parte communications, directly or indirectly, in any matter in connection with any substantive issue, with any interested person or party. Likewise, no person shall attempt to engage in ex parte communications with the hearing officer on behalf of any interested person or party.

(b) If the hearing officer receives any such ex parte communication, the other parties shall be given an opportunity to review that communication.

(c) Nothing shall prevent the hearing officer from communicating with parties or their representatives about routine matters such as requests for continuances or opportunities to inspect the file.

(d) The hearing officer may initiate communications with an impartial Agency employee who has not participated in a hearing or any determination in the case for the limited purpose of using the special skills or knowledge of the Agency and its staff in evaluating the evidence.

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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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER D. AGENCY-LEVEL DECISIONS, REOPENINGS, AND REHEARINGS

40 TAC §§823.30 - 823.33

The new rules are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The new rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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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For further information, please call: (512) 475-0829

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CHAPTER 841. WORKFORCE INVESTMENT ACT

The Texas Workforce Commission (Commission) adopts the repeal of the following sections of Chapter 841, relating to the Workforce Investment Act (WIA), as published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4373):

Subchapter C, Training Provider Certification, §841.48 and §841.49

Subchapter D, Local Area Grievance Procedure, §§841.61 - 841.69

Subchapter E, State Level Hearing, §§841.91 - 841.93, 841.95, 841.96

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the adopted rule change is to establish detailed and consistent procedures for complaints, hearings, and appeals related to workforce services administered by Local Workforce Development Boards (Boards). Texas Labor Code §302.065 requires that the Commission integrate the administration of multiple federal block grant programs and identify policy changes that support this integration. The Commission expanded this integration to state-funded workforce services, including examining the existing complaints and appeals processes for workforce services administered by the Boards. An absence of unified and integrated rules on complaints, hearings, and appeals related to workforce services makes the existing rules difficult to understand or interpret consistently and works as a barrier to integrating workforce services.

To maintain uniformity and consistency across all Board-administered workforce services and to protect due process rights of Texas Workforce Center customers, in a separate, but concur-

rent, rulemaking, the Commission has repealed Chapter 823, General Hearings rules, and adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals rules. New Chapter 823 requires Boards to establish local policies related to filing complaints, to provide opportunities for informal resolutions, and to establish procedures for Board hearings and appeals.

The Commission has reviewed sections of Chapter 841 relating to complaints or grievances, local-level appeals, and state-level hearings. The Commission repeals these sections and incorporates similar processes related to complaints, hearings, and appeals in new Chapter 823, including the complaints and appeals process that is currently established in the Workforce Investment Act (WIA) regulations at 20 C.F.R. §667.600 and §667.640.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS WITH COMMENTS AND RESPONSES

SUBCHAPTER C. TRAINING PROVIDER CERTIFICATION

The Commission adopts amendments to Subchapter C, as follows:

Under a separate, but concurrent, rulemaking, the Commission has adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals, which comprises the complaint, hearing, and appeal procedures for all Board-administered workforce services, including the information in the following sections.

§841.48. Local Appeals.

Section 841.48, procedures established by Boards for appeals requested by eligible training providers found by the Boards to be ineligible to receive WIA funding for training services, is repealed and the information is relocated in new Chapter 823.

§841.49. State Level Appeals.

Section 841.49, procedures established by the Agency for appeals requested by eligible training providers found by the Agency to be ineligible to receive WIA funding for training services, is repealed and the information relocated in new Chapter 823.

SUBCHAPTER D. LOCAL AREA GRIEVANCE PROCEDURE

The Commission adopts the repeal of Subchapter D, as follows:

Under a separate, but concurrent, rulemaking, the Commission has adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals, which comprises the complaint, hearing, and appeal procedures for all Board-administered workforce services, including the information in the following sections.

§841.61. Purpose and Coverage.

Section 841.61, procedures for resolving allegations of violations of the requirements of WIA in the operation of local WIA programs and activities, is repealed and the information is relocated in new Chapter 823.

§841.62. Grievance Filing Procedures at the Local Level.

Section 841.62, grievance procedures established by the Board to notify any participant or other affected party alleging a violation of the requirements of WIA at the local level of the right to file a complaint, is repealed and the information is relocated in new Chapter 823.

§841.63. Time Limitations at Local Level.

Section 841.63, the length of time required to file a complaint alleging noncriminal violations of the requirements of WIA, is repealed and the information is relocated in new Chapter 823.

§841.64. LWDB Responsibilities.

Section 841.64, responsibilities of the Boards regarding grievance procedures, is repealed and the information is relocated in new Chapter 823.

§841.65. Local Level Informal Conference Procedure.

Section 841.65, Board requirements regarding informal resolutions, is repealed and the information is relocated in new Chapter 823.

§841.66. Local Level Hearing Procedure.

Section 841.66, Board requirements to establish local hearing procedures for parties dissatisfied with the results of an informal conference, is repealed and the information is relocated in new Chapter 823.

§841.67. Written Decision.

Section 841.67, requirements for hearing officers to provide a written decision to all parties to a complaint, is repealed and the information is relocated in new Chapter 823.

§841.68. Remedies.

Section 841.68, remedies that may be imposed as enumerated at WIA §181(c)(3), is repealed and the information is relocated in new Chapter 823.

§841.69. Appeal.

Section 841.69, procedures for filing an appeal to the Agency if a party is dissatisfied with the results of a local level hearing, is repealed and the information is relocated in new Chapter 823.

SUBCHAPTER E. STATE LEVEL HEARING

The Commission adopts amendments to Subchapter E, as follows:

Under a separate, but concurrent, rulemaking, the Commission has adopted new Chapter 823, Integrated Complaints, Hearings, and Appeals, which comprises the complaint, hearing, and appeal procedures for all Board-administered workforce services, including the information in the following sections.

§841.91. Scope.

Section 841.91, related to the scope of this subchapter, is repealed and the information is relocated in new Chapter 823.

§841.92. Review Procedure for Appeals Made Under §841.69.

Section 841.92, procedures established by the Agency to select an impartial hearing officer to review the record to determine if a party was afforded a process that was held in compliance with WIA and local grievance procedures, is repealed and the information is relocated in new Chapter 823.

§841.93. State Level Informal Resolution and Hearing for Alleged Violations of the Requirements of WIA by the State or for Complaints by Individuals Affected by the Statewide Program.

Section 841.93, Agency requirements to establish procedures for state level informal resolutions and hearings for alleged violations of the requirements of WIA by the state or for complaints by individuals affected by the statewide program, is repealed and the information is relocated in new Chapter 823.

§841.95. Referral of Local Complaints.

Section 841.95, complaints arising under Subchapter D and made directly to the Commission, is repealed and the information is relocated in new Chapter 823.

§841.96. Appeal to Secretary of Labor.

Section 841.96, appeals made to the Secretary of Labor pursuant to 20 C.F.R. §§667.610, 667.640, 667.645, and 667.650, is repealed and the information is relocated in new Chapter 823.

No comments were received.

SUBCHAPTER C. TRAINING PROVIDER CERTIFICATION

40 TAC §841.48, §841.49

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 6, 2007.

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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER D. LOCAL AREA GRIEVANCE PROCEDURE

40 TAC §§841.61 - 841.69

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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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Reagan Miller
Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER E. STATE LEVEL HEARING

40 TAC §§841.91 - 841.93, 841.95, 841.96

The repeals are adopted under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

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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Deputy Division Director, Workforce Policy and Service Delivery Branch
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Optometry Board

Title 22, Part 14

The Texas Optometry Board files this notice of intention to review Texas Administrative Code, Title 22, Part 14, Chapters 277, 279 and 280, pursuant to the requirements of Texas Government Code §2001.039. This section requires all state agencies to review their rules every four years. After an assessment that the reasons for initially adopting the rules continue to exist, the agency's rules may be considered for re-adoption.

The agency has conducted a preliminary assessment of the following rules in Chapters 277, 279 and 280, and has determined that the reasons for initially adopting the rules continue to exist.

Chapter 277. Practice and Procedure

§277.1. Complaint Procedures.

§277.2. Disciplinary Proceedings.

§277.3. Probation.

§277.4. Reinstatement.

§277.5. Felony Convictions.

§277.6. Administrative Fines and Penalties.

§277.7. Patient Records.

§277.8. Emergency Temporary Suspension or Restriction.

§277.9. Alternative Dispute Resolution.

Chapter 279. Interpretations

§279.1. Contact Lens Examination.

§279.2. Contact Lens Prescriptions.

§279.3. Spectacle Examination .

§279.4. Spectacle and Ophthalmic Devices Prescriptions.

§279.5. Dispensing Ophthalmic Materials.

§279.9. Advertising.

§279.10. Professional Identification.

§279.11. Relationship with Dispensing Optician - Books and Records.

§279.12. Relationship with Dispensing Optician - Separation of Offices.

§279.13. Board Interpretation Number Thirteen.

§279.14. Patient Files.

§279.15. Board Interpretation Number Fifteen.

Chapter 280. Therapeutic Optometry

§280.1. Application for Certification.

§280.2. Required Education.

§280.3. Certified Therapeutic Optometrist Examination.

§280.5. Prescription and Diagnostic Drugs for Therapeutic Optometry.

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

§280.9. Application for Licensure as Optometric Glaucoma Specialist.

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

§280.11. Treatment of Glaucoma by an Optometric Glaucoma Specialist.

The agency invites comments from the public regarding whether the reasons for initially adopting these rules continue to exist. Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register.*

TRD-200705573
Chris Kloeris
Executive Director
Texas Optometry Board
Filed: November 14, 2007

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Texas State Board of Pharmacy

Title 22, Part 15

The Texas State Board of Pharmacy files this notice of intent to review Chapter 283 (§§283.1 - 283.11), concerning Licensing Requirements for Pharmacists, pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

Comments regarding whether the reason for adopting the rule continues to exist 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., January 4, 2008.

TRD-200705515

Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: November 12, 2007

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The Texas State Board of Pharmacy files this notice of intent to review Chapter 291, Subchapter B (§§291.31 - 291.35), concerning Community Pharmacy (Class A), pursuant to the Texas Government Code §2001.039, regarding Agency Review of Existing Rules.

Comments regarding whether the reason for adopting the rule continues to exist 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., January 4, 2008.

TRD-200705514
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Filed: November 12, 2007

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Adopted Rule Reviews

Texas Commission on Fire Protection

Title 37, Part 13

The Texas Commission on Fire Protection readopts without changes:

Chapter 407. Historically Underutilized Businesses;

Chapter 421. Standards for Certification;

Chapter 423. Fire Suppression;

Chapter 425. Fire Service Instructors;

Chapter 427. Training Facility Certification;

Chapter 429. concerning Minimum Standards for Fire Inspectors;

Chapter 439. Examinations for Certification;

Chapter 441. Continuing Education;

Chapter 451. Fire Officer;

Chapter 453. Minimum Standards for Hazardous Materials Technician;

Chapter 491. Voluntary Regulation of State Agencies and State Agency Employees;

Chapter 493. Voluntary Regulation of Federal Agencies and Federal Fire Fighters;

Chapter 495. Regulation of Nongovernmental Departments;

In accordance with Texas Government Code, §2001.039, added by Acts 1999, 76th Legislature, Chapter 1499, Article l, Chapter 1.11.

The proposed rules review was published in the July 20, 2007, issue of the *Texas Register* (32 TexReg 4553). The Texas Commission on Fire Protection received no comments regarding the review of these rules.

The Texas Commission on Fire Protection finds that the reasons for adopting these rules continue to exist.

TRD-200705506
Gary L. Warren, Sr.
Executive Director
Texas Commission on Fire Protection
Filed: November 9, 2007

♦ ♦ ♦

Texas Board of Nursing

Title 22, Part 11

The Texas Board of Nursing (Board) adopts the review of Chapter 220, relating to Nurse Licensure Compact pursuant to Texas Government Code, §2001.039. The proposed review was published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7086).

The Board determined that the original reason for adopting this chapter continues to exist.

No comments were received in response to the publication of the proposed rule review.

TRD-200705523
Katherine Thomas
Executive Director
Texas Board of Nursing
Filed: November 12, 2007

♦ ♦ ♦

The Texas Board of Nursing (Board) adopts the review of Chapter 224, relating to Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments, pursuant to Texas Government Code, §2001.039. The proposed review was published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7087).

The Board determined that the original reason for adopting this chapter continues to exist.

No comments were received in response to the publication of the proposed rule review.

TRD-200705526
Katherine Thomas
Executive Director
Texas Board of Nursing
Filed: November 12, 2007

♦ ♦ ♦

The Texas Board of Nursing (Board) adopts the review of Chapter 225, relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions, pursuant to Texas Government Code, §2001.039. The proposed review was published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7087).

The Board determined that the original reason for adopting this chapter continues to exist.

No comments were received in response to the publication of the proposed rule review.

TRD-200705525
Katherine Thomas
Executive Director
Texas Board of Nursing
Filed: November 12, 2007

♦ ♦ ♦

The Texas Board of Nursing (Board) adopts the review of Chapter 226, relating to Patient Safety Pilot Programs on Nurse Reporting Systems, pursuant to Texas Government Code, §2001.039. The proposed review was published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7087).

The Board determined that the original reason for adopting this chapter continues to exist.

No comments were received in response to the publication of the proposed rule review.

TRD-200705524
Katherine Thomas
Executive Director
Texas Board of Nursing
Filed: November 12, 2007

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 10 TAC §60.121(k)

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on Form 8823?
Major property condition violations	Material Noncompliance	10	HTC Bonds HOME HTF CDBG	Yes
Pattern of minor property condition violations	10	5	HTC Bonds HOME HTF CDBG	Yes
Administrative reporting of property condition violations	0	0	HTC Bonds HOME HTF CDBG	Yes
Owner refused to lease to a holder of rental assistance certificate/voucher because of the status of the prospective tenant as such a holder	Material Noncompliance	10	See §60.112	Yes
Owner failed to approve and distribute an Affirmative Marketing Plan as required under §60.112 of this chapter	3	1	See §60.112	No
Development failed to comply with requirements limiting minimum income standards for §8 residents.	10	3	See §60.112	No
Development is not available to general public	10	0	HTC	Yes
HUD or DOJ notification of possible Fair Housing Act violation	0	0	HTC	Yes
Determination of a violation under the Fair Housing Act	Material Noncompliance	10	All programs	Yes
Development is out of compliance and never expected to comply/ Foreclosure	Material Noncompliance	NA/No correction possible	All program	Yes
Owner did not allow on-site monitoring review	Material Noncompliance	5	All programs	Yes
LURA not in effect	Material Noncompliance	5	All programs	Yes
Development failed to meet minimum set aside	20	10	HTC Bonds	Yes
No evidence of, or failure to certify to, material participation of a non-profit or HUB, if required by the Land Use Restriction Agreement	10	3	HTC	Yes
Development failed to meet additional State required rent and occupancy restrictions	10	3	HTC Home HTF Bonds	No

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on Form 8823?
The Development failed to provide required supportive services as promised at Application	10	3	HTC Bonds	No
The Development failed to provide housing to the elderly as promised at Application	10	3	HTC Bonds HOME HTF CDBG	No
Failure to provide special needs housing	10	3	HTC Bonds HOME HTF CDBG	No
Changes in Eligible Basis or Applicable Percentage	3	NA, No correction possible	HTC	Yes
Failure to submit part or all of the AOCR or failure to submit any other annual, monthly, or quarterly report required by the Department	10	3	All programs	Yes
Utility Allowance not calculated properly	20	5	HTC Bonds HOME HTF CDBG	Yes
Failure to comply with the Next Available Qualifying Unit Rule	3	1	AHP	Na
Owner failed to execute required lease provisions, including language required by §60.110 or exclude prohibited lease language	3	1	HTC HOME	No
Failure to provide annual Housing Quality Standards inspection	10	3	HOME	NA
Development has failed to establish and maintain a reserve account in accordance with §1.37 of this title	Material Noncompliance	10	HTC	No
Development substantially changed the scope of services as presented at initial Application without prior Department approval	4	0	HTC	No
Change in ownership or General Partner without proper notification to and approval of Department	4	0	All programs	No
Failure to provide a notary public as promised at Application	5	1	HTC	No
Violations of the Unit Vacancy Rule	3	1	HTC	Yes
Casualty loss	0	0	All programs	Yes

Figure: 10 TAC §60.121(I)

Noncompliance Event	Uncorrected Points	Corrected Points	Programs	If HTC, on form 8823?
Unit not leased to Low Income Household	5	1	All programs	Yes
Low Income Units occupied by nonqualified full-time students	3	1	HTC during the compliance period Bond	Yes
Low Income Units used on transient basis	3	1	HTC Bond	Yes
Household income increased above the re-certification limit and an available Unit was rented to a market tenant	3	1	HTC During the compliance period Bonds HOME HTF AHP	Yes
Gross rent exceeds the highest rent allowed under the LURA or other deed restriction	5	1	All programs	Yes
Failure to maintain or provide tenant income certification and documentation	3	1	All programs	Yes
Unit not available for rent	3	1	All programs	Yes
Qualifying Unit designation removed from household	3	1	AHP	NA
Development evicted or terminated the tenancy of a low income tenant for other than good cause	10	3	HTC HOME	Yes
Household income increased above 80% at recertification and owner failed to properly determine rent	3	1	HOME	NA

Figure: 10 TAC §60.309(b)

Violation	Administrative Penalty with Corrective Action	Penalty for Non-compliance Non-corrected Action
Units leased to households that are not eligible because their income exceeds the allowable limit; occupied by non-eligible full time students; or noncompliance with senior age restrictions	Lease labeled "Do not renew lease--as soon as possible lease the unit to eligible household;" Lease to eligible household **Penalty: $100 per violation**	Violation of do not renew restriction **Penalty: $500 per violation** Multiple Violations after Corrective action requested. **Penalty: $1,000 per violation**
Rents charged exceed allowable limits or improperly calculated utility allowance	Responsible Party/Owner/manager demonstrates reduction in rent and/or recalculation of utility allowance **Penalty: $100 per violation**	Violation based on administrative error **Penalty: $250 per violation** Repeated Violations after Notice **Penalty: $500 per violation**
Property Condition Violations	Appropriate repairs completed and provide evidence related to public health and safety **Penalty: $250 per violation** Violation not an issue of public health and safety maters **Penalty: $50 per violation**	Violation for public health and safety matters **Penalty: $1,000 per day** Violation not an issue of public health and safety maters **Penalty: $250 per violation**
Failure to Submit Reports Timely and or failure to execute and record program documents	After written notice of failure to receive report owner must provide corrective action support within 30 days **Penalty: $100 per violation**	Failure to submit after: 30 days **Penalty: $250 per violation** 60 days **Penalty: $500 per violation** 90 days or more **Penalty: $1000 per violation**
Change in eligible basis	Owner to cease charging for facilities and/or convert commercial space back to residential space as applicable **Penalty: $50 per violation**	**Penalty: $200 per violation**
Failure to meet minimum set aside, violation of Available Unit Rule, or comply with rent and occupancy restrictions	Units rented to the appropriate income and rent restrictions for eligible households **Penalty: $25 per violation**	**Penalty: $300 per violation**
Failure to follow Fair Housing or federal laws providing access by the general public or failure to comply with Section 8 minimum income to rent standard	Owner must enter into a corrective action agreement and amend leasing requirements if appropriate **Penalty: $100 per violation**	General Public or Section 8 violations **Penalty: $250 per violation**
Failure to maintain adequate documentation or certification for compliance	Owner to recertify accordingly and provide documentation upon completion **Penalty: $25 per violation**	Failure to recertify **Penalty: $250 per violation** Failure to provide documentation **Penalty: $100 per violation**
Low income units used on transient basis	Owner should execute at least six month lease and provide evidence **Penalty: $25 per violation**	Failure to correct within: 30 days **Penalty: $100 per violation** 60 days **Penalty: $200 per violation** 90 days **Penalty: $300 per violation**

Violation	Administrative Penalty with Corrective Action	Penalty for Non-compliance Non-corrected Action
Violation of the Unit Vacancy Rule	Property must advertise availability of units within 30 days and provide evidence **Penalty: $100 per violation**	Failure to comply after: 30 days **Penalty: $250 per violation** 60 days **Penalty: $500 per violation** 90 days or more **Penalty: $1000 per violation**
No evidence of material participation by a qualified nonprofit	Owner to correct issue and certify compliance within 60 days **Penalty: $100 per violation**	Failure to submit documentation after: 60 days **Penalty: $500 per violation** 90 days **Penalty: $1000 per violation**
Failure to provide agreed to supportive services	Corrective action within 30 days **Penalty: $100 per violation**	Failure to provide agreed services after: 30 days **Penalty: $500 per violation** 60 plus days **Penalty: $1000 per violation**
Failure to pay compliance fees or compliance penalties timely	After notice of fees due and payable within 30 days of notice **Penalty: $25 per violation**	Admin penalty of 5% of fees owed per month as late fees
Failure to meet prescribed special needs set aside	Property must develop and follow adequate marketing plan utilizing organizations that work with special needs for corrective action within 60 days **Penalty: $100 per violation**	For each 30 day period set aside is not met or marketed after 60 days **Penalty: $250 per violation**
Failure to meet Department minimum standards for rehabilitation act compliance	If discovered during development, potential correction of building. If discovered after building, establish an account to fund necessary modifications **Penalty: $100 per violation**	Penalty of up to $1,000 per day up to a maximum of the cost of making necessary changes and referral for Debarment under 10 TAC §1.20
Continued non-compliance resulting in declaration of no longer participating in program	After written notice owner should provide a corrective action memo **Penalty: $100 per violation**	**Penalty: $1000 per violation**
Determination of material Non-compliance for more than six months	After notice of violation corrective action plan developed with Department **Penalty: $100 per violation**	**Penalty: $500 per violation**
Owner refuses to allow monitoring review	Allow monitoring upon request **Penalty: $50 per day not previously allowed**	**Penalty: $500 per day not allowing monitoring.**

Figure 1: 16 TAC Chapter 2--Preamble

For a LUG complaint involving:	Complainant's Costs	Cost per Employee for Sole Proprietorship (1 employee)	Micro-Business (5 employees)	Small Business (50 employees)	Large Business (1,000 employees)
Request for explanation	$ 220.00	$ 220.00	$ 44.00	$ 4.40	$0.22
If a complaint is filed:					
No travel; no outside mediator	$ 220.00	$ 220.00	$ 44.00	$ 4.40	$0.22
Travel; no outside mediator	$ 720.00	$ 720.00	$ 144.00	$ 14.40	$0.72
Travel; outside mediator	$1,320.00	$1,320.00	$ 264.00	$ 26.40	$1.32
Travel; outside mediator; and attorney or consultant	$9,320.00	$9,320.00	$1,864.00	$186.40	$9.32
Commission travel outside Austin	$ 250.00	$ 250.00	$ 50.00	$ 5.00	$0.25

Figure 2: 16 TAC Chapter 2--Preamble

For a LUG complaint involving:	Respondent's Costs	Cost per Employee for Sole Proprietorship (1 employee)	Micro-Business (5 employees)	Small Business (50 employees)	Large Business (1,000 employees)
Response to request for explanation	$ 220.00	$ 220.00	$ 44.00	$ 4.40	$0.22
Explanation for not having information	$ 44.00	$ 44.00	$ 8.80	$ 0.88	$0.04
If a complaint is filed:					
No travel; no outside mediator	$ 836.00	$ 836.00	$ 167.20	$ 16.72	$0.84
Travel; no outside mediator	$1,336.00	$1,336.00	$ 267.20	$ 26.72	$1.34
Travel; outside mediator	$1,936.00	$1,936.00	$ 387.20	$ 38.72	$1.94
Travel; outside mediator; and attorney or consultant	$9,936.00	$9,936.00	$1,987.20	$198.72	$9.94
Commission travel outside Austin	$ 250.00	$ 250.00	$ 50.00	$ 5.00	$0.25

Figure 3: 16 TAC Chapter 2--Preamble

		Cost per Employee for			
For an enforcement action for failure to participate in an informal complaint proceeding:	Respondent's Costs	Sole Proprietorship (1 employee)	Micro-Business (5 employees)	Small Business (50 employees)	Large Business (1,000 employees)
Responding to petition, no attorney	$ 88.00	$ 88.00	$ 17.60	$ 1.76	$ 0.09
Responding to petition with an attorney	$ 400.00	$ 400.00	$ 80.00	$ 8.00	$ 0.40
Travel to Austin for hearing	$ 500.00	$ 500.00	$ 100.00	$ 10.00	$ 0.50
Use of attorney for hearing, 40 hours	$ 8,000.00	$ 8,000.00	$1,600.00	$ 160.00	$ 8.00
If a penalty is imposed:					
Penalty of $5,000	$ 5,000.00	$ 5,000.00	$1,000.00	$ 100.00	$ 5.00
Penalty of $10,000	$10,000.00	$10,000.00	$2,000.00	$ 200.00	$ 10.00

Figure: 16 TAC Chapter 7--Preamble

	Cost per Employee for			
For a Commission enforcement action including:	Sole Proprietorship (1 employee)	Micro-Business (5 employees)	Small Business (50 employees)	Large Business (1,000 employees)
Discussing with Staff, no attorney	$ 176.00	$ 35.20	$ 3.52	$0.18
Discussing with Staff, with an attorney	$ 776.00	$ 155.20	$ 15.52	$0.78
Answering discovery, no attorney	$1,760.00	$ 352.00	$ 35.20	$1.76
Answering discovery, with an attorney	$9,760.00	$1,952.00	$195.20	$9.76
Settlement before hearing	$2,500.00	$ 500.00	$ 50.00	$2.50
Travel to Austin for hearing, no attorney	$1,204.00	$ 240.80	$ 24.08	$1.20
Travel to Austin for hearing, with an attorney	$4,404.00	$ 880.80	$ 88.08	$4.40
Commission-ordered penalty	$5,000.00	$1,000.00	$100.00	$5.00

Figure: 19 TAC §97.2001(d)

Job Corps Diploma Program Accountability Procedures Manual
August 2007

Background

In 2005, the 79th Legislature enacted statute that allows Job Corps to establish a diploma program to offer a secondary school curriculum, a diploma program, and a General Educational Development (GED) program. The requirements of the Job Corps diploma program are found under Chapter 18 of the Texas Education Code (TEC). Under Chapter 18 of the TEC, the Texas Education Agency (TEA) is required to implement appropriate accountability procedures consistent with Chapter 39 of the TEC, to be used in assigning an annual performance rating to Job Corps diploma programs that are consistent with the ratings assigned to school districts.

The goals of a Job Corps diploma program are to:

1. serve at-risk students who have not been successful in a traditional school setting;
2. increase student success rates in obtaining and maintaining employment; and
3. decrease future societal costs by offering a diploma program to students who would benefit from Job Corps academic and vocational programs.

Job Corps Diploma Program Student Eligibility Criteria

1. Any person enrolled in the Job Corps Training Program and who does not have a diploma is eligible to enroll in the Job Corps diploma program. Any person enrolled in the diploma program is eligible for programs or services under Chapter 18 of the TEC.
2. A person's eligibility for programs and services under Chapter 18 of the TEC does not exclude the person from being eligible for an education program or service under any other chapter of the TEC.

Requirements of a Job Corps Diploma Program

The diploma program shall:

1. provide a course of instruction that includes the required curriculum under Subchapter A, Chapter 28, of the TEC;
2. require that students enrolled in the diploma program satisfy the requirements of Section 39.025 of the TEC before receiving a diploma; and
3. comply with requirements established in rule to determine compliance with Chapter 18 of the TEC, as determined by the commissioner of education.

Student Records

The Job Corps diploma program must ensure that education records include information used to document the data it submits to TEA, including leaver, dropout, and completion data, that are used in the diploma program accountability procedures and reports. The education records of the diploma program must be made available to the TEA in the conduct of authorized monitoring, investigation, or audit activities.

Purpose of Job Corps Diploma Accountability Procedures

The purpose of the Job Corps accountability procedures is to ensure the implementation of accountability procedures consistent with Chapter 39 of the TEC, where appropriate, to assign an annual performance rating to Job Corps diploma programs that are consistent with the ratings assigned to school districts under Section 39.072 of the TEC.

In addition to other factors determined by the commissioner of education under Section 39.051 of the TEC, the diploma program accountability procedures consider:

1. student performance on the subject matters assessed by the secondary exit-level assessment instruments, the Texas Assessment of Knowledge and Skills (TAKS) required by Section 39.025 of the TEC;
2. dropout rate aggregated for the grade levels served by the diploma program; and
3. completion rate (students who leave the diploma program and receive GED certificates are not counted as completers in the Job Corps diploma program completion rate).

Description of the Job Corps Diploma Program

The state's accountability system is required to rate all districts and campuses serving students in Grades 1-12. Where appropriate, the accountability procedures for the Job Corps diploma programs are consistent with the state's accountability system. However, the accountability procedures for the Job Corps diploma programs necessitate separate accountability procedures that meet the characteristics of the students served in the diploma program and to appropriately evaluate the performance of the diploma program.

The diploma program is designed to expedite the progress of enrolled students toward performing at grade level and completing credits and passing the assessments necessary to attain a diploma. The diploma program accomplishes this goal by providing a variety of instructional services, including accelerated instruction, to meet the needs of students.

Job Corps Diploma Program School Year
The Job Corps diploma program operates on a year round school calendar: ***September 1 - August 31***.
An eligible student may enroll and withdraw at any time during the diploma program school year.

Job Corps Diploma Program Grade and Age Levels Served
The Job Corps diploma program serves Grades 9-12. Students who are eligible to enroll in the Job Corps training program are also eligible to enroll in the Job Corps diploma program. The eligibility age of enrollment in the Job Corps training program is age 16 through 24.

Job Corps Diploma Program Accountability Requirements

1. The diploma program shall comply with applicable state and federal laws and regulations, including Section 504 of Rehabilitative Act of 1973 (§504) and the Individuals with Disabilities Education Act (IDEA).
2. The diploma program must have appropriately certified instructional staff for each subject matter taught in the diploma program.
3. The diploma program must demonstrate required improvement when accountability standards are not met.

Evaluation of Job Corps Diploma Programs

The Job Corps diploma program accountability procedures are used to rate performance of the diploma program. Ratings are based on aggregate performance of the diploma program. Performance results of all students in the diploma program are included in the diploma program's annual performance rating and used in determining the diploma program's rating. Diploma programs receiving ratings under these accountability procedures are evaluated on the following indicators:

1. performance on the exit-level TAKS only
2. diploma program completion rate (Grades 9-12)
3. diploma program dropout rate (aggregate of all grade levels served in the diploma program)

Each of these performance indicators is described in the following section.

Job Corps Diploma Program Accountability Performance Indicators and Procedures

I. TAKS Indicator

Indicator Definition.

1. Total number of exit-level TAKS tests administered to diploma program students any time during the school year (September 1, 2006 - August 31, 2007).

2. Total number of exit-level TAKS tests on which the students met the passing standard.

$$\frac{\text{Tests passed}}{\text{Tests administered}} = \%\ \text{Met Standard}$$

Subjects. The exit-level TAKS tests include the following subjects:

English Language Arts
Mathematics
Social Studies
Science

Test Administrations. The exit-level TAKS must be administered to Job Corps diploma program students on the same date and in accordance with the same testing calendar established for the statewide student assessment program. A student's exit-level TAKS answer document must indicate a grade level. The indicator includes results for first-time testers and retesters from all TAKS administrations for the year (September 1 - August 31). The indicator is based on tests rather than students. If a student has results from multiple administrations for the same subject, all are included in the indicator.

Student Groups. The indicator is calculated for All Students and the following student groups.

- African American – A non-Hispanic person having origins in any of the Black racial groups of Africa.
- Hispanic – A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.
- White – A non-Hispanic person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Economically Disadvantaged is not included as a student group because the definition used for public school accountability is based on National School Lunch Program enrollment, which would not be applicable to the Job Corps diploma program. The ethnicity definitions are from the Public Education Information Management System (PEIMS) Data Standards.

Minimum Size Criteria. Performance is always evaluated at the All Students level. Student groups are evaluated if there are *at least 10 tests for the subject area tested.*

Data Source. Test results are provided to the Job Corps diploma program by the test contractor. TEA will calculate the rates.

II. Job Corps Diploma Program Completion Rate Indicator

Indicator Definition. Completion of the Job Corps diploma program is defined as meeting all of the requirements of the diploma program, including passing all portions of the exit-level TAKS. Students participating in an approved adult education GED program and receiving a GED certificate are **not included** in the Job Corps diploma program Completion Rate.

Data used to calculate the Completion Rate:

1. Total number of students who completed the Job Corps diploma program at any time between September 1, 2006 - August 31, 2007 (2006-2007 school year).
2. Total number of students who did not complete the Job Corps diploma program, between September 1, 2006 - August 31, 2007, but who are enrolled in the diploma program on the first school day in September 2007 (the first day of school for the 2007-2008 school year), are counted as "still enrolled" in the diploma program.
3. Total number of students who left the diploma program without completing the program between September 1, 2006 - August 31, 2007 (2006-2007 school year). These students will be reported with the appropriate "leaver" code listed in the Job Corps Diploma Program Leaver Code table.

Job Corps Diploma Program Completion Rate Calculation

$$\frac{\text{diploma recipients + still enrolled}}{\text{students enrolled in diploma program}} = \text{diploma program completion rate (\%)}$$

(diploma recipients + still enrolled + leavers + dropouts)

Important: Students who enroll in the Job Corps diploma program for the first time on the first school day in September 2007 are not included in the completion rate for 2006-2007. New enrollees on the first school day in September 2007 will be included in the completion rate for the 2007-2008 school year when the rate is calculated in 2009.

Leavers. The Job Corps diploma program must document the withdrawal of students and maintain on file the appropriate paperwork associated with student withdrawals. The Job Corps diploma program is required to maintain all documentation related to all leaver reason codes at the diploma program site. Merits of leaver documentation are assessed at the time the documentation is requested by the TEA for program monitoring purposes, including verifying data integrity. Determination of the acceptability of documentation is made by the TEA staff reviewing the documentation.

Leaver Documentation. In determining the merits of reported leaver codes, the TEA may review written documentation. When the Job Corps diploma program obtains oral withdrawal information, the information must be verified by telephone and noted in writing by an authorized representative of the Job Corps diploma program.

Withdrawal information should include:

- the date of withdrawal, signature(s) of the adult student or the person responsible for the student, such as the parent or legal guardian
- the date and signature of the diploma program principal or designee such as a staff member who serves as the school's registrar or attendance clerk
- the leaver code and statement of reason for withdrawal
- the student's destination
- documentation of the telephone call to verify the withdrawal information that was obtained orally
- documentation of enrollment in another public or private school (i.e., request for records)
- documentation of the date on which the student's enrollment and access was activated for the distance education school (i.e., e-mail notification of log-in access)

The **Job Corps Diploma Program Leaver Codes** are provided below and in the Appendix of this document.

Leaver Code	Explanation of Reason
01 – Student completed Job Corps diploma requirements	Use for students who meet all Job Corps diploma requirements (which includes passing the exit-level TAKS) at any time during the school year (September 1, 2006- August 31, 2007).
02 – Student withdrew from Job Corps Training Program to enter an institution of higher education or technical institution	Student withdrew from the Job Corps diploma program and training program to enroll in an institution of higher education or a technical institution. Documentation of enrollment must indicate or certify that the student is enrolled under a planned degree or certificate program for at least 3 semester hours or one class.
03 – Student is issued a GED certificate on or before - August 31 of the same school year	Student received a GED certificate on which the issue date is on or before August 31, 2007.
04 – Student withdrew from Job Corps Training Program to enroll in a public school in Texas	Student withdrew from the Job Corps diploma program and training program with the intent to enroll in a public school in Texas. Documentation must indicate that the student enrolled in a **public** school in Texas.
05 – Student withdrew from Job Corps Training Program to enroll in another Job Corps diploma program in Texas	Student withdrew from this Job Corps diploma and training program in order to enroll in another Job Corps diploma program. Documentation must indicate that the student enrolled in another Job Corps diploma program in Texas.
06 – Student withdrew from Job Corps Training Program to enroll in a private school in Texas	Student withdrew from the Job Corps diploma program and training program with the intent to enroll in a private school in Texas. Documentation must indicate that the student enrolled in a **private** school in Texas.
07 – Student withdrew from Job Corps diploma program to enroll in the Job Corps accredited distance education school	Student withdrew from the Job Corps diploma program to enroll in the Job Corps distance education school that is accredited by a regional and national accrediting agency recognized by the U.S. Department of Education. Documentation must show activation of the student's enrollment.
08 – Student died while enrolled in the diploma program	This code requires documentation of the student's death.
09 – Other	This code is used when the reason for student withdrawal is unknown or not listed in this chart, or when a student is withdrawn by the diploma program after a period of time because the student has quit participating in the diploma program and the reason is unknown. The diploma program must determine the number of days that will be implemented for these types of withdrawals, and provide written notice to each student upon enrollment in the diploma program that he/she will be withdrawn if he/she quits participating in the program for the specified number of days.

Student Groups. The indicator is calculated for All Students and the following student groups.

- African American – A non-Hispanic person having origins in any of the Black racial groups of Africa.
- Hispanic – A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.
- White – A non-Hispanic person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Economically Disadvantaged is not included as a student group because the definition used for public school accountability is based on National School Lunch Program enrollment, which would not be applicable to the Job Corps diploma program. The ethnicity definitions are from the PEIMS Data Standards.

Minimum Size Criteria. The Completion Rate is evaluated at the All Students level, if there are *at least 10 students enrolled* in the Job Corps diploma program at any time during the school year (September 1 – August 31). Student groups are evaluated if there are *at least 10 students in the student group.* If the minimum size requirement for All Students is not met, the Job Corps diploma program is not evaluated on Completion Rate.

Data Source. Completion data are reported for the prior school year. For example, completion data submitted in December 2007 will be for the September 1, 2006 - August 31, 2007 school year. The Job Corps diploma program must submit data to the TEA by **the first Monday in December 2007**. TEA will calculate the rates.

III. Job Corps Diploma Program Dropout Rate Indicator

The Job Corps Diploma Program Dropout Rate indicator is based on the total number of students participating (enrolled) in the diploma program during the Job Corps diploma program school year: September 1 - August 31. The dropout rate is an aggregate of Grades 9-12 dropouts as a percent of all students enrolled in the diploma program in Grades 9-12 from September 1 - August 31.

Indicator Definition. A student is counted as a dropout if the student was enrolled in the Job Corps diploma program at any time during the school year (September 1, 2006 - August 31, 2007) and is not enrolled in the diploma program on the first school day in September 2007.

Exceptions: A student is **not** counted as a dropout if the student:

- received diploma by August 31 of the same school year;
- died;
- received a GED certificate by August 31 of the same school year;
- withdrew to enroll in college or a technical institution;
- withdrew to enroll in a Texas public or private school providing secondary education or another Job Corps Diploma Program in Texas; or
- withdrew from the Job Corps diploma program to enroll in the Job Corps distance education school that is accredited by a regional and national accrediting agency recognized by the U.S. Department of Education.

Diploma Program Dropout Rate Calculation:

$$\frac{\text{dropouts (leaver code 09)}}{\text{students enrolled in diploma program (diploma recipients + still enrolled + leavers + dropouts)}} = \text{diploma program dropout rate (\%)}$$

Examples of Dropout and Non-Dropout Definitions:

1. A student who withdraws from the diploma program on November 15, 2006, and re-enrolls in the diploma program on May 15, 2007, does not receive a diploma from the diploma program by August 31, 2007, and is enrolled on first school day in September 2007 is not a dropout for 2006-2007.
2. A student who withdraws from the diploma program on June 15, 2007, and enrolls in the GED program on July 15, 2007, and receives a GED certificate on August 1, 2007, then re-enrolls in the diploma program on August 15, 2007, and is enrolled on the first school day in September 2007 is not a dropout for 2006-2007.
3. A student who withdraws from the diploma program on May 15, 2007, and re-enrolls in the diploma program on June 15, 2007, and does not complete the diploma program by August 31, 2007, and is not enrolled on the first school day in September 2007 is reported as a dropout for 2006-2007.

Student Groups. The indicator is calculated for All Students and the following student groups.

- African American – A non-Hispanic person having origins in any of the Black racial groups of Africa.
- Hispanic – A person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.
- White – A non-Hispanic person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Economically Disadvantaged is not included as a student group because the definition used for public school accountability is based on National School Lunch Program enrollment, which would not be applicable to the Job Corps diploma program. The ethnicity definitions are from the PEIMS Data Standards.

Minimum Size Criteria. The Dropout Rate is evaluated at the All Students level, if there are *at least 10 students enrolled* in the diploma program at any time during the school year (September 1 - August 31). Student groups are evaluated if there are *at least 10 students in the student group.* If the minimum size requirement for All Students is not met, the diploma program is not evaluated on Dropout Rate.

Data Source. Dropouts are reported for the prior school year. For example, dropout data submitted in December 2007 will be for the September 1, 2006 - August 31, 2007 school year. The Job Corps diploma program must submit data to the TEA by **the first Monday in December 2007**. TEA will calculate the rates.

How Students Are Counted for the Job Corps Diploma Program Accountability Performance Indicators

Student Enrollment Status and the "One-day" Snapshot Date

For accountability purposes, the Job Corps diploma program has a "one-day" snapshot date. The "one-day" snapshot date is the **first school day in September**. On the first school day in September 2007, the diploma program must assign an enrollment status and grade level classification (9, 10, 11, or 12) to each student who was enrolled in the diploma program at any time during the 2006-2007 school year.

The enrollment statuses (and leaver codes) are:

1. diploma recipient: the student was awarded a Texas high school diploma on or before August 31, 2007 (leaver code 01);
2. still enrolled: the student was still enrolled in the Job Corps diploma program on the first school day in September 2007 (no leaver code);
3. leaver: the student
    a. passed the GED test and received a GED certificate on or before August 31, 2007 (leaver code 03);
    b. withdrew from the Job Corps diploma program to enroll in another educational setting (leaver code 02, 04, 05, 06, or 07);
    c. died (leaver code 08);
4. dropout: the student left the Job Corps diploma program for any reason not categorized above (leaver code 09).

Each student enrolled in the Job Corps diploma program in the 2006-2007 school year should fit into **one** of the above four categories.

Counting Leavers and Students Who Re-enroll. Any student enrolled in the diploma program in the 2006-2007 school year is assigned only one leaver code, regardless of the number of times or reasons for withdrawing and re-enrolling in the diploma program. The student's leaver code must reflect the student's last leaver status as of the first school day in September.

Counting Diploma Recipients. **August 31st** is the date by which students must receive their diplomas to be counted as diploma recipients of the Job Corps diploma program.

Job Corps Diploma Program Data Collection and Reporting

By **the first Monday in December** of each school year, the diploma program is required to submit to TEA certain data for use in determining the annual performance rating of the diploma program.

The **"one-day" snapshot date** used to determine the data is **the first school day in September.**

Data Collection Form

The Job Corps diploma program is required to submit and correct data in the format determined by TEA. The data collection form is included in the Appendix of this document. The collection of data is reviewed annually and revised, as necessary, to assign an annual performance rating to the diploma program. The Job Corps diploma program must retain auditable individual student data and documentation for activities such as monitoring or investigations.

Requests for Extensions to Submission Deadline

Extenuating circumstances may occur that preclude the diploma program from submitting its data to TEA on time. These extenuating circumstances are limited to circumstances that are not within the control of the diploma program including natural disasters or catastrophes and for which there are no practical options to providing the data to TEA. Extensions for these circumstances are considered and granted on a case-by-case basis. If the diploma program anticipates that it will not be able to meet the due date, a written statement signed by the director of the Job Corps diploma program (or designee) must be sent to the TEA no later than 30 calendar days from the due date and include the following information.

- the reasons for the delay or anticipated delay in submitting the data;
- the plan of action for resolving the existing problems;
- a request for an extension; and
- a commitment to a specific date for submitting the data to TEA. Extensions greater than 30 days after the TEA due date will not be approved unless it is substantiated that the circumstances are extreme and for which no alternative is available.

Requests for extension are to be mailed or faxed to:

Associate Commissioner
School District Services
Texas Education Agency
1701 N. Congress Ave.
Austin, TX 78701-1494
FAX (512) 475-3665

The TEA division responsible for school district services will notify the Job Corps diploma program director (or designee) whether the extension was or was not granted. If the data submission is delayed and communication is not received from the diploma program, the diploma program campus name will be forwarded to TEA General Counsel for further action.

Correcting Data Submission

The diploma program may find it necessary to correct data submitted. All diploma program resubmissions must be submitted to the TEA no later than the **last school day in January**. If extenuating circumstances arise and the diploma program is not able to correct its data within this timeline, the same procedures used to request an extension to data submission (above) must be followed.

Release of Diploma Program Accountability Preview Data Tables and Ratings

By **August 1 of each year**, the Job Corps diploma program **accountability rating will be released**.

The Job Corps diploma program will not have access to their data tables or ratings electronically, such as through a TEA Secure Environment (TEASE). TEA will provide accountability data and rating reports to the diploma program by certified U.S. Mail. TEA will not fax or email accountability data reports and ratings.

Job Corps Diploma Program Performance Standards

This section prescribes the standards and criteria for each performance indicator used to evaluate the diploma program. TEA staff will annually recommend to the commissioner of education the appropriate standards for each performance indicator listed below to meet the characteristic of students served in the diploma program.

1. Exit-level TAKS Passing Standard
2. Diploma Program Completion Rate Standard
3. Diploma Program Dropout Rate Standard

For students receiving special education services, the standard for meeting Admission, Review, and Dismissal (ARD) expectations will continue to be set locally, consistent with state law. Students receiving services under an individualized education plan (IEP) and taking TAKS will be included in the TAKS indicator.

The diploma program must demonstrate required improvement when accountability standards are not met.

The standards for each performance indicator will be established for 2007-2008, based on data collected for 2006-2007.

Job Corps Diploma Program Accountability Standards for Rating Issued in August 2008

Indicator	Rating	
	2005-2006 *Report data*	**2006-2007**
Exit-level TAKS	*Not Evaluated*	Acceptable 45%
Diploma Program Completion Rate $\frac{\text{Diploma recipients + still enrolled}}{\text{Students enrolled in diploma program (diploma recipients + still enrolled + leavers + dropouts)}}$ = completion rate (%)	*Not Evaluated*	Acceptable -*75%*
Diploma Program Dropout Rate $\frac{\text{dropouts (leaver code 09)}}{\text{students enrolled in diploma program (diploma recipients + still enrolled + leavers + dropouts)}}$ = dropout rate (%) Students dropping out in 2005-2006 are reported in 2006-2007 Students dropping out in 2006-2007 are reported in 2007-2008 *"Dropout" is defined in the Job Corps Diploma Program Accountability Procedures.*	*Not Evaluated*	Acceptable -*10%*

Job Corps Diploma Program Accountability Ratings

The diploma program rated under the Job Corps diploma program accountability procedures is assigned one of the three ratings listed below:

1. *Acceptable*
2. *Unacceptable*
3. *Not Evaluated*

Acceptable or Unacceptable	If there are no exit-level TAKS results, the diploma program will not be rated. If there are exit-level TAKS results, the program will be rated if the program meets the minimum size criteria.
Not Evaluated	Assigned to diploma programs with no exit-level TAKS results or to programs that do not meet the minimum size criteria.

Special Analysis for Small Numbers

The TEA conducts special analysis when very small amounts of data are used in determining the performance rating of the Job Corps diploma program. For special analysis, the Job Corps Diploma Program accountability procedures use comparative data from the prior year.

Job Corps Diploma Program Appeal Process

Preview Data Tables

The diploma program will receive a preview of its data table as determined by the TEA and described in the Job Corps Diploma Program Accountability Procedures Manual. After receipt of the data table, the diploma program may appeal the rating to the commissioner of education or the commissioner's designee. For the Job Corps diploma program, the Associate Commissioner of School District Services is designated to review the appeal and recommend the final rating to the commissioner of education.

Appeal Ratings

1. The diploma program may appeal the data or calculation error attributable to the TEA or the test contractor for the student assessment program.
2. Problems due to the diploma program's errors in data submission or on TAKS answer sheets are considered on a case-by-case basis.
3. The statutes permit consideration of data reporting quality in evaluating the merits of an appeal. Poor data quality is not a valid reason to appeal the accountability rating. Only appeals that would result in a changed rating will be considered.

How to Appeal a Rating

The diploma program appealing an accountability rating must submit to the commissioner of education a letter that includes the following:

1. A statement that the letter is an appeal of the [YEAR] Job Corps diploma program accountability rating;
2. The name and ID number of the diploma program for which the appeal is being submitted.
3. The specific indicator(s) appealed.
4. The problem, including details of the data affected and what caused the problem.
5. If applicable, the reason(s) why the cause of the problem is attributable to the TEA or the test contractor for the student assessment program.
6. The reason(s) why the change would result in a different rating, including calculations that support the different outcome.
7. A statement that all information included in the appeal is true and correct to the diploma program's best knowledge and belief.
8. The signature of the official representative of the diploma program.

Additional Appeal Procedures

- The Job Corps diploma program is provided one opportunity to appeal each indicator.
- When student-level information is in question, supporting information must be provided for review, including the student's name and identification number.
- The diploma program must ensure all relevant information is included in the appeal. The TEA will not contact the diploma program for additional materials.
- The appeal letter must be postmarked by the date determined by the TEA. Appeals postmarked after this date will not be considered.
- The appeal letter must be addressed to Commissioner of Education and mailed to Job Corps Diploma Program Accountability Procedures; Office of School District Services; Texas Education Agency; 1701 N. Congress Ave.; Austin, TX; 78701-1494.

How an Appeal Is Processed and Decision Issued

1. The details of the appeal are entered into a database for tracking purposes.

2. TEA staff evaluates the request using TEA data sources to validate the information to the extent possible and all relevant data.
3. The Division of School District Services prepares and forwards a recommendation to the commissioner of education.
4. The commissioner of education makes the final decision.
5. The diploma program is notified in writing of the commissioner's decision and the reason for the decision.
6. The decision of the commissioner is final and is not subject to further review or appeal.
7. If an appeal is granted, the data upon which the appeal was based will not be modified. TEA reports that reflect accountability data, must report the data as they are submitted to the TEA. Accountability data are subject to review by the Office of the State Auditor.
8. The commissioner of education will respond in writing to each appeal. The letter from the commissioner serves as notification of the official rating for the diploma program.

Final Ratings

After the resolution of all appeals, the TEA will assign a final rating to the diploma program.

On-site Investigations

Under Section 39.074 of the TEC, the commissioner may (1) direct the TEA to conduct on-site investigations at any time to answer any questions concerning a program, including special education, required by federal law or for which the program receives federal funds; and (2) raise or lower the performance rating as a result of the investigation. The manner in which the TEA will conduct the on-site investigation is described under Section 39.076 of the TEC and 19 TAC §97.1033. In conducting the on-site investigation, data other than the data reported through the data collection form may be reviewed by the TEA to determine compliance with applicable federal and state laws and rules. The diploma program is required to maintain at its program facility, the education records and data required in meeting TEA reporting requirements. The Job Corps diploma program must retain auditable individual student data and documentation for activities such as monitoring and investigations.

Required Improvement

Required Improvement compares prior-year performance to current-year performance. In order to conduct this comparison, All Students or any student group must meet the minimum size requirement for the prior year.

Improvement Standards for the diploma program will be determined for 2008-2009 based on data submitted for 2006-2007 and 2007-2008.

In order to move a Job Corps diploma program from an *Unacceptable* rating to an *Acceptable* rating, the diploma program must demonstrate required improvement within two school years.

Performance Indicator	Standard of Improvement Required
TAKS Measure	a standard of _(*TBD*)_% within two years
Diploma Program Completion Rate	a standard of _(*TBD*)_% within two years
Diploma Program Dropout Rate	a decline in the rate to be at _(*TBD*)_% within two years

In order to move a Job Corps diploma program from an *Unacceptable* rating to an *Acceptable* rating, the diploma program must meet the standards of improvement on all deficient performance indicators. If the improvement standard is met for every deficient measure, then the diploma program is assigned an *Acceptable* rating.

Sanctions

Based on the nature of and severity of the problem(s) identified, the commissioner of education has the authority to take action under Chapter 39 of the TEC, including closure of the diploma program.

Sanctions may be applied as a result of:

- problems identified through the application of system safeguards;
- unacceptable performance for two consecutive years; or
- the findings of an on-site investigation authorized under Section 39.074 of the TEC.

Appendix

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TEXAS EDUCATION AGENCY

Job Corps Diploma Program
2007-2008 Data Collection Form for 2006-2007 Data Year

Please PRINT or TYPE:

Job Corps Diploma Program Name _____

Job Corps Diploma Program Number _____

Job Corps Diploma Program Director's Name _____

Telephone Number _____

The following signature affirms that the undersigned has submitted all required data and has taken measures to verify the accuracy and the authenticity of the data being submitted for the Job Corps Diploma Program.

Job Corps Diploma Program Director's Signature _____

Date _____

Authority for Data Collection: Texas Education Code, §18.006 - Job Corps Diploma Program.

Planned Use of the Data: For **2007-2008 Diploma Program Accountability Ratings** for the Job Corps Diploma Program issued by the Commissioner in compliance with Chapter 18 of the Texas Education Code.

Instructions: Complete **ONE** report for the Job Corps diploma program using **2006-2007 school year data.** Complete this form regardless of the diploma program enrollment size. Do not leave any boxes blank and do not write "not applicable." If there is no number to report in a box, enter "0" (zero) in that box. Do not attach any additional documents to this report. ***See additional instructions below for each item.***

Submission Timeline: This completed and signed form must be **postmarked by the first Monday in December 2007.** Mail form to:

Texas Education Agency
Associate Commissioner
School District Services
1701 N. Congress Avenue
Austin, Texas 78701-1494

Fax and email submissions are not accepted. Maintain a copy of this report and any supporting documentation for your records. Texas Education Agency (TEA) will send the Job Corps Diploma Program Director a written confirmation of receipt.

Questions: If there are any questions regarding the data submission, please call School District Services at (512) 463-5889. For submission corrections, please refer to the Correcting Data Submission section of the ***Job Corps Diploma Program Accountability Procedures Manual.***

Please note that information submitted to TEA is subject to release in accordance with Chapter 552 of the Texas Government Code (Texas Public Information Act), and includes the Family Educational Rights and Privacy Act (FERPA).

GROUP	All Students	African American	Hispanic	White
IMPORTANT: In each column, the total of #2, #3, #4 and #5 should equal the total in #1. The number of African American, Hispanic, and White students on each row may not equal ALL STUDENTS on that row because ALL STUDENTS may include other ethnicities.				
1. **Total Students** who were enrolled in the Job Corps diploma program at any time between September 1, 2006, and August 31, 2007. If a student withdrew from the diploma program and later re-entered it, count the student only once.				
2. **Diploma Recipients:** Students in #1 who were **awarded a Job Corps diploma** at any time between September 1, 2006, and August 31, 2007 (Leaver Code 01). See *Leaver Code* Table on page 2. Completing the diploma program means meeting all diploma program requirements and passing all portions of the exit-level TAKS.				

continues

GROUP	All Students	African American	Hispanic	White
IMPORTANT: In each column, the total of #2, #3, #4 and #5 should equal the total in #1. The number of African American, Hispanic, and White students on each row may not equal ALL STUDENTS on that row because ALL STUDENTS may include other ethnicities.				
3. **Still Enrolled:** Students in #1 who did not complete the diploma program (including did not pass the exit-level TAKS) and who are **still enrolled in the diploma program** on the first school day in September 2007 (no Leaver Code). "Still enrolled" is defined as a student who was enrolled during the 2006-2007 school year (regardless of whether the student withdrew and re-enrolled) and is enrolled on the first school day in September 2007.				
4. **Leavers:** Students in #1 who did not complete the diploma program, were not enrolled in the diploma program on the first school day in September 2007, and were withdrawn under any of the following *Leaver Codes: 02, 03, 04, 05, 06, 07,or 08.* A student with one of these seven (7) leaver codes is not counted as a dropout for the diploma program accountability system. Any student enrolled in the diploma program in the 2006-2007 school year is assigned only **one** leaver code on the "one-day" snapshot date: first school day in September 2007. Regardless of the number of times or reasons the student withdrew and re-enrolled in the diploma program, assign the student one leaver code and count the student only once.				
5. **Dropouts**: Students in #1 who did not complete the diploma program, were not enrolled on the first school day in September 2007, and were withdrawn under Leaver Code 09.				
6. **Total Students** who **participated in Job Corps Training Program** at any time between September 1, 2006, and August 31, 2007, **and** who entered the training program without a high school diploma, **and** who did not participate in the diploma program. If a student withdrew from the training program and later re-entered it, count the student only once.				

Leaver Code	Explanation of Reason
01 – Student completed Job Corps diploma requirements	Use for students who meet all diploma requirements (which includes passing the exit-level TAKS) at any time during the school year (September 1, 2006 - August 31, 2007).
02 – Student withdrew from Job Corps Training Program to enter an institution of higher education or technical institution	Student withdrew from the Job Corps diploma program and training program to enroll in an institution of higher education or a technical institution. Documentation of enrollment must indicate or certify that the student is taking classes under a planned degree or certificate program for at least 3 semester hours or one class.
03 – Student is issued a GED certificate on or before by August 31 of the same school year	Student received a GED certificate on which the issue date is on or before August 31, 2007.
04 – Student withdrew from Job Corps Training Program to enroll in a public school in Texas	Student withdrew from the Job Corps diploma program and training program with the intent to enroll in a public school in Texas. Documentation must indicate that the student enrolled in a **public** school in Texas.
05 – Student withdrew from Job Corps Training Program to enroll in another Job Corps diploma program in Texas	Student withdrew from the Job Corps diploma program and training program in order to enroll in another Job Corps diploma program. Documentation must indicate that the student enrolled in another Job Corps diploma program in Texas.
06 – Student withdrew from Job Corps Training Program to enroll in a private school in Texas	Student withdrew from the Job Corps diploma program and training program with the intent to enroll in a private school in Texas. Documentation must indicate that the student enrolled in a **private** school in Texas.
07 – Student withdrew from Job Corps diploma program to enroll in the Job Corps distance education school.	Student withdrew from the Job Corps diploma program to enroll in the Job Corps distance education school that is accredited by a regional and national accrediting agency recognized by the U.S. Department of Education. Documentation must show activation of the student's enrollment.
08 – Student died while enrolled in the diploma program	This code requires documentation of the student's death.
09 – Other	This code is used when the reason for student withdrawal is unknown or not listed in this chart, or when a student is withdrawn by the diploma program after a period of time because the student has quit participating in the diploma program and the reason is unknown. The diploma program must determine the number of days that will be implemented for these types of withdrawals, and provide written notice to each student upon enrollment in the diploma program that he/she will be withdrawn if he/she quits participating in the program for the specified number of days.

Figure: 30 TAC §213.14(a)

Table 1

CLASSIFICATION/NUMBER OF ACRES	FEE
One single-family residential dwelling on less than 5 acres	$650
Multiple single-family residential dwellings and parks	
Less than 5 acres	$1,500
5 acres to less than 10 acres	$2,500
10 acres to less than 40 acres	$4,000
40 acres to less than 100 acres	$6,500
100 acres to less than 500 acres	$8,000
500 acres or more	$10,000
Non-residential (Commercial, industrial, institutional, multi-family residential, schools, and other sites where regulated activities will occur)	
Less than 1 acre	$3,000
1 acre to less than 5 acres	$4,000
5 acres to less than 10 acres	$5,000
10 acres to less than 40 acres	$6,500
40 acres to less than 100 acres	$8,000
100 acres or more	$10,000

Figure: 30 TAC §213.27(b)

Table 2

CLASSIFICATION/NUMBER OF ACRES	FEE
One single-family residential dwelling on less than 5 acres	$650
Multiple single-family residential dwellings and parks	
Less than 5 acres	$1,500
5 acres to less than 10 acres	$2,500
10 acres to less than 40 acres	$4,000
40 acres to less than 100 acres	$6,500
100 acres to less than 500 acres	$8,000
500 acres or more	$10,000
Non-residential (Commercial, industrial, institutional, multi-family residential, schools, and other sites where regulated activities will occur)	
Less than 1 acre	$3,000
1 acre to less than 5 acres	$4,000
5 acres to less than 10 acres	$5,000
10 acres to less than 40 acres	$6,500
40 acres to less than 100 acres	$8,000
100 acres or more	$10,000

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 Affordable Housing Corporation

Notice of Request for Proposals

Notice is hereby given that the Texas State Affordable Housing Corporation (the "Corporation") has approved its 2008 Requesting for Proposals for our multifamily Private Activity Bond Program. The program seeks applications from qualified developers for the creation or preservation of multifamily affordable rental developments. The Request for Proposals outlines the Corporation's process and guidelines for selecting qualified development to receive residential rental bond financing.

The Corporation will begin accepting applications immediately. Application materials are posted on the Corporation's website at: http://tsahc.org/multi/multi_bond.php.

Applications to be considered for an inducement resolution at the Corporation's January 2008 Board meeting must be submitted by 5:00 pm on December 14, 2007. All submissions thereafter must be submitted at least 21 days prior to the Corporation's Board meeting at which they will be considered for an Inducement Resolution.

Staff is available to talk with interested developers about their development proposals. Please contact David Danenfelzer, by phone at (512) 477-3555 ext. 403, or by email at: ddanenfelzer@tsahc.org.

TRD-200705561
David Long
President
Texas State Affordable Housing Corporation
Filed: November 13, 2007

♦ ♦ ♦

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 November 2, 2007, through November 8, 2007. 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 this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on November 14, 2007. The public comment period for this project will close at 5:00 p.m. on December 14, 2007.

FEDERAL AGENCY ACTIONS:

Applicant: Randy Moore; Location: The project is located in wetlands contiguous to Laguna Madre at 217 to 223 Esperanza Street, South Padre Island, Cameron County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Isabel, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 14; Easting: 682798; Northing: 2889589. Project Description: The proposed project consists of the construction of four single-family houses, on four separate lots, in a tidal slough connected to the Laguna Madre. The project will result in the shading of approximately 13,000 square feet of a tidal slough that contain shallow waters and a mangrove fringe along the shoreline. The revised project plans depicted with this notice are intended to address comments received from the previous public notice, 24394, dated 22 November 2006, which proposed filling of approximately 0.17 to 0.20 acres of the slough in addition to related shading. The driveway and garage areas have now been elevated to avoid wetland fill and minimize impacts. CCC Project No.: 08-0022-F1; Type of Application: U.S.A.C.E. permit application #SWG-2006-1541 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, 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-200705547
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: November 13, 2007

♦ ♦ ♦

Comptroller of Public Accounts

Notice of Contract Award

Pursuant to Chapters 403 and 2156, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces the following contract award:

The notice of request for proposals was published in the April 27, 2006, issue of the *Texas Register* (32 TexReg 2389) (RFP #177c).

The contractor will provide Texas 529 Plan Management Services for the Texas Prepaid Higher Education Tuition Board.

The contract was awarded to OFI Private Investments, Inc. The total amount of the contract is based on the fair market value of assets under management. The term of the contract is November 6, 2007 through August 31, 2012, with option for 2 additional 1-year renewals.

TRD-200705470

William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: November 8, 2007

♦ ♦ ♦

Notice of Legal Banking Holidays

Texas Tax Code Annotated, §111.053(b), requires that, before January 1 of each year, the Comptroller of Public Accounts publish a list of the legal holidays for banking purposes for that year. This is the 2008 Eleventh District Holiday Schedule. Pursuant to the Federal Reserve Bank of Dallas Notice 07-33, dated August 10, 2007, the Federal Reserve Bank of Dallas and its branches at El Paso, Houston, and San Antonio, Texas, will observe the following holidays for Calendar Year 2008 and will not be open on the dates indicated below.

Tuesday, January 1, New Year's Day

Monday, January 21, Martin Luther King, Jr. Day

Monday, February 18, Presidents Day

Monday, May 26, Memorial Day

Friday, July 4, Independence Day

Monday, September 1, Labor Day

Monday, October 13, Columbus Day

Tuesday, November 11, Veterans Day

Thursday, November 27, Thanksgiving Day

Thursday, December 25, Christmas Day

The Federal Reserve standard holiday schedule mandates that, if January 1, July 4, November 11, or December 25 falls on a Sunday, the following Monday will be observed as a holiday. If January 1, July 4, November 11, or December 25 occurs on a Saturday, the preceding Friday will not be observed as a holiday. For the year 2008, no holidays fall on Saturday or Sunday.

TRD-200705584
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: November 14, 2007

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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 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 11/19/07 - 11/25/07 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 11/19/07 - 11/25/07 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200705558
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: November 13, 2007

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Texas Department of Criminal Justice

Request for Proposals #696-BF-8-P002

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Texas Department of Criminal Justice (TDCJ) is accepting proposals for a Consulting Services Contract to improve Historically Underutilized Business (HUB) participation. TDCJ anticipates awarding a contract to the Offeror most advantageous to TDCJ based on the factors specified within the solicitation.

The RFP can be obtained through the Electronic State Business Daily at: http://esbd.cpa.state.tx.us/ or by contacting:

TDCJ Contracts and Procurement

Mary Drewry, Contract Administrator

E-mail: mary.drewry@tdcj.state.tx.us

Phone: (936) 437-7130

Sealed offers will be accepted until 3:00 PM, December 28, 2007, at the following address:

Texas Department of Criminal Justice

Contracts and Procurement Department

2 Financial Plaza, Suite 525

Huntsville, Texas 77340

Attn: 696-BF-8-P002

TRD-200705493
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: November 9, 2007

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East Texas Council of Governments

Request for Proposals for Mobile Workforce Center with "Go Green" Attitude

Notice is given that as the fiscal agent and administrative unit for the East Texas Workforce Development Board, The East Texas Council of Governments (ETCOG) is soliciting bids, in the form of this Request for Proposal (RFP), for the purchase of a specialty vehicle or travel trailer to be outfitted as a mobile workforce center from qualified vendors.

The East Texas Workforce Development Board is responsible for the oversight of state and federally funded training, employment, and childcare services in a fourteen county area around Longview and Tyler.

It is anticipated that the services delivered will be completed by March 31, 2008, or 120 days after the order for the specialty vehicle is placed, whichever is earliest. ETCOG reserves the right to alter the request for products and services, as well as extend the timeframe, if conditions warrant.

Persons or organizations wanting to receive a Request for Proposal document should inquire by fax or email to East Texas Council of Govern-

ments, 3800 Stone Road, Kilgore, Texas 75662, Attn: Monty Thomas. The fax number for ETCOG is (903) 983-1440. The email address is monty.thomas@yahoo.com. Questions regarding the RFP process can be addressed by sending a fax or email as described above.

If you wish to respond, the due date for this RFP is November 26, 2007 by 12:00 pm (noon).

TRD-200705440
David A. Cleveland
Executive Director
East Texas Council of Governments
Filed: November 8, 2007

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Texas Education Agency

Request for Applications Concerning the 2007 - 2010 Beginning Teacher Induction and Mentoring Program Grant, Cycle 2

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under Request for Applications (RFA) #701-08-128 from public school districts and open-enrollment charter schools in Texas.

Description. The purpose of this program is to allow school districts or open-enrollment charter schools to assign a mentor teacher to each classroom teacher with less than two years teaching experience. Teacher mentors must (1) teach in the same school as the teacher being mentored; (2) teach the same subject or grade level, as applicable, as the teacher being mentored (to the extent practicable); and (3) meet qualifications as determined by the commissioner of education in 19 TAC Chapter 153, School District Personnel, Subchapter BB, Commissioner's Rules Concerning Professional Development, §153.1101, Beginning Teacher Induction and Mentoring Program. A beginning teacher induction and mentoring program must be based on a research-based mentoring program that, through external evaluation, has demonstrated success in improving new teacher quality.

Dates of Project. The Beginning Teacher Induction and Mentoring Program, Cycle 2, will be implemented during the 2007-2008, 2008-2009, and 2009-2010 school years. Applicants should plan for a starting date of no earlier than May 1, 2008, and an ending date of no later than May 31, 2010.

Project Amount. A total of $14.7 million is available for funding approximately 30 projects. Each project will receive a maximum total of $1 million for the 2007-2010 school years. This project is funded 100% from state funds.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. The TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

The TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Requesting the Application. A complete copy of the RFA may be obtained by writing the Document Control Center, Room 6-108, Texas Education Agency, William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701; by calling (512) 463-9304; by faxing (512) 463-9811; or by e-mailing dcc@tea.state.tx.us. Please refer to the RFA number and title in your request. Provide your name, complete mailing address, and phone number including area code. The announcement letter and complete RFA will also be posted on the TEA website at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Further Information. For clarifying information about the RFA, contact Carlos Garza, Division of Discretionary Grants, Texas Education Agency, (512) 463-9269. In order to assure that no prospective applicant may obtain a competitive advantage because of acquisition of information unknown to other prospective applicants, any information that is different from or in addition to information provided in the RFA will be provided only in response to written inquiries. Copies of all such inquiries and the written answers thereto will be posted on the TEA website in the format of Frequently Asked Questions (FAQs) at http://burleson.tea.state.tx.us/GrantOpportunities/forms. In the "Select Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Thursday, January 24, 2008, to be eligible to be considered for funding.

TRD-200705569
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: November 14, 2007

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 4, 2008.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforce-

ment coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: A Young Adventure Child Care Learning Center Inc.; DOCKET NUMBER: 2007-1267-PWS-E; IDENTIFIER: RN101239515; LOCATION: Richmond, Fort Bend County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 Texas Administrative Code (TAC) §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect any routine water samples for bacteriological analysis; 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect all five distribution samples following the coliform found months and by failing to post the public notices of the failure to collect the five distribution samples; and 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(B) and THSC, §341.033(d), by failing to collect all the repeat samples and by failing to post the public notices of the failure to collect the repeat samples; PENALTY: $2,257; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: ALBERTSON'S LLC dba Albertson's Express 1016; DOCKET NUMBER: 2007-1326-AIR-E; IDENTIFIER: RN101656031; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: fuel dispensing station; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the seven pounds per square inch absolute maximum Reid vapor pressure requirement for gasoline; PENALTY: $1,220; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(3) COMPANY: Anarkali Enterprises, Inc. dba Sack N Snack 2; DOCKET NUMBER: 2007-1200-PST-E; IDENTIFIER: RN101536761; LOCATION: Kennedale, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(a)(1)(A) and the Code, §26.3475(c)(1), by failing to provide a method of release detection capable of detecting a release from any portion of the underground storage tank (UST) system; 30 TAC §334.50(b)(2)(A)(i)(III) and the Code, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.50(b)(2) and the Code, §26.3475(a), by failing to provide release detection for the piping associated with the USTs; 30 TAC §334.7(d)(3), by failing to provide an amended UST registration to the commission for any change or additional information regarding USTs; 30 TAC §115.246(7)(A) and THSC, §382.085(b), by failing to maintain records on-site; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment; and 30 TAC §115.242(3) and (3)(A) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; PENALTY: $7,200; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: Arledge Ridge Water Supply Corporation; DOCKET NUMBER: 2007-1262-PWS-E; IDENTIFIER: RN101230910; LOCATION: Bonham, Fannin County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.42(j), by failing to provide certification by an organization accredited by American National Standards Institute for the calcium hypochlorite disinfectant; 30 TAC §290.43(c)(4), by failing to maintain an operable water level indicator on the 50,000 gallon ground storage tank; 30 TAC §290.45(b)(1)(D)(iii) and THSC, §341.0315(c), by failing to provide two or more pumps that have a total capacity of two gallons per minute per connection; 30 TAC §290.46(m)(1)(A), by failing to conduct annual inspections on the water system's four ground storage tanks and one elevated storage tank; 30 TAC §290.46(m)(1)(B), by failing to conduct annual inspections on the water system's two pressure tanks; and 30 TAC §290.41(c)(3)(N) and §290.46(s)(1), by failing to calibrate the well meter at well number one at least once every three years; PENALTY: $1,350; ENFORCEMENT COORDINATOR: Andrea Linson-Mgbeoduru, (512) 239-1482; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Benbrook, LLC; DOCKET NUMBER: 2007-0371-MWD-E; IDENTIFIER: RN102963238; LOCATION: Tarrant County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(17) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number 12723001, Sludge Provisions, Reporting Requirements, by failing to submit the annual sludge report; and 30 TAC §305.42(a) and the Code, §26.121, by failing to maintain authorization for the discharge of wastewater; PENALTY: $10,126; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Chemtrade Refinery Services, Inc.; DOCKET NUMBER: 2007-0742-AIR-E; IDENTIFIER: RN100218932; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: spent acid regeneration plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Permit Number 3149, Special Condition (SC) Number 7, Federal Operating Permit (FOP) Number O-01409, SC Number 7A, and THSC, §382.085(b), by failing to record the sulfur dioxide (SO_2) emissions data as reported in the deviations reports; 30 TAC §116.115(c) and §122.143(4), Permit Number 3149, SC Number 1, FOP Number O-01409, SC Number 7A, and THSC, §382.085(b), by failing to calculate SO_2 emissions as reported in the deviation reports; 30 TAC §116.115(c) and §122.143(4), Permit Number 3149, SC Number 7B, FOP Number O-01409, SC Number 7A, and THSC, §382.085(b), by failing to zero and span the SO_2 continuous emissions monitoring system as reported in the deviation report; 30 TAC §111.127(c) and THSC, §382.085(b), by failing to continuously operate an opacity monitor as reported in the deviation report; 30 TAC §101.201(a)(1)(B) and THSC, §382.085(b), by failing to submit initial reports; 30 TAC §101.201(c) and THSC, §382.085(b), by failing to submit final reports; 30 TAC §116.115(c) and §122.143(4), Permit Number 3149, SC Number 1, FOP Number O-01409, SC Number 7A, and THSC, §382.085(b), by failing to maintain an emission rate below the maximum allowable emission limit of 400 pounds per 24 hours for SO_2; 30 TAC §112.3(c) and THSC, §382.085(b), by failing to maintain SO_2 net ground level concentrations below 0.32 parts per million by volume; and 30 TAC §116.115(c) and §122.143(4), Permit Number 3149, SC Number 8, FOP Number O-01409, SC Number 7A, and THSC, §382.085(b), by failing to maintain authorized emissions from the final vent stack; PENALTY: $34,119; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(7) COMPANY: Chusei (U.S.A.), Inc. dba Quest Separation Technologies, Inc.; DOCKET NUMBER: 2007-1098-IWD-E; IDENTIFIER: RN100660612; LOCATION: La Porte, Harris County, Texas; TYPE OF FACILITY: industrial organic chemical manufacturing; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0003686000, Effluent Limitations and Monitoring Requirements Number 1 for Outfall 002, and the Code, §26.121(a), by failing to comply with the permitted effluent limits; PENALTY: $7,750; Supplemental Environmental Project (SEP) offset amount of $3,100 applied to Galveston Bay Foundation - "Marsh Mania"; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OF-

FICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Coastal Industrial Coatings, Incorporated; DOCKET NUMBER: 2007-1132-AIR-E; IDENTIFIER: RN104924543; LOCATION: Kountze, Hardin County, Texas; TYPE OF FACILITY: sandblasting and surface coating plant; RULE VIOLATED: 30 TAC §116.110(a) and THSC, §382.085(b) and §382.0518(a), by failing to obtain a permit or meet the conditions of a permit by rule; PENALTY: $1,700; ENFORCEMENT COORDINATOR: Lindsey Jones, (512) 239-4930; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: Custom Crushed Stone, Inc.; DOCKET NUMBER: 2007-1187-MSW-E; IDENTIFIER: RN104159934; LOCATION: San Antonio, Bexar County, Texas; TYPE OF FACILITY: concrete, asphalt, steel, wood chip, and compost recycling; RULE VIOLATED: 30 TAC §328.4(b)(3)(B), by failing to protect recycled material from degradation, contamination, or loss of value as recyclable material; 30 TAC §328.5(c)(1), by failing to submit to the TCEQ a written closure cost estimate for hiring a third party to close the facility by disposition of all processed and unprocessed materials; and 30 TAC §328.4(b)(3) and §328.5(f)(1), by failing to provide any documentation to show that during each subsequent six-month period, the amount of material that is recycled, or transferred to a different site for recycling, equals at least 50% by weight or volume of the material accumulated at the beginning of the period; PENALTY: $10,000; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(10) COMPANY: Craig J. Dickson; DOCKET NUMBER: 2007-1156-PWS-E; IDENTIFIER: RN103105557; LOCATION: Brookshire, Waller County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B), by failing to perform routine monthly bacteriological sampling of the public water supply and by failing to provide public notification of the failure to conduct bacteriological sampling; PENALTY: $1,395; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: City of Dilley; DOCKET NUMBER: 2005-0223-MWD-E; IDENTIFIER: RN103124137; LOCATION: Dilley, Frio County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10404-003, Effluent Limitations and Monitoring Requirements 1 and 3, and the Code, §26.121(a)(1), by failing to comply with the permitted effluent limits for total suspended solids, pH, and five-day carbonaceous biochemical oxygen demand; PENALTY: $2,540; Supplemental Environmental Project (SEP) offset amount of $2,032 applied to Texas Association of Resource Conservation & Development Areas, Inc. ("RC&D") - Unauthorized Trash Dump Cleanup; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(12) COMPANY: Forestar (USA) Real Estate Group Inc.; DOCKET NUMBER: 2007-1199-EAQ-E; IDENTIFIER: RN102759537; LOCATION: Bexar County, Texas; TYPE OF FACILITY: mixed-use development construction site; RULE VIOLATED: 30 TAC §213.4(j)(2) and Edwards Aquifer Protection Plan (EAPP) File Number 1788.05, Project Description, by failing to submit and receive approval of modifications to an EAPP prior to performing a regulated activity; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(13) COMPANY: Gas Solutions II Ltd.; DOCKET NUMBER: 2007-1473-AIR-E; IDENTIFIER: RN100237502; LOCATION: Longview, Gregg County, Texas; TYPE OF FACILITY: natural gas compression, treating, and natural gas liquids recovery plant; RULE VIOLATED: 30 TAC §122.146(2) and THSC, §382.085(b), by failing to submit an annual compliance certification; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Sidney Wheeler, (210) 490-3096; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(14) COMPANY: City of Granbury; DOCKET NUMBER: 2007-1231-PWS-E; IDENTIFIER: RN102690971; LOCATION: Granbury, Hood County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by exceeding the maximum contaminant level (MCL) for total trihalomethanes (TTHM); PENALTY: $715; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (210) 490-3096; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Harbenger Enterprises, Inc.; DOCKET NUMBER: 2007-1047-WQ-E; IDENTIFIER: RN105232508; LOCATION: Weatherford, Parker County, Texas; TYPE OF FACILITY: construction site; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to develop and implement a storm water pollution prevention plan and obtain authorization to discharge storm water associated with a construction activity; PENALTY: $3,000; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Hina Enterprises, Inc. dba OJS Mobil Mart; DOCKET NUMBER: 2007-1193-PST-E; IDENTIFIER: RN101914026; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c)(1), by failing to monitor USTs for releases; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for the UST system; PENALTY: $6,100; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: Ernest Hogue; DOCKET NUMBER: 2007-0597-PST-E; IDENTIFIER: RN101656460; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: property with USTs; RULE VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, three USTs; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs; and 30 TAC §334.22(a) and the Code, §5.702, by failing to pay outstanding UST fees and associated late fees; PENALTY: $8,925; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(18) COMPANY: Hondo Healthcare & Rehabilitation Center, Inc. (previously known as Harvest Communities of Houston, Inc.); DOCKET NUMBER: 2007-1078-MWD-E; IDENTIFIER: RN102186889; LOCATION: Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1) and §309.13(e)(2) and TPDES Permit Number 10825001, Other Requirements Number 3, by failing to implement a nuisance prevention system to mitigate odor and noise; 30 TAC §305.125(1) and §319.1 and TPDES Permit Number 10825001, Monitoring and Reporting Requirements Number 1, by failing to submit discharge monitoring reports as required by the permit; 30 TAC §305.125(1) and (11)(B) and §319.7(c), and TPDES Permit Number 10825001, Monitoring and Re-

porting Requirements Number 3.b., by failing to have all the required monitoring and reporting records available for review upon request; 30 TAC §305.125(1) and §319.1 and TPDES Permit Number 10825001, Monitoring and Reporting Requirements Number 1, by failing to correctly calculate and report the monitoring data based on the required monitoring frequency for November 2005; 30 TAC §305.125(1) and (5) and TPDES Permit Number 10825001, Operational Requirements Number 1, by failing to properly operate and maintain the facility; and 30 TAC §21.4 and the Code, §5.702, by failing to pay outstanding consolidated water quality fees and associated late fees; PENALTY: $15,408; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: Francisco DeLuna dba Joint Aggies Irrigation; DOCKET NUMBER: 2007-1465-LII-E; IDENTIFIER: RN105212930; LOCATION: Bryan, Brazos County, Texas; TYPE OF FACILITY: landscape irrigation business; RULE VIOLATED: 30 TAC §30.5(b) and §344.4(a), Texas Occupations Code, §1903.251, and the Code, §37.003, by failing to obtain an irrigator license prior to advertising services for which an irrigator license is required; PENALTY: $262; ENFORCEMENT COORDINATOR: Colin Barth, (512) 239-0086; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(20) COMPANY: Alex P. McCloskey; DOCKET NUMBER: 2007-1749-WOC-E; IDENTIFIER: RN103397733; LOCATION: San Patricio County, Texas; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(21) COMPANY: Martha Gallison dba Mt. Houston Tire Disposal; DOCKET NUMBER: 2007-1184-MSW-E; IDENTIFIER: RN103042867; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: scrap tire processing; RULE VIOLATED: 30 TAC §328.58(c), by failing to properly manifest shipments of scrap tires for disposal; 30 TAC §328.60(a) and §328.63(b)(2), by failing to obtain a scrap tire storage registration prior to storing more than 500 tires; and 30 TAC §328.56(b) and §328.57(c)(3), by failing to ensure that scrap tires and scrap tire pieces are transported by a registered tire transporter; PENALTY: $5,940; ENFORCEMENT COORDINATOR: Dana Shuler, (512) 239-2505; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: NRG Texas LP; DOCKET NUMBER: 2007-1237-AIR-E; IDENTIFIER: RN100542927; LOCATION: Limestone County, Texas; TYPE OF FACILITY: electric generating power plant; RULE VIOLATED: 30 TAC §101.10(e) and THSC, §382.085(b), by failing to submit the 2005 emissions inventory; PENALTY: $2,975; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(23) COMPANY: Optimum Calves, L.L.C. and Roger Gomez dba Optimum Calves; DOCKET NUMBER: 2007-1213-AGR-E; IDENTIFIER: RN104925334; LOCATION: Bailey County, Texas; TYPE OF FACILITY: dairy calf operation; RULE VIOLATED: 30 TAC §321.31(a) and the Code, §26.121(a), by failing to prevent the unauthorized discharge of agricultural wastewater; and 30 TAC §321.46(a)(1) and TPDES Confined Animal Feeding Operation General Permit Number TXG920817, Part III.A.1(a), by failing to develop a pollution prevention plan for the facility; PENALTY: $2,440; ENFORCEMENT COORDINATOR: Lynley Doyen, (512) 239-1364; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(24) COMPANY: City of Quinlan; DOCKET NUMBER: 2007-1283-MWD-E; IDENTIFIER: RN101917565; LOCATION: Hunt County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number WQ0013725001, Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with permitted effluent limits; PENALTY: $6,100; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: David E. Shivers dba Shan D Water Supply; DOCKET NUMBER: 2007-1370-PWS-E; IDENTIFIER: RN101189058; LOCATION: Rusk County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and THSC, §341.0315(c), by failing to comply with the MCL for TTHM; PENALTY: $354; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (210) 490-3096; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(26) COMPANY: Tige Boats, Inc.; DOCKET NUMBER: 2007-1406-AIR-E; IDENTIFIER: RN104316500; LOCATION: Abilene, Taylor County, Texas; TYPE OF FACILITY: boat manufacturing plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(E) and THSC, §382.085(b), by failing to maintain records containing sufficient data to determine compliance with emissions limits; and 30 TAC §122.145(2)(C), Operating Permit Number O-02674, General Terms and Conditions, and THSC, §382.085(b), by failing to timely submit a deviation report; PENALTY: $4,750; ENFORCEMENT COORDINATOR: Terry Murphy, (512) 239-5025; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(27) COMPANY: Union Carbide Corporation; DOCKET NUMBER: 2007-0209-AIR-E; IDENTIFIER: RN100219351; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), New Source Review (NSR) Permit Number 49023, SC Number 1, FOP O-01914, SC Number 5, and THSC, §382.085(b), by failing to comply with permitted emissions and throughput limits; and 30 TAC §116.116(b)(1) and THSC, §382.085(b), by failing to represent vent streams and amend NSR Permit Number 9085; PENALTY: $76,450; Supplemental Environmental Project (SEP) offset amount of $30,580 applied to Houston-Galveston AERCO's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Jessica Rhodes, (512) 239-2879; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200705548
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 13, 2007

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Notice of District Petition

Notices issued November 2, 2007 through November 8, 2007.

TCEQ Internal Control No. 07092007-D04; The Gardens of DeCordova, L.P., a Texas limited partnership, and Continental Real Estate, Inc. (Petitioners) filed a petition with the Texas Commission on Environmental Quality (TCEQ) for the annexation of The Gardens of DeCordova into Acton Municipal Utility District of Hood and Johnson Counties under Chapter 54 of the Texas Water Code and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioners hold title to the Property (the proposed annexation area) and are owners of a majority in value of the land to be included in the District; (2) there are three lien holders (Texas Department of Housing and Community

Affairs, Northwest Central Texas Housing Finance Corporation, First National Bank of Weatherford) on the Property to be included in the annexation area; (3) the Property contains approximately 22.139 acres located in Hood County, Texas; and (4) the Property is within the extraterritorial jurisdiction of the City of DeCordova, Texas (City). The lien holders were notified by certified mail on October 18, 2007 of the proposed annexation of the Property into Acton MUD, as attested by the Petitioners. The TCEQ may grant a contested case hearing on this petition if a written hearing request is filed within 30 days after the newspaper publication of this notice.

TCEQ Internal Control No. 07232007-D01; Memorial Point Utility District of Polk County (the "District") filed an application with the Texas Commission on Environmental Quality (TCEQ) for authority to adopt and impose a uniform operation and maintenance standby fee of $10.19 per month ($122.28 per year) per equivalent single-family connection for calendar years 2008-2010 on unimproved property within the District. The application was filed pursuant to Chapter 49 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The TCEQ may approve the standby fee as requested or a lower standby fee, but it shall not approve a standby fee greater than the amount requested. The standby fee is a personal obligation of the person owning the undeveloped property on January 1 of the year for which the fee is assessed. A person is not relieved of his prorated share of the standby fee obligation on transfer of title to the property. On January 1 of each year, a lien is attached to the undeveloped property to secure payment of any standby fee imposed and the interest or penalty, if any, on the fee. The lien has the same priority as a lien for taxes of the District. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 30 days after the publication of this notice.

TCEQ Internal Control No. 07252007-D03; MA Sedona Lakes, LP, (Petitioner) filed a petition for creation of Sedona Lakes Municipal Utility District No. 1 of Brazoria County (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land, consisting of three tracts, to be included in the proposed District; (2) there are two lien holders, E2M Value Added Fund, LP. and Capital One, National Association, on the property to be included in the proposed District; (3) the proposed District will contain approximately 500.22 acres located in Brazoria, Texas; and (4) the proposed District is wholly within the extraterritorial jurisdiction of the City of Manvel, 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. 2007-R-11, effective June 11, 2007, the City of Manvel, Texas, gave its consent to the creation of the proposed District. 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 $52,600,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200705567
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 14, 2007

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes. The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas

78711-3087 and must be **received by 5:00 p.m. on January 4, 2008.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Billy C. Jones dba National Dry Cleaners; DOCKET NUMBER: 2006-1559-DCL-E; TCEQ ID NUMBER: RN104402268; LOCATION: 547 Greens Parkway, Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULES VIOLATED: 30 TAC §337.10(a) and Texas Health and Safety Code (THSC), §374.102, by failing to complete and submit the required registration form to the TCEQ for a dry cleaning and/or drop station facility; PENALTY: $1,185; STAFF ATTORNEY: Dinniah Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(2) COMPANY: Gar Lee Humelsine; DOCKET NUMBER: 2007-0109-LII-E; TCEQ ID NUMBER: RN105137681; LOCATION: 1308 Green Hill Drive, Arlington, Tarrant County, Texas; TYPE OF FACILITY: landscape irrigation installer; RULES VIOLATED: 30 TAC §334.4(a) and §30.5(a) and (b), Texas Water Code (TWC), §37.003, and Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system; PENALTY: $250; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Houston Precast, Inc.; DOCKET NUMBER: 2006-0836-AIR-E; TCEQ ID NUMBER: RN104960497; LOCATION: 11393 Sleepy Hollow Road, Conroe, Montgomery County, Texas; TYPE OF FACILITY: specialty concrete batch plant; RULES VIOLATED: 30 TAC §116.110(a)(2)(A) and THSC, §382.085(b) and §382.0518(a), by failing to obtain authorization prior to constructing and operating a specialty concrete batch plant; PENALTY: $30,000; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(4) COMPANY: Larry Webb dba I-27 Recycling and Public Scales and Lance Webb dba I-27 Recycling and Public Scales; DOCKET NUMBER: 2007-0192-MSW-E; TCEQ ID NUMBER: RN101978690; LOCATION: 6201 North I-27, Lubbock, Lubbock County, Texas; TYPE OF FACILITY: non-permitted municipal solid waste facility; RULES VIOLATED: 30 TAC §328.4(b)(3)(A), by failing to ensure during each subsequent six-month period that the amount of material recycled or transferred to a different site for recycling equaled at least 50% by weight or volume of the material accumulated at the beginning of that period; 30 TAC §328.5(b)(3) and (4), by failing to ensure that prior to the commencement of new operations the owner or operator of a recycling facility reports, on forms provided by the executive director, how the materials(s) will be recycled and any updates or changes to information contained in the facility report within 90 days of the effective date of the change; 30 TAC §328.5(d), by failing to establish and maintain financial assurance for closure of the facility; 30 TAC §328.4(b)(3)(B)(ii), by failing to protect recycled material from degradation, contamination, or loss of value as recyclable material; 30 TAC §328.60(a), by failing to obtain a scrap tire storage site registration for the facility pursuant to 30 TAC §328.55 prior to accumulating and storing in excess of 500 used or scrap tires on the ground or 2,000 used or scrap tires (or weight equivalent tire pieces or any combination thereof) in enclosed and lockable containers; and 30 TAC §330.7(a), by failing to prevent the dumping of municipal solid waste without the written authorization of the commission; PENALTY: $80,625; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3520, (806) 796-7092.

(5) COMPANY: Manicured Landscapes, Inc.; DOCKET NUMBER: 2007-1257-LII-E; TCEQ ID NUMBER: RN105231922; LOCATION: P.O. Box 41843, Houston, Harris County, Texas; TYPE OF FACILITY: landscape irrigation installation operation; RULES VIOLATED: 30 TAC §30.5(b) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to obtain a license prior to advertising or representing to the public that Manicured Landscapes, Inc. could perform services for which a license or registration is required; PENALTY: $263; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(6) COMPANY: Mickey D. Wells dba Together Manufacturing; DOCKET NUMBER: 2005-0958-IHW-E; TCEQ ID NUMBER: RN102963998; LOCATION: 203 Peterson Drive, Kerrville, Kerr County, Texas; TYPE OF FACILITY: metal plating facility; RULES VIOLATED: 30 TAC §335.6(c), by failing to update the Notice of Registration with all solid waste streams and waste management units using electronic notification software or paper forms provided by the executive director; 30 TAC §335.62 and §335.503(a) and 40 Code of Federal Regulations (CFR) §262.11, by failing to conduct a hazardous waste determination and by failing to classify the wastes for all of the waste streams at the facility; 30 TAC §335.69(a)(2) and (3) and 40 CFR §262.34(a)(2) and (3) and §262.34(d)(4), by failing to ensure that the date upon which each period of accumulation begins is clearly marked and visible for inspection on each container, and that each container and tank is labeled or marked clearly with the words Hazardous Waste; 30 TAC §335.112(a)(8) and 40 CFR §265.171 and §265.173(a), by failing to ensure that a container holding hazardous waste is always properly closed except when it is necessary to add or remove waste, and by failing to manage and store hazardous waste in containers that are in good condition; 30 TAC §327.5(c), by failing to submit written information, such as a letter, describing the details of the discharge or spill and supporting the adequacy of the response action, to the appropriate TCEQ regional manager within 30 working days of the discovery of the reportable discharge; 30 TAC §327.5(a)(5) and (6), by failing to immediately manage the wastes after a spill or discharge; 30 TAC §335.4 and TWC, §26.121(a), by failing to prevent the discharge or imminent threat of discharge of industrial solid waste or municipal hazardous waste into or adjacent to the waters in the state without obtaining specific authorization for such a discharge; 30 TAC §§335.69(a)(4), 335.69(f)(5)(A), (B), and (D), and 335.112(a)(2), by failing to develop a contingency plan and emergency procedures, and attempt to familiarize police, fire departments, emergency response teams, and hospitals with the layout of the facility, properties of hazardous waste handled at the facility, associated hazards, places where facility personnel would normally be working, entrances to roads inside the facility, possible evacuation routes, and the types of injuries or illnesses which could result from fires, explosions, or releases at the facility; 30 TAC §335.69(f)(5)(C) and 40 CFR §262.34(d)(5)(iii), by failing to ensure that all employees are thoroughly familiar with proper waste handling and emergency procedures relevant to their responsibilities during normal facility operations and emergencies; and 30 TAC §335.69(h) and 40 CFR §262.34(d), by failing to comply with the 180 day accumulation time limit for a small quantity generator; PENALTY: $28,355; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: San

Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: Nhan Q. Ha dba 7-7 Cleaners and Alterations; DOCKET NUMBER: 2006-1445-DCL-E; TCEQ ID NUMBER: RN103041158; LOCATION: 1201 Westheimer Road, Suite G, Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning facility; RULES VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form to the TCEQ; PENALTY: $1,209; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(8) COMPANY: Nicolas Amezquita; DOCKET NUMBER: 2007-0559-LII-E; TCEQ ID NUMBER: RN105062970; LOCATION: 9540 Kempwood Drive, Apartment 177, Houston, Harris County, Texas; TYPE OF FACILITY: landscaping business; RULES VIOLATED: 30 TAC §30.5(a) and (b) and §334.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to have a TCEQ irrigator license prior to representing himself as a landscape irrigator and selling and installing a landscape irrigation system; PENALTY: $656; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

(9) COMPANY: Ray Johnson; DOCKET NUMBER: 2007-0442-PST-E; TCEQ ID NUMBER: RN102226925; LOCATION: 901 North Van Buren Street, Henderson, Rusk County, Texas; TYPE OF FACILITY: underground storage tank (UST) system; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, four USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $21,000; STAFF ATTORNEY: Ben Thompson, Litigation Division, MC 175, (512) 239-1297; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(10) COMPANY: Troy Brown; DOCKET NUMBER: 2007-0982-PST-E; TCEQ ID NUMBER: RN101891877; LOCATION: 2162 United States Highway 259 South, Diana, Upshur County, Texas; TYPE OF FACILITY: out-of-service gasoline station; RULES VIOLATED: 30 TAC §334.47(a)(2) and §334.54(b), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, four USTs for which any applicable component of the system is not brought into timely compliance with the upgrade requirements, and by failing to maintain all piping, pump, manways, tank access points, and auxiliary equipment in a capped, plugged, locked, and/or otherwise secured manner to vandalism by unauthorized persons; and 30 TAC §334.7(d)(3), by failing to provide written notice of any change or additional information within 30 days from the date of the occurrence of the change or addition; PENALTY: $11,550; STAFF ATTORNEY: Barham A. Richard, Litigation Division, MC 175, (512) 239-0107; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(11) COMPANY: William M. Aldrup; DOCKET NUMBER: 2007-0497-LII-E; TCEQ ID NUMBER: RN103610069; LOCATION: 4600 Villa Nava Street, San Antonio, Bexar County, Texas; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: 30 TAC §30.5(a) and §344.4(a), TWC, §37.003, and Texas Occupations Code, §1903.251, by failing to hold an irrigator license prior to selling, designing, consulting, installing, maintaining, altering, repairing, or servicing an irrigation system and by representing to the public that he could perform a service for which a license is required; PENALTY: $7,500; STAFF ATTORNEY: Patrick Jackson, Litigation Division, MC 175, (512) 239-6501; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(12) COMPANY: Yubany A. Rodriguez dba AR Lawn & Landscape Care; DOCKET NUMBER: 2007-0607-LII-E; TCEQ ID NUMBER: RN105156061; LOCATION: 1718 Goodwin Drive, Garland, Dallas County, Texas; TYPE OF FACILITY: lawn and landscape care business; RULES VIOLATED: 30 TAC §30.5(a) and §344.4, TWC, §37.003, and Texas Occupations Code §1903.251, by failing to hold a current TCEQ irrigator license prior to advertising or representing himself to the public as a holder of a license; PENALTY: $262; STAFF ATTORNEY: Patrick Jackson, Litigation Division MC 175 (512) 239-6501; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-200705553
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 13, 2007

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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. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 4, 2008.** 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 shall be submitted to the commission in **writing.**

(1) COMPANY: Dennis James Schouten dba Dennis Schouten Dairy; DOCKET NUMBER: 2007-0624-AGR-E; TCEQ ID NUMBER: RN102844768; LOCATION: the west side of State Highway 108, approximately 1.25 miles southeast of Huckabay, Erath County, Texas; TYPE OF FACILITY: dairy concentrated animal feeding operation; RULES VIOLATED: 30 TAC §321.42(s), by failing to develop and operate under a comprehensive nutrient management plan certified by the Texas State Soil and Water Conservation Board; PENALTY:

$2,340; STAFF ATTORNEY: Dinniah Chahin, Litigation Division, MC 175, (512) 239-0617; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Environmental Recycle, Inc.; DOCKET NUMBER: 2007-0746-MLM-E; TCEQ ID NUMBER: RN104759576; LOCATION: 2721 North Custer Road, outside Prosper, Collin County, Texas; TYPE OF FACILITY: municipal solid waste (MSW) recycling facility; RULES VIOLATED: 30 TAC §328.5(d), by failing to establish and maintain financial assurance for closure of an MSW recycling facility; 30 TAC §328.2(3), by failing to remove non-recyclable waste from the facility within one week after processing it for recycling; 30 TAC §328.5(b)(4), by failing to update the facility's Notice of Intent within 90 days of the effective date of the change; and Texas Water Code (TWC), §26.121(a), by failing to prevent the discharge of MSW into or adjacent to waters in the state; PENALTY: $3,640; STAFF ATTORNEY: Shawn Slack, Litigation Division, MC 175, (512) 239-0063; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Gabino Olmos dba Olmos Trucking & Hauling; DOCKET NUMBER: 2007-1085-WQ-E; TCEQ ID NUMBER: RN105064364; LOCATION: 8926 Hergotz Lane, Austin, Travis County, Texas; TYPE OF FACILITY: vehicle maintenance, fueling, painting, lubrication, and cleaning facility; RULES VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge storm water associated with industrial activities; PENALTY: $1,050; STAFF ATTORNEY: Gary Shiu, Litigation Division, MC R-12, (713) 422-8916; REGIONAL OFFICE: Austin Regional Office, 2800 South Interstate Highway 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(4) COMPANY: IZ, Inc. dba IZ Food Mart; DOCKET NUMBER: 2006-1825-PST-E; TCEQ ID NUMBER: RN101534790; LOCATION: 699 West Renner Road, Richardson, Collin County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.244(1) and (3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II vapor recovery system; 30 TAC §115.246(1) and (3) and THSC, §382.085(b), by failing to maintain records on-site of all required Stage I and Stage II records pertaining to a underground storage tank (UST) system and make immediately available for inspection by commission personnel; 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to provide and maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board Executive Order(s), and free of defects that would impair the effectiveness of the system, including, but not limited to absence or disconnection on any component that is a part of the approved system; 30 TAC §115.242(9) and THSC, §382.085(b), by failing to post operating instructions conspicuously on the front of each gasoline dispensing pump equipped with a Stage II vapor recovery system; 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(c)(1), by failing to provide a method of release detection capable of detecting a release from any portion of the UST system which contained regulated substances including tanks, piping, and other ancillary equipment; and 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel each operating day; PENALTY: $25,000; STAFF ATTORNEY: Kathleen Decker, Litigation Division, MC 175, (512) 239-6500; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Jesus Jorge Flores dba Corner Stop; DOCKET NUMBER: 2004-1232-PST-E; TCEQ ID NUMBER: RN102225448; LOCATION: mile 6 1/2 West and mile 9 North, Weslaco, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to 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 petroleum USTs; PENALTY: $1,050; STAFF ATTORNEY: Becky Combs, Litigation Division, MC 175, (512) 239-6939; REGIONAL OFFICE: Harlingen Regional Office, 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(6) COMPANY: Prince A, Inc.; DOCKET NUMBER: 2005-1476-PST-E; TCEQ ID NUMBER: RN101550713; LOCATION: 6551 Grapevine Highway, North Richland Hills, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A), (b)(2), (b)(2)(A)(i)(III) and (d)(1)(B)(ii) and TWC, §26.3475(a) and (c)(1), by failing to provide proper release detection for the UST system; 30 TAC §115.246(1) and THSC, §382.085(b), by failing to maintain Stage II records at the facility and make them available for inspection by agency personnel; and 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; PENALTY: $5,400; STAFF ATTORNEY: Jacquelyn Boutwell, Litigation Division, MC 175, (512) 239-5846; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: The City of Hico; DOCKET NUMBER: 2005-0871-MWD-E; TCEQ ID NUMBER: RN102184066; LOCATION: 300 Utility Street, Hico, Hamilton County, Texas; TYPE OF FACILITY: domestic wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010188001, Effluent Limitations and Monitoring Requirements Numbers 1 and 3, by exceeding permitted effluent limits in January 2004, and in August - December 2004; 30 TAC §305.125(5) and §317.4(d) and TPDES Permit Number WQ0010188001, Operational Requirements Number 1, by failing to ensure that the facility and all its systems of collection, treatment, and disposal were properly operated and maintained; 30 TAC §§305.125(1), 319.6, and 319.9(c) and TPDES Permit Number WQ0010188001, Monitoring and Reporting Requirements Number 3(c), and Sludge Provisions Section III(F), by failing to make monitoring records readily available for review; 30 TAC §305.125(1), TWC, §26.121(a), and TPDES Permit Number WQ0010188001, Effluent Limitations and Monitoring Requirements Number 2, by failing to maintain the chlorine residual between the permitted limits of one and four milligrams per liter; 30 TAC §305.125(1) and (4) and §305.535(c)(1), TWC, §26.121(a), and TPDES Permit Number WQ0010188001, Operational Requirements Number 1, by failing to prevent the discharge of solids into the receiving stream; 30 TAC §305.125(4) and §305.535(c)(1) and TPDES Permit Number WQ0010188001, Operational Requirements Number 1, by failing to prevent an unauthorized discharge of wastewater from the aeration basin; 30 TAC §305.125(9)(A) and TPDES Permit Number WQ0010188001, Monitoring and Reporting Requirements Number 7(a), by failing to verbally notify the TCEQ within 24 hours and submit written notification within five days of becoming aware of an unauthorized discharge from the aeration basin; and 30 TAC §305.125(1) and (5) and §319.11(c) and (d) and TPDES Permit Number WQ0010188001, Monitoring and Reporting Requirements Numbers 2 and 5, and Operational Requirements Number 1, by

failing to conduct process control testing and failing to conduct proper flow measurement procedures; PENALTY: $41,170; Supplement Environmental Project offset amount of $41,170 applied to Hamilton County; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-200705552
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 13, 2007

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Notice of Opportunity to Comment on Shutdown/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Order (S/DO). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with 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. The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

A copy of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/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 January 4, 2008.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DO and/or the comment procedure at the listed phone numbers; however, comments on the S/DO shall be submitted to the commission in **writing.**

(1) COMPANY: Airtex Investments, Inc. dba Time Mart 10; DOCKET NUMBER: 2006-1880-PST-E; TCEQ ID NUMBER: RN101849693; LOCATION: 8520 Telephone Road, Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.48(c), by failing to conduct effective manual or automatic inventory control procedures for all underground storage tanks (USTs) at the facility used in the retail sale of petroleum substances used as a motor fuel; and 30 TAC §334.50(b)(1)(A) and (d)(4)(A)(ii)(II) and Texas Water Code, §26.3475(c)(1), by failing to monitor the USTs in a manner to detect a release at a frequency of at least once every month, and failing to perform an automatic test for substance loss that can detect a release which equals or exceeds a rate of 0.2 gallons per hour from the UST system; PENALTY: $6,450; STAFF ATTORNEY: Lena Roberts, Litigation Division, MC 175, (512) 239-0019; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023, (713) 767-3500.

TRD-200705554
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: November 13, 2007

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Notice of Public Hearing on Proposed Revisions to the State Implementation Plan

The Texas Commission on Environmental Quality (commission or TCEQ) will conduct a public hearing to receive testimony regarding proposed revisions to the state implementation plan (SIP) to meet the requirements of the Federal Clean Air Act (FCAA), §110(a)(2)(D)(i) relating to the interstate transport of Eight-Hour Ozone and Fine Particulate Matter ($PM_{2.5}$). The proposed revisions reference existing nitrogen oxides control strategies to reduce the concentration of eight-hour ozone in Texas, as well as reference the state's participation in the Federal Clean Air Interstate Rule (CAIR) to reduce transport of $PM_{2.5}$.

The proposed revisions verify that the Prevention of Significant Deterioration and Nonattainment New Source Review permitting programs and Visibility programs are being implemented in Texas. The proposed revisions, once adopted, would fulfill Texas' obligation regarding interstate transport of eight-hour ozone and $PM_{2.5}$ under §110(a)(2)(D)(i) of the Federal Clean Air Act. There is no associated rulemaking with this SIP revision.

A public hearing on this proposal will be held in Austin, on December 11, 2007, at 10:00 a.m., at TCEQ's Austin Headquarter Office, Building B, 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, TCEQ staff will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact the Air Quality Division at (512) 239-4900. Requests should be made as far in advance as possible.

Comments may be submitted to Kim Herndon, MC 206, Air Quality Division, Chief Engineer's Office, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-5687. Electronic comments may be submitted at *www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments pertaining to the interstate transport of eight-hour ozone and $PM_{2.5}$ SIP revision proposal should reference Project Number 2007-057-SIP-NR. The comment period closes on January 7, 2008.

Copies of the proposed revision may be viewed at the commission's web site at *http://www.tceq.state.tx.us/implementation/air/sip/transport/transportsip.html*. For further information, please contact Kim Herndon, Air Quality Planning Section, (512) 239-1421.

TRD-200705485
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 9, 2007

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Notice of Public Hearings on Proposed Revisions to 30 TAC Chapter 213

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 213, Edwards Aquifer, under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B.

This rulemaking implements HB 3098, 80th Legislature, 2007, Regular Session, by revising the 30 TAC Chapter 213 fee structure for water pollution abatement plans and contributing zone plans submitted to the TCEQ for review by the Edwards Aquifer Protection Program.

The commission will hold a public hearing on this proposal in Austin on December 10, 2007 at 10:00 a.m. at the Texas Commission on Environmental Quality Complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearings. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Lesley Williamson, Office of Legal Services, at (512) 239-2461.

Comments may be submitted to Lesley Williamson, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-032-213-CE. The comment period closes January 7, 2008. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Tracy Miller, Field Operations Support Division, (512) 239-4127.

TRD-200705483
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: November 9, 2007

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Notice of Water Quality Applications

The following notices were issued during the period of October 25, 2007 through November 13, 2007.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

AQUA TEXAS INC has applied for a renewal of TPDES Permit No. WQ0012303001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 15,000 gallons per day. The facility is located at 5818 Paloma, approximately 300 feet west of Goslin Road and approximately 1,500 feet south of Root Road in the community of Spring in Harris County, Texas.

CITY OF DUMAS has applied to the TCEQ for a new permit, proposed TPDES Permit No. WQ0010161002, to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 1,940,000 gallons per day. The facility will be located approximately one mile east of U.S. Highway 287 and south of the City of Dumas on East 19th Street in Moore County, Texas.

CITY PUBLIC SERVICE OF SAN ANTONIO, which operates the O.W. Sommers/J.T. Deely/J.K. Spruce Steam Electric Station, has applied for a major amendment to TPDES Permit No. WQ0001514000 to authorize an increase in the daily average flow at Outfall 007 from 1,000,000,000 to 1,440,000,000 gallons per day and maximum daily flow 1,380,000,000 to 1,800,000,000 gallons per day; to authorize an increase in the maximum pH from 9.0 to 10.0 standard units at Outfall 109; to authorize the discharge of low volume waste and quench water at Outfall 109; to authorize the discharge of car and equipment wash water at Outfalls 104 and 112. The current permit authorizes the discharge of once-through cooling water and previously monitored effluents (PMEs)(low volume waste and/or metal cleaning waste from internal Outfall 101, 102, 108 and 112, ash transport water, other low volume waste and/or metal cleaning waste from internal Outfall 103, coal pile runoff from internal Outfall 104, discharge from a pond containing storm water from material storage areas, flue gas desulphurization (FGD) scrubber sludge and/or metal cleaning waste from internal Outfall 109, treated domestic wastewater at a daily average flow not to exceed 0.04 million gallons per day via internal Outfall 110, storm water at internal Outfall 113, 115, 116, 117, 118 and 014) from Sommers Units 1 & 2 and from Deely Units 1 & 2 at a daily average flow not to exceed 1,440,000,000 gallons per day via Outfall 001; low volume waste and/or metal cleaning waste and storm water from construction activities on an intermittent and flow variable basis via Outfall 002; storm water from diked storage areas on an intermittent and flow variable basis via Outfall 006; and once-through cooling water and previously monitored effluents (PMEs) (storm water, wastewater from fire booster pumps, washdown water and storm water from construction activities from internal Outfall 712, a pond containing storm water runoff (sludge/fly ash disposal area and landfill area) from internal Outfall 713) from Spruce Unit 1at a daily average flow not to exceed 1,000,000,000 gallons per day. The facility is located adjacent to Calaveras Lake at 9599 Gardner Road, and east-southeast of the City of San Antonio, Bexar County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 250 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014811001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 100,000 gallons per day. The facility was previously permitted under TPDES Permit No. WQ0012685001 which expired May 1, 2007. The facility is located at 6690 Huffmeister Road, Houston, in Harris County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 286 has applied for a renewal of TPDES Permit No. WQ0013020001, which authorizes the discharge of treated domestic wastewater at a daily aver-

age flow not to exceed 600,000 gallons per day. The facility is located approximately 4,500 feet west of the crossing of Farm-to-Market Road 249 over Cypress Creek in Harris County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 418 has applied for a major amendment to TPDES Permit No. WQ0014476001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 800,000 gallons per day to an annual average flow not to exceed 2,000,000 gallons per day. TCEQ received this application on August 2, 2007. The facility is located approximately 4,000 feet south and 3,000 feet west of the intersection of House Hahl Road and U.S. Highway 290 in Harris County, Texas.

LAKE FOREST PLANT ADVISORY COUNCIL has applied for a renewal of TPDES Permit No. WQ0011084001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,760,000 gallons per day. The facility is located south of Cypress Creek, approximately 0.5 mile west of State Highway 249 and 1.25 miles north of Grant Road in Harris County, Texas.

MEMORIAL HILLS UTILITY DISTRICT has applied for a renewal with changes of TPDES Permit No. WQ0011044001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located immediately south of Cypress Creek, approximately 600 feet north and 600 feet east of the intersection of Farm-to-Market Road 1960 and Hardy Road in Harris County, Texas.

PARIS GENERATION L.P. which operates Paris Energy Center, has applied for a renewal of TPDES Permit No. WQ0003021000, which authorizes the discharge of cooling tower blowdown commingled with metal cleaning waste, low volume waste, and storm water runoff at a daily average flow not to exceed 375,000 gallons per day via Outfall 001 and storm water on an intermittent and flow variable basis via Outfall 002. The facility is located 0.1 miles west of U.S. Highway 271 and 0.5 miles north of the intersection of U.S. Highway 271 and U.S. Highway 82, north of the City of Paris, Lamar County, Texas.

R&K WEIMAN MHP L.C., Weiman MHP WWTP, 3881 Aruba Circle, Huntington Beach, California 92649-2061, has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0012310001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The plant site is located adjacent to and east of Horsepen Bayou; approximately 1,500 feet south of the intersection of Farm-to-Market Road 529 and Jackrabbit Road in Harris County, Texas

ROGER ALLEN LUND has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014801001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 13,500 gallons per day. The facility was previously permitted under TPDES Permit No. WQ0013829001 which expired February 1, 2007. The facility is located at 52 Hickory Ridge Lane, on the north side of Farm-to-Market Road 320, east of the intersection of Farm-to-Market Road 3324 and Farm-to-Market Road 320, approximately two and one-half miles west of the City of Palestine in Anderson County, Texas.

SIENNA PLANTATION MUNICIPAL UTILITY DISTRICT NO 1 has applied for a major amendment to TPDES Permit No. WQ0014118001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 900,000 gallons per day to an annual average flow not to exceed 1,200,000 gallons per day. The facility is located approximately 800 feet west of Oyster Creek and 1650 feet southeast of the intersection of Sienna Parkway and Waters Lake Boulevard in Fort Bend County, Texas.

TIDWELL WASTEWATER UTILITY L.L.C. has applied for a renewal of TPDES Permit No. WQ0014320001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The facility will be located at 8911 East Sam Houston Parkway North in Houston, approximately 1,700 feet west of East Beltway 8 and approximately 2,500 feet north of Tidwell Road in Harris County, Texas.

TOWER OAK BEND WATER SUPPLY CORPORATION has applied for a renewal of TPDES Permit No. WQ0011986001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located approximately one mile east of Jones Road and 1,000 feet north of Cypress-North Houston Road in Harris County, Texas.

WESTLAKE MUNICIPAL UTILITY DISTRICT NO 1 has applied to the Texas Commission on Environmental Quality (TCEQ) for a major amendment to Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0011284001 to authorize a reduction in the discharge of treated domestic wastewater from an annual average flow not to exceed 1,200,000 gallons per day to a daily average flow not to exceed 900,000 gallons per day and to remove the dechlorination requirement. The facility is located at 2631 Greenhouse Road, approximately 800 feet north of the intersection of Saums Road and Greenhouse Road in Harris County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200705565
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 14, 2007

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Notice of Water Rights Application

Notices issued November 1, 2007 through November 9, 2007.

APPLICATION NO. 12225; GSHS Customer Service Building 1, Ltd., 700 E. Marshall Avenue Longview, Texas 75601, Applicant, has applied for a Water Use Permit to construct and maintain a dam and reservoir with a capacity of 15.5 acre-feet of water and a surface area of 2.69 acres on an unnamed tributary of Grace Creek, Sabine River Basin for in-place recreation purposes in Gregg County. The application and fees were received on July 3, 2007, and additional information was received on August 30, 2007. The application was declared administratively complete and filed with the Office of the Chief Clerk on September 7, 2007. The TCEQ may grant a contested case hearing on this application if a written hearing request is filed within 30 days from the date of newspaper publication of this notice.

APPLICATION NO. 06-4847A; Angelina-Nacogdoches Counties Water Control and Improvement District No. 1, 1524 Woodberry, Lufkin, Texas 75904, Applicant, has applied for an amendment to Certificate of Adjudication No. 06-4847 to delete Diversion Points 1 and 2 located on Striker Creek Reservoir on Striker Creek, Neches River Basin, authorization to divert water from the perimeter of the Striker Creek Reservoir, and to add municipal use. The application and fees were received on February 15, 2007. Additional information was received on May 18, June 4, and June 7, 2007. The application was accepted for filing and declared administratively complete on June 29, 2007. Written public comments and requests for a public meeting should be submitted to

the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12242; E. E. Hood & Sons, Inc., P.O. Box 10, Von Ormy, Texas 78073, Applicant, has applied for a Temporary Water Use Permit to divert and use not to exceed an additional 10 acre-feet of water within an additional one-year period from the Guadalupe River, Guadalupe River Basin for industrial purposes in Kendall County. The application and partial fees were received on July 25, 2007. Additional information and fees were received on October 22, 2007. The application was declared administratively complete and accepted for filing on October 31, 2007. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by November 30, 2007.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicants name and permit number; (3) the statement "I/we request a contested case hearing"; and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200705566
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: November 14, 2007

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Texas Facilities Commission

Request for Proposals #303-8-10090-B

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Criminal Justice (TDCJ), announces the issuance of Request for Proposals (RFP) #303-8-10090-B. TFC seeks a 10 year lease of approximately 10,884 square feet of office space in the Fort Worth area, Tarrant County, Texas.

The deadline for questions is November 30, 2007, and the deadline for proposals is December 7, 2007, at 3:00 p.m. The award date is January 16, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Myra Beer at (512) 463-5773. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=73920.*

TRD-200705580
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 14, 2007

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Request for Proposals #303-8-10627

The Texas Facilities Commission (TFC), on behalf of the Texas Parks and Wildlife Department, announces the issuance of Request for Proposals (RFP) #303-8-10627 TFC seeks a 10 year lease of approximately 15,605 square feet of office, maintenance shop and vehicle compound space in Brownwood, Brown County, Texas.

The deadline for questions is November 30, 2007, and the deadline for proposals is December 11, 2007, at 3:00 p.m. The anticipated award date is January 16, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Myra Beer at (512) 463-5773. A copy of the RFP may be downloaded from the Electronic State Business Daily at: *http://esbd.cpa.state.tx.us/1380/bid_show.cfm?bidid=73924.*

TRD-200705586
Kay Molina
General Counsel
Texas Facilities Commission
Filed: November 14, 2007

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Office of the Governor, Economic Development and Tourism Division

Request for Qualifications for Outside Counsel for Texas Economic Development Bank

The Texas Economic Development Bank (Bank), in the Office of the Governor, Economic Development and Tourism Division (EDT), requests responses of qualifications from law firms interested in advising the Bank in legal matters relating to economic development bond and commercial paper programs administered by the Bank. The Bank seeks qualified legal counsel to provide expert advice and assistance to financial and legal staff on matters relating to bond issuances, lending practices, portfolio management and related activities and programs beginning January 1, 2008.

General Information:

Government Code 489 sets out the Bank's programs, responsibilities, and duties. The finance programs currently include the following economic development bond, and commercial paper programs: the Texas Small Business Industrial Development Corporation and the Industrial Revenue Bond Program established under the Development Corporation Act of 1979 (Article 5190.6, Vernon's Texas Civil Statues); the Product Development Fund and the Small Business Incubator Fund established under the Government Code, Chapter 489, Subchapter D; private activity bond allocation for projects that meet the criteria for funding from the Texas Enterprise Fund established under Government Code subsection 1372.031; and the Texas Leverage Fund. Users of these programs include but are not limited to businesses, municipalities and industrial development corporations. Economic growth and job creation are the intended outcomes of the programs.

Scope of services:

Services primarily involve:

1. Advising the Bank on legal issues related to programs administered by the Bank such as tax issues, letters of credit, business organization, project finance, municipal law, constitutional issues related to public funds, or other bond and commercial paper matters.

2. Assisting in making presentations and required submissions and obtaining approvals from the Bond Review Board and any other state entity with supervisory authority over the Bank, when necessary.

3. Preparing and/or reviewing resolutions, loan agreements, contracts and other documents to which the Bank may be a party and which may be necessary in connection with bond issues and grant awards.

4. Advising and/or representing the Bank in meetings with government staff, legislators, program users, or representatives of financial institutions.

5. Assisting in all other matters as necessary or incidental to the issuance of economic development bonds and commercial paper.

The Bank may require the advice to be provided orally or in writing, on an as-needed basis. Requirements are not anticipated to exceed 260 hours between January 1, 2008 and August 31, 2008.

Responses, qualifications:

Responses to this RFP should include at least the following information:

1. a description of the firm's or attorney's qualifications for performing the legal services requested, including the firm's prior experience in bond issuance, commercial paper and tax matters,

2. the names, experience, and qualifications of the individual attorneys who would be assigned to perform services under the contract for performing the legal services requested,

3. hourly billing rates for attorneys and other staff who would be assigned to perform services under the contract, flat fees, or other fee arrangement directly related to the achievement of the division's specific goals,

4. reimbursable expenses,

5. efforts made by the firm to encourage and develop the participation of minorities and women in the provision of the firm's legal services and proposed use of women and minorities in regard to the services required under the contract, if any,

6. disclosures of conflicts of interest, identifying each and every matter in which the firm has, within the past calendar year, represented any entity or individual with an interest adverse to the Office of the Governor or the State of Texas, or any of its boards, agencies, commissions, universities or elected or appointed officials,

7. confirmations of willingness to comply with policies, directives and guidelines of the Office of the Governor, the Bond Review Board and the Attorney General of the State of Texas,

8. contact information, including address, telephone and fax number, and the name of the individual who will be the Bank's primary contact on this contract, and

9. any other information that may be helpful or necessary in evaluating the proposer's qualifications.

Responsive information should be presented in substantially the same order as it is set forth above. A law firm or attorney will be selected based on demonstrated knowledge and experience, quality of staff assigned to perform services under the contract, compatibility with the goals and objectives of the Bank and the state and reasonableness of proposed fees. The successful proper will be required to execute a contract with EDT, subject to approval by the Texas Attorney General, a draft of which is included with this request. EDT reserves the right to accept or reject any or all proposals submitted and to negotiate any and all aspects of proposals. EDT is not responsible for and will not reimburse any costs incurred in developing and submitting a proposal.

Delivery of response, deadline for submission:

Five unbound copies, suitable for reproduction, of the response should be mailed to Office of the Governor, Financial Services, P.O. Box 12878, Austin, Texas 78711-2878 or delivered to 1100 San Jacinto Boulevard, Austin, Texas 78701. Facsimiles and e-mail will not be accepted. The deadline for submission of qualifications is Monday, December 3, 2007. Proposals must be received, not postmarked, by that date. Questions regarding this bid may be directed to Mr. Michael Bryant at (512) 463-3471 or michael.bryant@governor.state.tx.us.

TRD-200705581
Michael Bryant
Assistant General Counsel
Office of the Governor, Economic Development and Tourism Division
Filed: November 14, 2007

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Request for Qualifications for Outside Counsel for the Texas Small Business Industrial Development Corporation

The Texas Economic Development Bank (the Bank), in the Office of the Governor, Economic Development and Tourism Division (OGEDT), requests qualifications from law firms interested in advising the Bank with the structuring and closing of lending transactions (loans and/or purchasing of bonds) and other legal matters related to the Texas Small Business Industrial Development Corporation (the "Issuer") for the Texas Public Facilities Capital Access Program (TEXCAP) (the "Program"), marketed as Texas Industry Development (TID). The Bank seeks qualified legal counsel to provide expert advice and assistance to financial and legal staff on matters relating to loan origination, lending practices, structuring proposed transactions, applicable bond and tax issues, preparing legal financial documents, closing of transactions, portfolio management and related activities beginning immediately.

General Information:

The OGEDT administers the Program with the oversight of a five member board (Board) appointed by the Governor. The Issuer, established under the Development Corporation Act of 1979 (Vernon's Texas Civil Statutes, Article 5190.6,), developed the Program to promote economic development in the State of Texas and to assist eligible borrowers in fi-

nancing eligible economic development projects. The Issuer derived its funds from the public market for the Program by the issuance of tax exempt bonds.

Scope of services:

1. Advising the Bank on legal issues related to acquiring and documenting obligations approved by the Board. This includes, but is not limited to, the structuring of proposed transactions, applicable bond and tax issues, applicable federal, state and municipal law, or any other related matters.

2. Preparing and/or reviewing any and all legal and binding documents associated with acquiring program obligations in compliance with the bond indenture as amended, related service provider agreements, and federal, state and municipal law. These include, but are not limited to resolutions, loan agreements for long term debt financing, legal opinions, contracts and other documents to which the OGEDT and/or Board may be a party and which may be necessary in connection with acquiring program obligations.

3. Advising and/or representing the OGEDT in meetings with the Board, program users, service providers and any other related meetings.

4. Assisting in all other matters as necessary or incidental to the origination and closing of long term debt financing for the proposed obligations.

The OGEDT may require the advice to be provided orally or in writing, on an as-needed basis. All projects approved by the Board for debt financing prior to May 30, 2008 must be closed under the terms of the contract no later than, August 31, 2008.

Responses, qualifications:

Responses to this RFQ should include at least the following information:

1. a description of the firm's or attorney's qualifications for performing the legal services requested, including the firm's prior experience in bond issuance, debt financing and tax matters,

2. the name, title, experience, and qualifications of the individual attorneys who would be assigned to perform services under the contract for performing the legal services requested,

3. hourly billing rates for attorneys and staff who would be assigned to perform services under the contract by name and/or title,

4. identification of any flat fees or other fee arrangements directly related to the achievement of the division's goals of providing financing with the bond proceeds to eligible borrowers,

5. reimbursable expenses,

6. efforts made by the firm to encourage and develop the participation of minorities and women in the provision of the firm's legal services and proposed use of women and minorities in regard to the services required under this contract, if any,

7. disclosures of conflicts of interest, identifying each and every matter in which the firm has, within the past calendar year, represented any entity or individual with an interest adverse to the Office of the Governor or the State of Texas, or any of its boards, agencies, commissions, universities or elected or appointed officials,

8. confirmation of willingness to comply with policies, directives and guidelines of the Office of the Governor and the Attorney General of the State of Texas,

9. contact information, including address, telephone and fax number, and the name of the individual who will be the Bank's primary contact on this contract, and

10. any other information that may be helpful or necessary in evaluating the respondent's qualifications.

Responsive information should be presented in substantially the same order as it is set forth above. A law firm or attorney will be selected based on demonstrated knowledge and experience, quality of staff assigned to perform services under the contract, compatibility with the goals and objectives of the Bank and the state and reasonableness of proposed fees. The successful respondent will be required to execute a contract with OGEDT. OGEDT reserves the right to accept or reject any or all proposals submitted and to negotiate any and all aspects of proposals. OGEDT is not responsible for and will not reimburse any costs incurred in developing and submitting a proposal.

Delivery of response, deadline for submission:

Five unbound copies, suitable for reproduction, of the response should be mailed to the Economic Development Bank, Office of the Governor, Economic Development and Tourism Division, P.O. Box 12428, Austin, Texas 78711-2428 or delivered to 1100 San Jacinto, Austin, Texas 78701, attention Michael Bryant. Facsimiles and email will not be accepted. The deadline for submission of qualifications is Tuesday, December 4, 2007. Proposals must be received, not postmarked, by that date. Questions regarding this request for qualifications may be directed to Michael Bryant at (512) 463-3471 or michael.bryant@governor.state.tx.us.

TRD-200705583
Michael Bryant
Assistant General Counsel
Office of the Governor, Economic Development and Tourism Division
Filed: November 14, 2007

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Texas Health and Human Services Commission

Notice of Cancellation of the Hearing on Proposed Provider Reimbursement Rates

The Texas Health and Human Services Commission (HHSC) is canceling the public hearing originally scheduled to be held on November 28, 2007, at 9:00 a.m., to receive comments from interested persons on proposed Medicaid reimbursement rates applicable Support Consultation Services. The notice of this hearing was published in the November 9, 2007, issue of the *Texas Register* (32 TexReg 8198). The rate will not be available by November 28, 2007. The public hearing will be rescheduled and notice of the hearing will be published in the *Texas Register* at that time.

TRD-200705551
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: November 13, 2007

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on December 10, 2007, at 10:00 a.m. to receive public comment on the proposed Medicaid payment rates for procedure codes relating to physician-administered drugs and durable medical equipment, orthotics, prosthetics, and supplies (DMEPOS). The public hearing will be held in the Lone Star Conference Room of

the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rate for the physician-administered drug, 90378, will be retroactively effective September 1, 2007. Claims filed on or after September 1, 2007, will be reprocessed. The implementation date will be February 15, 2008. The proposed payment rates for the DMEPOS procedure codes will be effective and implemented on February 15, 2008.

Methodology and justification. The proposed payment rate for the physician-administered drug, 90378, is calculated in accordance with 1 TAC §355.8085, which addresses the reimbursement methodology for physicians and certain other practitioners; and the specific fee guidelines published in Section 2.2.1.2 of the 2007 Texas Medicaid Provider Procedures Manual. The proposed payment rates for the DMEPOS codes are calculated in accordance with 1 TAC §355.8021 which addresses reimbursement methodology for DMEPOS; and the specific fee guidelines published in Section 2.2.1 of the 2007 Texas Medicaid Provider Procedures Manual.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after November 26, 2007. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Required Notice: The five-character codes included in this notice are obtained from the Current Procedural Terminology (CPT®), copyright 2006 by the American Medical Association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of this notice is with HHSC and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in this notice. Fee schedules, relative value units, conversion factors and/or related components are not assigned by the AMA, are not part of CPT, and the AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of this notice should refer to the most recent Current Procedural Terminology, which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/DFARS apply. CPT is a registered trademark of the American Medical Association.

Procedure Codes and Proposed Payment Rates

TOS & Procedure Code	Code Description	Proposed Medicaid Fee
1-90378	*	$15.75
9-A4209	5+ cc STERILE SYRINGE&NEEDLE	$0.29
9-A4216	STERILE WATER/SALINE, 10 mL	$0.39
9-A4217	STERILE WATER/SALINE, 500 mL	$3.13
9-A4230	INFUSION SET FOR EXTERNAL INSULIN PUMP, NONNEEDLE CANNULA TYPE	$10.20
9-A4232	SYRINGE W/NEEDLE INSULIN 3 cc	$2.45
9-A4245	ALCOHOL WIPES PER BOX	$2.04
9-A4259	LANCETS PER BOX OF 100	$12.06
9-A4326	MALE EXTERNAL CATHETER	$10.79
1/9-A4351	STRAIGHT TIP URINE CATHETER	$1.81
9-A4361	OSTOMY FACEPLATE	$18.37
9-A4455	ADHESIVE REMOVER PER OUNCE	$1.22
9-A4500	BELOW KNEE SURGICAL STOCKING	$10.88
9-A4556	ELECTRODES, PAIR	$12.14
9-A4557	LEAD WIRES, PAIR	$21.10
9-A4627	SPACER BAG/RESERVOIR	$20.00
9-A4930	STERILE, GLOVES PER PAIR	$0.34
9-A5062	DRNBLE OSTOMY POUCH W/O BARRIER	$2.09
9-A5102	BEDSIDE DRAIN BTL W/WO TUBE	$22.42
9-A5114	FOAM/FABRIC LEG STRAP, REPLACEMENT, PER SET	$8.94
9-A5126	ADHESIVE/NONADHESIVE DISK OR FOAM PAD	$1.32
9-A6205	COMPOSITE DRSG > 48 SQ IN	$6.23
9-A6550	NEG PRES WOUND THER DRSG SET	$27.42
9-A7046	REPL WATER CHAMBER, PAP DEV	$19.51
L-E0424	STATIONARY COMPRESSSED GAS O2	$198.40
L-E0431	PORTABLE GASEOUS O2	$31.79
L-E0434	PORTABLE LIQUID O2	$31.79
L-E0439	STATIONARY LIQUID O2	$198.40
L-E0442	OXYGEN CONTENTS LIQUID PER/UNIT	$77.45

Type of Service (TOS) code key:
1 - Medical Services
9 - Other/DME Purchased
L - DME Rental

TRD-200705516
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: November 12, 2007

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Department of State Health Services

Notice of Agreed Orders

Notice is hereby given that the Department of State Health Services issued Agreed Orders to the following registrants:

National Inspection Services, Inc. (License Number L05930) of Crowley. A total penalty of $4,500 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Hermann Breast Center (Registration Number M00528) of Houston. A total penalty of $5,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

The Chiropractic Connection, PC (Registration Number R24620) of Allen. A total penalty of $3,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Preferred MRI, Inc. (Registration Number R25900) of Dallas. A total penalty of $3,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

H&H X-Ray Services, Inc. (License Number L02516) of Flint. A total penalty of $2,000 shall be paid by registration for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Stephen S. Sims, MD, PA (Registration Number R29335) of Huntsville. A total penalty of $1,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Aztec Manufacturing Partnership, LTD (License Number L05056) of Crowley. A total penalty of $3,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Glen T. Garlington, DC (Registration Number R21111) of Arlington. A total penalty of $2,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Parker College of Chiropractic (Registration Number R17934) of Dallas. A total penalty of $3,750 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Schlumberger Technology (License Number L01833) of Sugar Land. The registrant must provide training for all site RSO's by the deadline stated in the order for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Chiropractic Associates, PC (Registration No. R17599) of League City. A total penalty of $22,750 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Texas Gamma Ray (License Number L05561) of Houston. A total penalty of $1,750 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

C3S, Inc. (License Number L05989) of Houston. A total penalty of $1,500 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Columbia Valley Healthcare System (Registration Number M00589) of Brownsville. A total penalty of $1,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Sulphur Springs Medical Center (License Number L05701) of Sulphur Springs. A total penalty of $4,500 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Capital Family Practice, LLP (Registration Number R22228) of Austin. A total penalty of $500 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Matrix Metals, LLC (License Number L00312) of Richmond. A total penalty of $400 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

Albracht Family Chiropractic (Registration Number R29170) of Cedar Park. A total penalty of $2,000 shall be paid by registrant for violations of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

P. Arumugham, M.D. Associated, dba Family Clinic (Registration Number R09762) of Richardson. A total penalty of $1,000 shall be paid by registrant for violation of 25 Texas Administrative Code, Chapter 289. The registrant shall also comply with additional settlement agreement requirements.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, press "1" then press "0", Monday - Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200705431
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: November 8, 2007

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Texas Higher Education Coordinating Board

Request for Proposal for LVN Nursing Consulting Services

OVERVIEW: THECB is seeking proposals in response to this Request For Proposal (RFP) for LVN nursing consulting services. The Board is seeking to employ a nationally-recognized nurse educator with experience in curriculum design to assist the Board in developing a new, innovative curriculum model(s) for vocational/practical nurse education programs (LVN programs).

The Board is a state agency with statutory authority to review curriculum and approve degree programs. Within the context of that authority, the 80th Texas Legislature directed the Board (Senate Bill 139) to "conduct a study to identify methods to improve the curricula of professional and vocational nursing programs. The study must focus on methods to improve instruction on providing safe and high-quality nursing care to patients." As a result of the study, the Board must submit to the legislature, governor and each institution of higher education that offers a nursing program "a report that includes specific, detailed recommendations concerning methods to improve the curricula, including instruction relating to patient care." The Board has used this directive as an opportunity to propose a new, innovative curriculum model(s) for the state's 107 LVN programs. The proposed model(s) will fulfill the legislative directive and respond to the state's current and predicted nurse shortage and to changes in student learning, learning technologies, student populations, and the role of nurses in providing quality patient care.

The consultant's responsibility will include, but not necessarily be limited to, developing a new curriculum model(s) for LVN programs. The curriculum model(s) would differentiate the unique content and skill requirements for LVN programs and LVN to associated degree in nursing (ADN) and baccalaureate degree in nursing (BSN) transition programs and would have the following minimum characteristics and/or content requirements. The model(s) will:

1. Meet or exceed standards of national vocational/practical nursing accreditation bodies or clearly identify conflicts with those standards;

2. Be completed by students in no more than 12 months or clearly describe rationale for longer or shorter programs;

3. Emphasize the latest patient safety competencies;

4. Use competency-based testing;

5. Facilitate articulation between LVN programs and mobility among different levels of nursing including certified nurse aide (CNA), LVN, ADN, and BSN education;

6. Promote student success and completion rates;

7. Promote evidence-based practice;

8. Maximize the use of existing and potential vocational nursing faculty at LVN programs and at their clinical affiliates;

9. Propose a faculty to student ratio for clinical courses that is consistent with projected enrollment increases, likely faculty shortages, and availability of new learning technologies;

10. Integrate didactic and clinical content with new instructional technology;

11. Address any characteristics unique to Texas and vocational nursing instruction in Texas;

12. Propose standardized pre-requisite courses, if applicable;

13. Propose any needed modification to the differentiations between LVN and ADN and BSN instruction;

14. Promote easy transition from student nurse to practice vocational nurse to minimize training needed after graduation; and

15. Provide a cost per graduate that is as low as possible.

THECB is, simultaneously with this RFP, also seeking proposals to develop a new curriculum model for degree programs leading to initial licensure of registered nurses (RN programs). Consideration will be given to consultants who respond to both RFPs and display the necessary qualifications and resources in both cases.

PROPOSER QUALIFICATIONS

To be eligible for consideration, a consultant must: have a master's degree (a doctoral degree is preferred) in nursing, education or closely related field; experience administering or teaching in a LVN program or a LVN to ADN or BSN transition program; experience developing, modifying and evaluating vocational nursing curriculum to meet professional standards of higher education and vocational nurse practice; and experience writing reports for a broad audience; identify other individuals who would be available to THECB as resources.

PROPOSAL EVALUATION/AWARD THECB shall evaluate all Proposals to determine if they conform to the requirements of the RFP. Those that do not conform may be eliminated from further consideration and applicants shall be notified of that fact upon either: 1.) a contract being awarded or 2.) a decision not to award a contract under this RFP.

THECB will make its selection based on the following criteria: demonstrated knowledge, competence, and experience of consultant with developing LVN curriculum; reference check; compatibility of Consultant with the goals and objectives of THECB; overall quality of response to RFP; reasonableness of proposed fees.

THECB will negotiate with Awarded Proposer to develop a Contract under which the nursing consultant services described in this RFP will be performed.

THECB has sole discretion and reserves the right to reject any and all responses to this RFP and to cancel the RFP if it is deemed in the best interest of THECB to do so. Issuance of this RFP in no way constitutes a commitment by THECB to award a Contract or to pay for any expenses incurred either in the preparation of a response to this RFP, attendance at an oral presentation or in the production of a contract for financial services.

SERVICE PERIOD LVN nursing consultant services related to a Contract resulting from this RFP shall commence upon the date of Contract execution and continue through March 1, 2009. THECB shall have the exclusive option to extend the contract for a one (1) to (4) month extension following the expiration of the original Contract term. It is anticipated that future contract extensions shall be issued per the terms and conditions agreed upon in the Contract and shall be executed via the issuance of a written Contract change document by THECB's Assistant Commissioner for Academic Affairs and Research.

Proposal Deadline

Deadline for responding to this RFP is 5:00 p.m., C.S.T., December 16, 2007.

For a complete copy of the RFP, including instructions for submitting a proposal, please contact:

THECB Project Director

Donna Carlin, Program Director

(512) 427-6241, Phone; (512) 427-6168, Fax

E-mail: donna.carlin@thecb.state.tx.us

TRD-200705432
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: November 8, 2007

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Texas Department of Housing and Community Affairs

Request for Proposals for Uniform Physical Conditions Standards Inspections

Notice of Extended Deadline to Respond

SUMMARY. The Texas Department of Housing and Community Affairs (TDHCA), through its Contract Monitoring and Compliance Division, issued a Request for Proposals (RFP) for outsourced Uniform Physical Condition Standards (UPCS) Inspections for multifamily housing rental developments funded by TDHCA. The RFP was published in the *Texas Register* and posted on the Electronic State Business Daily on November 9, 2007.

DEADLINE FOR SUBMISSION. The deadline for submission in response to the Request for Proposals is extended to 4:00 p.m., Central Daylight Saving Time, Monday, December 10, 2007. No proposal received after the deadline will be considered. No incomplete, unsigned, or late proposals will be accepted after the Proposal Deadline, unless TDHCA determines, in its sole discretion, that it is in the best interest of TDHCA to do so.

Individuals or firms interested in submitting a proposal should visit our website at http://www.tdhca.state.tx.us/pmcomp/index.htm, for a complete copy of the RFP. Throughout the procurement process, all questions relating to this RFP must be submitted to TDHCA in writing to Mike Garrett (michael.garrett@tdhca.state.tx.us).

Place and Method of Proposal Delivery. Proposals shall be delivered to:

Mike Garrett, Compliance Monitor:

Physical Address for Overnight Carriers:

221 East 11th Street

Austin, Texas 78701-2410

Mailing Address:

P.O. BOX 13941

Austin, TX 78711-3941

(512) 475-3800

TRD-200705585
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: November 14, 2007

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Texas Department of Insurance

Notice of Application by a Small Employer Health Benefit Plan Issuer to be a Risk-Assuming Health Benefit Plan Issuer

Notice is given to the public of the application of the listed small employer health benefit plan issuer to be a risk-assuming health benefit plan issuer under Insurance Code §1501.312. A small employer health benefit plan issuer is defined by Insurance Code §1501.002(16) as a health benefit plan issuer offering, delivering, issuing for delivery, or renewing health benefit plans subject to the Insurance Code, Chapter 1501, Subchapters C - H. A risk-assuming health benefit plan issuer is defined by Insurance Code §1501.301(4) as a small employer health benefit plan issuer that does not participate in the Texas Health Reinsurance System. The following small employer health benefit plan issuer has applied to be a risk-assuming health benefit plan issuer:

Aetna Health Inc.

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal Division--Nick Hoelscher, 333 Guadalupe, Tower I, Room 920, Austin, Texas.

If you wish to comment on the application of Aetna Health Inc. to be a risk-assuming health benefit plan issuer, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the application and comments, and a determination that all requirements of law have been met, the Commissioner or his designee may take final action on the applicant's election to be a risk-assuming health benefit plan issuer.

TRD-200705425
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: November 7, 2007

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Notice of Application by a Small Employer Health Benefit Plan Issuer to be a Risk-Assuming Health Benefit Plan Issuer

Notice is given to the public of the application of the listed small employer health benefit plan issuer to be a risk-assuming health benefit plan issuer under Insurance Code §1501.312. A small employer health benefit plan issuer is defined by Insurance Code §1501.002(16) as a health benefit plan issuer offering, delivering, issuing for delivery, or renewing health benefit plans subject to the Insurance Code, Chapter 1501, Subchapters C - H. A risk-assuming health benefit plan issuer is defined by Insurance Code §1501.301(4) as a small employer health benefit plan issuer that does not participate in the Texas Health Reinsurance System. The following small employer health benefit plan issuer has applied to be a risk-assuming health benefit plan issuer:

Aetna Life Insurance Company

The application is subject to public inspection at the offices of the Texas Department of Insurance, Legal Division--Nick Hoelscher, 333 Guadalupe, Tower I, Room 920, Austin, Texas.

If you wish to comment on the application of Aetna Life Insurance Company to be a risk-assuming health benefit plan issuer, you must submit your written comments within 60 days after publication of this notice in the *Texas Register* to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Upon consideration of the application and comments, and a determination that all requirements of law have been met, the Commissioner or his designee may take final action on the applicant's election to be a risk-assuming health benefit plan issuer.

TRD-200705426
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: November 7, 2007

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Third Party Administrator Applications

The following third party administrator (TPA) application has been filed with the Texas Department of Insurance and is under consideration.

Application of CUNNINGHAM LINDSEY U.S., INC., a domestic third party administrator. The home office is HOUSTON, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200705423
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: November 7, 2007

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of CNA CLAIMPLUS, INC., a foreign third party administrator. The home office is RENO, NEVADA.

Application of CLAIMS MANAGEMENT, INC., (using the assumed name of ARKANSAS CLAIMS MANAGEMENT, INC.), a foreign third party administrator. The home office is BENTONVILLE, ARKANSAS.

Application of DENTAL BENEFIT PROVIDERS, INC., a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application to change the name of TEXAS EMPLOYERS ASSOCIATED MEDICAL SERVICES, INC. to TEXAS EMPLOYERS ASSOCIATED MEDICAL SERVICES, INC., (using the assumed name of TEAMS, INC.) a foreign third party administrator. The home office is CORPUS CHRISTI, TEXAS.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200705582
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: November 14, 2007

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Texas Lottery Commission

Instant Game Number 1025 "Groovy 8's"

The Texas Lottery Commission filed for publication Instant Game Number 1025 "Groovy 8's". The document was published in the October 26, 2007, issue of the Texas Register (32 TexReg 7759). The validation codes were changed to reflect a four digit game number after the procedure was published in the *Texas Register.* Sections 1.2.F, J and K now read as follows:

1.2 Definitions in Instant Game No. 1025.

F. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

J. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1025), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1025-0000001-001.

TRD-200705549
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: November 13, 2007

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Texas Parks and Wildlife Department

Notice of Availability and Request for Comments on a Proposed Settlement Agreement

AGENCIES: Texas Parks and Wildlife Department (TPWD), Texas Commission on Environmental Quality (TCEQ), and the Texas General Land Office (TGLO) (hereafter, Natural Resource Trustees).

ACTION: Notice of availability of a proposed Settlement Agreement for natural resource damages resulting from the impacts of the November 15, 2004 crude oil discharge from an Energytec, Inc. facility into an un-named tributary of Oliver Lake and Sulphur River in Titus County, Texas and of a 30-day period for public comment on the Agreement beginning the date of publication of this notice.

SUMMARY: This notice serves to inform the public that the Natural Resource Trustees in cooperation with Energytec, Inc. have developed a proposed Settlement Agreement to resolve Natural Resource Damages associated with this incident. The proposed Settlement Agreement calls for Energytec, Inc. to preserve a 79 acre tract of wet riparian habitat in Titus County.

The opportunity for public review and comment on the proposed Settlement Agreement announced in this notice is required under the Texas Water Code §7.110 and 15 CFR §990.25 of the federal Natural Resource Damage Assessment regulations.

ADDRESSES: A copy of this Settlement Agreement may be obtained by contacting: Johanna Gregory, Trustee Program, TPWD, 4200 Smith School Road, Austin, Texas 78744, Phone: (512) 912-7103, e-mail: johanna.gregory@tpwd.state.tx.us.

DATES: Comments must be submitted in writing within 30 days of the publication of this notice to Johanna Gregory of TPWD at the address listed in the previous paragraph. The Natural Resource Trustees will consider all written comments received during the 30-day comment period prior to finalizing the Settlement Agreement.

SUPPLEMENTARY INFORMATION:

On or about November 15, 2004 a transfer line(s) leading to an injection well and storage tank(s) in the Hoffman-Bankhead Unit located on the Hearts Bluff Game Ranch northeast of the city of Talco, Titus County, Texas, ruptured, resulting in an unauthorized discharge of crude oil into an unnamed tributary of Oliver Lake and Sulphur River. Approximately 8,400 gallons of crude oil were discharged into the creek and adjacent riparian habitat. Oil was observed at the discharge point and extended 0.50 miles downstream in the unnamed tributary to Oliver Lake and Sulphur River. After the initial discharge, oil spread further downstream in the unnamed tributary to Oliver Lake and adjacent bottomland hardwoods due to heavy rains and localized flooding. The oiling of habitat ranged from light to very heavy bands of oil on the banks, snags, and vegetation adjacent to and in the creek. Oil bands were observed as high as 4 feet on some trees.

Initial response actions by Energytec, Inc. included the use of heavy equipment to clear and remove oiled vegetation as well as bury standing oil in upland and aquatic environments. Secondary response actions initiated by the environmental contractors included herding oil to collection points where it was removed using vacuum trucks and absorbent pads. Further remedial actions were undertaken, including the chipping and land farming of oiled vegetation and oily debris. Oily debris and oiled trees and soil were buried in and along the banks of the unnamed tributary to Lake Oliver and Sulphur River. These further remedial actions required extensive grading, removal, and redistribution of sediments and soils in and along the unnamed tributary. Response and remedial actions resulted in natural resource injuries in addition to those caused by the discharge of crude oil. The response actions described have not adequately addressed, or are not expected to address, the potential injuries from the incident.

Natural resources or their services impacted as a result of the spill and spill response included riparian/bottomland hardwood habitat, upland habitat, and aquatic habitat of the unnamed tributary to Lake Oliver and Sulphur River. Biota impacted by the spill included fish, birds, other wildlife species, and benthic communities.

Natural Resource Trustees (Trustees) have the authority under OPA (33 U.S.C. Section 2701 et seq.) to assess natural resource injuries resulting from this incident. TPWD, TCEQ, and TGLO are Trustees of the natural resources injured by the Energytec discharge.

The Natural Resource Trustees have determined that resources subject to their trust authority under this Act were exposed to crude oil as a result of the discharge. The quantity and concentration of the material discharged was sufficient to result in the impairment of exposed habitats. Energytec, Inc. as the designated responsible party declined the opportunity to work in a formal cooperative process with the Trustees to perform a restoration-based assessment addressing injuries to natural resource services resulting from the spill. The Trustees undertook this action on their own and performed several site investigations to assess the extent of injuries resulting from the discharge of oil and the associated response actions. Results from site investigations and Habitat Equivalency Analysis were used to determine the scale of restoration necessary to compensate for injuries to natural resource services.

In accordance with the Oil Pollution Act of 1990 regulations, the Trustees evaluated a reasonable range of restoration alternatives to compensate for injuries to natural resource services. After examining restoration alternatives and potential restoration sites, the Trustees have identified the preservation of existing high quality habitat located on Hearts Bluff Game Ranch as the preferred restoration alternative. The Trustees' proposed restoration project would preserve all or portions of a 79 acre tract of wet riparian habitat in Titus County.

For further information contact: Johanna Gregory at (512) 912-7103, fax: (512) 912-7160, e-mail: johanna.gregory@tpwd.state.tx.us.

TRD-200705564
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: November 14, 2007

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Notice of Hearing and Opportunity for Public Comment

This is a notice of an opportunity for public comment and a public hearing on the City of Georgetown's application for a Texas Parks and Wildlife Department (TPWD) permit to dredge state-owned sand and gravel from the South San Gabriel River in Williamson County at a location approximately 1/2 mile downstream from the Highway 29 crossing and approximately 500 feet upstream from the Austin Avenue (Business I-35) crossing of the South San Gabriel River.

The hearing will be held at 11:00 a.m. on Friday, December 14, 2007 at TPWD Headquarters, 4200 Smith School Road, Austin, Texas 78744.

The hearing is not a contested case hearing under the Administrative Procedure Act.

Written comments must be submitted within 30 days of the publication of this notice in the *Texas Register* or the newspaper, whichever is later, or at the public hearing.

Submit written comments, questions, or requests to review the application to: Beth Hilliard, 4200 Smith School Road, Austin, Texas 78744; fax (512) 389-4482; or e-mail beth.hilliard@tpwd.state.tx.us.

TRD-200705550
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: November 13, 2007

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State Preservation Board

Consulting Services Contract Notification

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, the State Preservation Board is giving notice that it intends to award a consulting agreement for a museum exhibit formative evaluation to People, Places & Design Research, unless a better offer is received. The Agency has received underwriting for the implementation of the exhibit through a grant from the National Endowment for the Humanities (NEH). The Consultant will work with agency staff to provide research strategy, develop test prototypes, review visitor testing results, analyze data and create a summary report in order to understand the effectiveness of specific components of the exhibition design. The Agency intends to award the contract to the consultant listed above who had been identified in a previous NEH grant and was hired to perform a front end evaluation for the project. The consultant brings to the project valuable and necessary depth of knowledge of exhibition content and design objectives.

Please call David Denney, Director of Public Programs, The Bob Bullock Texas State History Museum, (512) 936-2311 if you have questions or need further information. The deadline for inquiries is December 27, 2007.

TRD-200705555
Linda Gaby
Director of Administration
State Preservation Board
Filed: November 13, 2007

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 8, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable San Antonio, L.P. for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 34998 before the Public Utility Commission of Texas.

The requested CFA service area will be expanded, if approved, to include the City of Universal City, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34998.

TRD-200705544
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 12, 2007

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 8, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable San Antonio, L.P. for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 34999 before the Public Utility Commission of Texas.

The requested CFA service area will be expanded, if approved, to include the Cities of Converse, Kirby, Live Oak, Selma, Garden Ridge and Hill Country Village, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34999.

TRD-200705545
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 12, 2007

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Announcement of Application for State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 8, 2007, for a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of M. Brown Enterprises, Inc. d/b/a Level I Wireless Networks for a State-Issued Certificate of Franchise Authority, Project Number 35000 before the Public Utility Commission of Texas.

The requested CFA service area includes the geographic area of the entire State of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35000.

TRD-200705546
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 12, 2007

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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 November 8, 2007, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Moviestar Telecom Inc. for a Service Provider Certificate of Operating Authority, Docket Number 34997 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone and long distance services.

Applicant's requested SPCOA geographic area includes the area of Texas currently served by Southwestern Bell Telephone d/b/a AT&T 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 November 28, 2007. 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 34997.

TRD-200705543
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 12, 2007

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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 November 9, 2007, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215. The Applicant will file the LRIC study on or after November 19, 2007.

Docket Title and Number: Application of Verizon Southwest, Inc. for Approval of LRIC Study for ISDN PRI Service Pursuant to P.U.C. Substantive Rule §26.215, Docket Number 35007.

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 35007. Written comments or recommendations should be filed no later than forty-five (45) days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 35007.

TRD-200705557
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 13, 2007

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Notice of Petition for Expanded Local Calling Service

Notice is given to the public of the filing with the Public Utility Commission of Texas of a petition on October 4, 2007, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA).

Project Title and Number: Petition of the Stillman Exchange for Expanded Local Calling Service, Project Number 34869.

The petitioners in the Stillman exchange request ELCS to the exchanges of Harlingen, LaSara, Port Mansfield, and Santa Rosa.

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 December 10, 2007. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2789. All comments should reference Project Number 34869.

TRD-200705556
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 13, 2007

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Request for Comments on Development of Instructions, Form, and Affidavit for Renewable Energy Credit Microgenerator Aggregator Registration

The staff of the Public Utility Commission of Texas (PUC or commission) has initiated Project Number 34602, *PUC Development of Registration Form for a Renewable Energy Credit Aggregator Pursuant to PUC Subst. R. §25.173*, to develop a form that will comply with the requirements of PUC Substantive Rule §25.173(p)(3), *Goal for Renewable Energy, Microgenerators and REC Aggregators*. PUC Substantive Rule §25.173 requires any person, municipality, political subdivision, or political subdivision corporation that aggregates the renewable energy generation of two or more microgenerators to register with the commission and the program administrator and also to register to participate in the Renewable Energy Credit (REC) trading program. This project will determine the information that must be submitted to the commission in order to register as a REC Microgenerator Aggregator.

The commission will make available for comment the Draft Instructions, Form, and Affidavit for REC Microgenerator Aggregator Registration in Central Records and on the commission's website for Project Number 34602 on November 16, 2007 (www.puc.state.tx.us/electric). Parties are requested to provide comment on the draft forms by Friday, December 14, 2007.

Written comments concerning this project 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 reference Project Number 34602.

Questions concerning Project Number 34602 should be referred to Mohammed Ally, Electric Utility Engineer, Infrastructure Reliability Division, (512) 936-7375 or Nathan C. Barrow, Attorney, Legal Division, (512) 936-7477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200705488
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 9, 2007

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South Texas Development Council

Request for Proposals

The South Texas Development Council (STDC) is requesting proposals for the provision of basic and advance/specialized peace officers training. All basic and specialized training provided must be conducted in conformance with TCLEOSE requirements. Only one contract will be awarded. The STDC reserves the right to reject any and all proposals received and to award a contract only upon availability of funding from the Governor's Office, Criminal Justice Division. Specifications, submittal requirements, and other information may be obtained from Mr. Juan E. Rodriguez, STDC, 1002 Dicky Lane, P.O. Box 2187, Laredo, Texas 78044-2187, Tel: (956) 722-3995, Fax: (956) 722-2670.

TRD-200705475
Juan E. Rodriguez
Program Coordinator
South Texas Development Council
Filed: November 8, 2007

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Request for Proposals

The South Texas Development Council (STDC) is requesting proposals for the provision of Transportation Planning Services. Transportation planning services must be in accordance to H.B. 3588. Only one contract will be awarded. The STDC reserves the right to reject any and all proposals received and to award a contract only upon availability of funding from the Texas Department of Transportation. Specifications, submittal requirements, and other information may be obtained from Mr. Juan E. Rodriguez, STDC, P.O. Box 2187, Laredo, Texas 78044-2187, Tel: (956) 722-3995, Fax: (956) 722-2670.

TRD-200705474
Juan E. Rodriguez
Program Coordinator
South Texas Development Council
Filed: November 8, 2007

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Texas Department of Transportation

Aviation Division - Request for Proposal for Aviation Architectural/Engineering Services

The City of McKinney, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional engineering firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional aviation architectural/engineering design services described below.

Current Project: City of McKinney. TxDOT CSJ No.: 08CTMCKNY. Scope: Provide architectural/engineering services to design and construct an Air Traffic Control Tower and associated appurtenances at Collin County Regional Airport.

There is no DBE goal. TxDOT Project Manager is Michelle Hannah.

To assist in your proposal preparation the criteria, 5010 drawing, and most recent Airport Layout Plan are available online at **www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm** by selecting "Collin County Regional Airport".

Interested firms shall utilize the latest version of Form AVN-550, titled "Aviation Architectural/Engineering Services Proposal". The form may be requested from TxDOT Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483, phone number 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT web site at **www.dot.state.tx.us/services/aviation/consultant.htm**. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. Proposals shall be stapled but not bound in

any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-550 **must be received** by TxDOT Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than December 17, 2007, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Edie Stimach.

The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The criteria for evaluation engineering proposals can be found at **http://www.dot.state.tx.us/services/aviation/consultant.htm**. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1-800-68-PILOT (74568). For procedural questions, please contact Edie Stimach, Grant Manager. For technical questions, please contact Michelle Hannah, Project Manager.

TRD-200705492
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: November 9, 2007

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Public Hearing Notice - Highway Project Selection Process

In accordance with Transportation Code, §201.602, the Texas Transportation Commission (commission) will conduct a public hearing to receive data, comments, views, and/or testimony concerning the commission's highway project selection process and the relative importance of the various criteria on which the commission bases its project selection decisions. It is emphasized that the subject of the hearing will be the procedure by which projects are selected and not the merits or details of specific projects themselves.

The public hearing will be held on Thursday, December 13, 2007 at 9:00 a.m. in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 E. 11th Street, Austin, Texas. The hearing will be held in accordance with the procedures specified in 43 TAC §1.5. Any interested person may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the commission as may be necessary to ensure a complete record. While any person with pertinent comments or testimony concerning the selection procedure will be granted an opportunity to present them during the course of the hearing, the commission reserves the right to restrict testimony in terms of time and repetitive comment. Organizations, associations, or groups are encouraged to present their commonly-held views, and same or similar comments, through a representative member where possible. Presentations must remain pertinent to the issue being discussed. A person may not assign a portion of his or her time to another speaker. Persons with disabilities who plan to attend the hearing and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Randall Dillard, Government and Public Affairs Division, at 125 East 11th St., Austin, Texas 78701-2383, or (512) 305-9137 at least two working days prior to the hearing so that appropriate arrangements can be made.

Highway project selection information will be available on December 3, 2007, at the department's Riverside Annex, 118 East Riverside Drive, Bldg. 118, Room 2C-5, Austin, Texas, (512) 486-5063. Written comments may be submitted to the James L. Randall, P.E., Director, Transportation Planning and Programming Division, Texas Department of Transportation, P.O. Box 149217, Austin, Texas 78714-9217. The deadline for receipt of comments is 5:00 p.m. on January 18, 2008.

TRD-200705563
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: November 14, 2007

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The University of Texas System

Public Notice Announcing the Final Candidates for Superintendent Search

Pursuant to *Texas Government Code* §552.126, public notice is hereby given on behalf of The University of Texas University Charter School that the following finalists are being considered for the position of superintendent for the University Charter School:

Christopher Shawn Allen

Sarah Wilson Nelson

Maria Guadalupe (Lupita) Garcia

Gwyn Ann Boyter

Walter Mark Gesch

Ann Patricia O'Doherty

Velma Rochelle Wilson

Ramon Samano Abarca

Bret Alan Champion

The finalists will be interviewed in mid-November, and a new superintendent is expected to be named by the end of the month.

More information about the position of superintendent and the hiring process can be obtained by contacting:

Dr. Jess Butler, Interim Superintendent

The University of Texas-University Charter School

8701 N. Mopac Expressway, Suite 350

Austin, Texas 78759

Phone: (512) 471-5280

Fax: (512) 471-4758

TRD-200705429
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: November 7, 2007

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).