TEXAS REGISTER

Volume 25 Number 41 October 13, 2000 *Pages 10247-10418*

This month's front cover artwork:

Artist: *Kristi Bolcik*
12th grade
Woodsboro High School

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. 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.

We will display artwork on the cover of each *Texas Register.* The artwork featured on the front cover is chosen at random.

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*. The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register.*

Texas Register, (ISSN 0362-4781), is published weekly, 52 times a year. Issues will be published by the Office of the Secretary of State, 1019 Brazos, Austin, Texas 78701. Subscription costs: printed, one year $150, six months $100. First Class mail subscriptions are available at a cost of $250 per year. Single copies of most issues for the current year are available at $10 per copy in printed format.

The **Texas Register** is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Austin, Texas.

POSTMASTER: Send address changes to the **Texas Register,** P.O. Box 13824, Austin, TX 78711-3824.

a section of the
Office of the Secretary of State
P.O. Box 13824
Austin, TX 78711-3824
(800) 22607199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
Secretary of State - Elton Bomer
Director - Dan Procter

Customer Relations
Leti Benavides
LaKiza Fowler

Texas Administrative Code
Dana Blanton
Roberta Knight

Texas Register
Leah Billingsley
Carla Carter
Melissa Dix
Ann Franklin
Kris Hogan
Diana Muniz-Franklin
Crystal Richey

Circulation/Marketing
Jill S. Ledbetter

THE GOVERNOR

As required by Texas Civil Statutes, Article 6252-13a, §6, 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.

Executive Order GWB 00-5

The State of Texas

Executive Department

Office of the Governor

Austin, Texas

Relating To The Texas Commission On Volunteerism And Community Service And Amending Executive Order GWB 96-9

WHEREAS, the Texas Commission on Volunteerism and Community Service was previously created by Executive Order; and

WHEREAS, I have determined that the number of voting members of the Commission should be increased to 16 in order to ensure additional continuity of the membership of the Commission.

NOW, THEREFORE, I, George W. Bush, Governor of the State of Texas, do hereby set the number of voting members on the Texas Commission on Volunteerism and Community Service at 16 and do hereby amend Executive Order GWB 96-9 accordingly. All other provisions of Executive Order GWB 96-9 shall remain in force.

This Executive Order shall be effective immediately and shall remain in full force and effect until modified, amended or rescinded by me.

Given under my hand this the 25th day of September, 2000.

George W. Bush, Governor

TRD-200006903

♦ ♦ ♦

OFFICE OF THE ATTORNEY GENERAL

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

Opinions

Opinion No. JC-0286

The Honorable Bruce Isaacks Denton County Criminal District Attorney P.O. Box 2850 Denton, Texas 76202

Re: Whether a tax assessor-collector must refund monies paid into an inventory tax escrow account by a heavy equipment dealer during a year in which the dealer was not in business as of January 1 and did not owe taxes (RQ-220-JC)

S U M M A R Y

Although a tax assessor-collector lacks statutory authority to accept or deposit in the heavy equipment dealer inventory tax escrow account monies paid by a dealer in a year in which the dealer would not owe taxes, a heavy equipment dealer who mistakenly prepays such taxes is not entitled to a refund of the monies unless he is entitled to a refund under section 31.11 of the Tax Code or can show that he paid them as the result of fraud, because of a mutual mistake of fact, or under duress.

Opinion No. JC-0287

The Honorable Homero Ramirez Webb County Attorney 1110 Victoria, Suite 403 Laredo, Texas 78040

Re: Which county is responsible for mental health services proceeding costs under section 571.018 of the Texas Health and Safety Code and related question (RQ-0227-JC)

S U M M A R Y

The county that initiates emergency detention procedures or, if no such procedures are initiated, the county that accepts an application for court-ordered mental health services, issues an order for protective custody, or issues an order for temporary mental health services is generally responsible for paying mental health services proceeding costs under section 571.018 of the Health and Safety Code. A nonresponsible county conducting mental health services proceedings is authorized to collect the costs of those proceedings from the responsible county regardless of whether the responsible county has agreed to pay those costs. A county's responsibility for paying mental health services proceeding costs is not limited to actions that are "derivative" of the initial commitment proceeding. The costs of mental health services proceedings payable by the responsible county include, but are not limited to, those enumerated in section 571.018(c) of the Health and Safety Code.

Opinion No. JC-0288

The Honorable James A. Farren Randall County Criminal District Attorney 501 16th Street Canyon, Texas 79015

Re: Authority of a commissioners court to contract to repair roads within a municipality that belong to a property owners association (RQ-0235-JC)

S U M M A R Y

Except in the limited case governed by article III, section 52f of the Texas Constitution, a commissioners court may not enter into an interlocal agreement with a municipality to repair roads within the municipality which are private and not open to use by the general public.

Opinion No. JC-0289

The Honorable Florence Shapiro Chair, State Affairs Committee Texas State Senate P.O. Box 12068 Austin, Texas 78711-2068

Re: Whether a protective order may permit a perpetrator of family violence to collect his personal property from the residence he shared with his victim: Clarification of Attorney General Opinion JC-0112 (1999) (RQ-0231-JC)

S U M M A R Y

Neither the domestic violence protective order sections of the Family Code or of the Code of Criminal Procedure explicitly permit, or specifically prohibit, a judge to include in such an order a provision requiring a police officer to escort a perpetrator of domestic violence to the family home to retrieve personal property. Article 5.045 of the Code of Criminal Procedure is not by its terms applicable in such a situation, and accordingly does not provide immunity from liability for a police officer providing such an escort.

For further information, please call (512) 463-2110

TRD-200006899
Susan D. Gusky
Assistant Attorney General
Office of the Attorney General
Filed: October 4, 2000

♦ ♦ ♦

TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statues: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39.

Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Requests

AOR-473 Closed. Answered by previous opinions.

AOR-475 Closed. Answered by previous opinions.

The Texas Ethics Commission is authorized by section 571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 36, Penal Code; and (8) Chapter 39, Penal Code.

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

TRD-200006815
Tom Harrison
Executive Director
Texas Ethics Commission
Filed: September 29, 2000

♦ ♦ ♦

PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. MEDICAID REIMBURSEMENT RATES

SUBCHAPTER M. MISCELLANEOUS MEDICAL PROGRAMS

DIVISION 2. MEDICAID WAIVER PROGRAM FOR PEOPLE WITH DEAF-BLINDNESS AND MULTIPLE DISABILITIES

The Texas Health and Human Services Commission (HHSC) proposes the repeal of §355.9021, concerning cost report; the repeal of §355.9022, concerning reimbursement methodology for community-based services provided to people who are deaf-blind with multiple disabilities; and new §355.9022, concerning reimbursement methodology for community-based services provided to people who are deaf-blind with multiple disabilities, in its Medicaid Reimbursement Rates chapter. The purpose of the proposal is to make the cost-reporting and reimbursement methodology for this Medicaid waiver program consistent with the other Medicaid programs operated by the Texas Department of Human Services (DHS). The proposed new §355.9022 requires that contracted providers of these Medicaid waiver services prepare annual cost reports in accordance with §355.101 of this title (relating to Introduction).

Don Green, chief financial officer, has determined that for the first five-year period the new section and repeals are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the repeals and new section.

Commissioner Don Gilbert has determined that for each year of the first five years the proposed repeals and new section are in effect the public benefit anticipated as a result of the proposal is that the repeals and new section will bring this program into consistency with other Medicaid waiver programs operated by DHS. There will be no adverse economic effect on small or micro businesses, because no changes in practice are required of any business, large or small.

DHS proposes related policy in 40 TAC §42.12 in this issue of the *Texas Register*.

Questions about the content of this proposal may be directed to Nancy Kimble at (512) 438-4051 in DHS's Rate Analysis Department. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-274, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules in the *Texas Register*.

1 TAC §355.9021, §355.9022

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

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

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

§355.9021. Cost report.

§355.9022. Reimbursement Methodology for Community-based Services Provided to People Who Are Deaf-Blind with Multiple Disabilities.

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

Filed with the Office of the Secretary of State, on September 28, 2000.

TRD-200006791
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 438-3734

♦ ♦ ♦

1 TAC §355.9022

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

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

§355.9022. Reimbursement Methodology for Community-based Services Provided to People Who Are Deaf-Blind with Multiple Disabilities.

(a) General information. Cost reports pertaining to providers' fiscal years ending in calendar year 2000 and subsequent years will be governed by information in this section. The Texas Department of Human Services (DHS) applies the general principles of cost determination as specified in §355.101 of this title (relating to Introduction).

(b) General. DHS will reimburse qualified Texas Medicaid contracted providers for waiver services provided to individuals who are deaf-blind with multiple disabilities.

(c) Other sources of cost information. If DHS has determined that there is not sufficient reliable cost report data from which to set reimbursements and reimbursement ceilings for waiver services, reimbursements and reimbursement ceilings will be developed by using data from surveys; cost report data from other similar programs; consultation with other service providers and/or professionals experienced in delivering contracted services; and other sources. Since sufficient cost data are not available for orientation and mobility, chore, and dietary services, the reimbursement rates for these services will be determined in this manner.

(d) Waiver rate determination methodology. Recommended reimbursements for waiver services will be determined on a fee-for-service basis in the following manner for each of the services provided:

(1) Total allowable costs for each provider will be determined by analyzing the allowable historical costs reported on the cost report.

(2) Each provider's total reported allowable costs, excluding depreciation and mortgage interest, are projected from the historical cost-reporting period to the prospective reimbursement period as described in §355.108 of this title (relating to Determination of Inflation Indices). The prospective reimbursement period is the period of time that the reimbursement is expected to be in effect.

(3) Payroll taxes and employee benefits are allocated to each salary line item on the cost report on a pro rata basis based on the portion of that salary line item to the amount of total salary expense for the appropriate group of staff. Employee benefits will be charged to a specific salary line item if the benefits are reported separately. The allocated payroll taxes are Federal Insurance Contributions Act (FICA) or Social Security, Medicare Contributions, Workers' Compensation Insurance (WCI), the Federal Unemployment Tax Act (FUTA), and the Texas Unemployment Compensation Act (TUCA).

(4) Allowable administrative and overall facility/operations costs are allocated or spread to each waiver service cost component on a pro rata basis based on the portion of each waiver service's service units reported to the amount of total waiver service units reported. Service- specific facility and operations costs for out-of-home assisted living, out-of-home respite, and habilitation day services will be directly charged to the specific waiver service.

(5) For physical therapy, occupational therapy, speech/hearing/language, case management, skilled nursing, and behavior communication specialist services, an allowable cost per unit of service is calculated for each contracted provider for each service. The allowable costs per unit of service for each contracted provider are arrayed. The units of service for each contracted provider in the array are summed until the median unit of service is reached. The corresponding expense to the median unit of service is determined and is multiplied by 1.044. The allowable costs per unit of service may be combined into an array with the allowable costs per unit of service of similar services provided by other programs in determining the median cost per unit of service.

(6) For habilitation day, residential habilitation (less than 24-hour and 24-hour residential habilitation), assisted living (24-hour supervision and less than 24-hour supervision), and intervenor services, two cost areas are created:

(A) The attendant cost area includes salaries, wages, benefits, and mileage reimbursement calculated as specified in §355.112 of this title (relating to Attendant Compensation Rate Add-on).

(B) An "other direct care" cost area is created which includes costs for services not included in subparagraph (6)(A) of this paragraph as determined in subparagraphs (1)-(4) of this paragraph. An allowable cost per unit of service is determined for each contracted provider for the other direct care cost area. The allowable costs per unit of service for each contracted provider are arrayed. The units of service for each contracted provider in the array are summed until the median unit of service is reached. The corresponding expense to the median unit of service is determined and is multiplied by 1.044.

(C) The attendant cost area and the other direct care cost area are summed to determine the cost per unit of service.

(D) The room and board payments for waiver clients receiving assisted living services are covered in the reimbursement for these services and will be paid to providers from the client's Supplemental Security Income, less a personal needs allowance.

(7) The lifetime ceiling per client for environmental accessibility services is determined from sources other than cost reports for this program. The annual ceiling per client for specialized medical equipment is determined from sources other than cost reports for this program.

(8) Pre-enrollment assessment services are based on the hourly case management reimbursement.

(9) DHS may adjust reimbursement if new legislation, regulations, or economic factors affect costs, according to §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs).

(e) Authority to determine reimbursement. The authority to determine reimbursement is specified in §355.101 of this title (relating to Introduction).

(f) Reporting of cost.

(1) Cost-reporting guidelines. If DHS requires a cost report for any waiver service in this program, providers must follow the cost-reporting guidelines as specified in §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Excused from submission of cost reports. If required by DHS, all contracted providers must submit a cost report unless the number of days between the date the first DHS client received services and the provider's fiscal year end is 30 days or fewer. The provider may be excused from submitting a cost report if circumstances beyond the control of the provider make cost-report completion impossible, such as the loss of records due to natural disasters or removal of records from the provider's custody by any regulatory agency. A Deaf-Blind Multiple Disabilities (DB-MD) Waiver contracted provider may also be excused from submitting a cost report if the total number of DHS DB-MD clients served during the reporting period is three or less. Requests to be excused from submitting a cost report must be received by DHS's Rate Analysis Department before the due date of the cost report.

(3) Reporting and verification of allowable cost.

(A) Providers are responsible for reporting only allowable costs on the cost report, except where cost-report instructions indicate that other costs are to be reported in specific lines or sections. Only allowable cost information is used to determine recommended reimbursements. DHS excludes from reimbursement determination any unallowable expenses included in the cost report and makes the appropriate adjustments to expenses and other information reported by providers; the purpose is to ensure that the database reflects costs and other information which are necessary for the provision of services; and are consistent with federal and state regulations.

(B) Individual cost reports may not be included in the database used for reimbursement determination if:

(i) there is reasonable doubt as to the accuracy or allowability of a significant part of the information reported; or

(ii) an auditor determines that reported costs are not verifiable.

(C) When material pertinent to proposed reimbursements is made available to the public, the material will include the number of cost reports eliminated from reimbursement determination for the reason stated in (B)(i) of this paragraph.

(4) Allowable and unallowable costs. Providers must follow the guidelines in determining whether a cost is allowable or unallowable as specified in §355.102 and §355.103 of this title (relating to General Principles of Allowable and Unallowable Costs and Specifications for Allowable and Unallowable Costs), in addition to the following.

(A) Client room and board expenses are not allowable, except for those related to respite care.

(B) The actual cost of specialized medical equipment is not allowable for cost-reporting purposes.

(g) Reporting revenue. Revenues must be reported on the cost report in accordance with §355.104 of this title (relating to Revenues).

(h) Reviews and field audits of cost reports. DHS staff perform desk reviews or field audits on all contracted providers. The frequency and nature of field audits are determined by DHS staff to ensure the fiscal integrity of the program. Desk reviews and field audits will be conducted in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), and providers will be notified of the results of a desk review or a field audit in accordance with §355.107 of this title (relating to Notification of Exclusions and Adjustments). Providers may request an informal review and, if necessary, an administrative hearing to dispute an action taken by DHS under §355.110 of this title (relating to Informal Reviews and Formal Appeals).

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

Filed with the Office of the Secretary of State, on September 28, 2000.

TRD-200006792
Marina Henderson
Executive Deputy Commissioner
Texas Health and Human Services Commission
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 438-3734

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. PROVISIONS OF THE REAL ESTATE LICENSE ACT

SUBCHAPTER F. EDUCATION, EXPERIENCE, EDUCATIONAL PROGRAMS, TIME PERIODS AND TYPE OF LICENSE

22 TAC §535.62

The Texas Real Estate Commission (TREC) proposes an amendment to §535.62, concerning acceptable courses of study for real estate license applicants.

Section 535.62 establishes the guidelines for the acceptance of courses required for a person to obtain or renew a real estate license. The section permits an applicant to submit correspondence courses offered by an accredited college or university if a final written examination is a requirement for receiving credit from the provider, and the course otherwise complies with the guidelines. The proposed amendment would require the examination to be administered no sooner than three days after the student enrolls for the correspondence course, so as to provide adequate time for the student to master the course material and prepare for the examination.

Mark A. Moseley, general counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state or for units of local government as a

result of enforcing or administering the section. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the section.

Mr. Moseley also has determined that for each year of the first five years the section as proposed is in effect the public benefit anticipated as a result of enforcing the section will be greater mastery of course material by potential licensees. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted to Mark A. Moseley, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under Texas Civil Statutes, Article 6573a, §5(h), which authorize the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

The statute which is affected by this proposal is Texas Civil Statutes, Article 6573a.

§535.62. Acceptable Courses of Study.

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

(d) A core real estate course also must meet each of the following requirements to be accepted.

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

(5) For a correspondence course, the course must have been offered by an accredited college or university, successful completion of a written final examination was a requirement for receiving credit from the provider, and the examination was administered under controlled conditions to positively identified students no sooner than three days after the student enrolled for the course.

(6)-(9) (No change.)

(e)-(f) (No change.)

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

Filed with the Office of the Secretary of State, on September 29, 2000.

TRD-200006813
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 465-3900

♦ ♦ ♦

SUBCHAPTER G. MANDATORY CONTINUING EDUCATION

22 TAC §535.71, §535.72

The Texas Real Estate Commission (TREC) proposes amendments to §535.71, concerning approval of providers, courses and instructors for mandatory continuing education (MCE) and §535.72, concerning presentation of courses, advertising and records.

By law, many Texas real estate licensees are required to complete MCE courses to renew an active real estate license. MCE providers are approved by TREC and must offer their courses in accordance with TREC rules. Section 535.71 provides guidelines for the approval of courses, including correspondence courses and courses offered by alternative delivery methods, such as computers. Completion of a final examination is required for a student to receive credit for these courses. The proposed amendment to §535.71 would require the course provider to administer the examination no sooner than three days after the student enrolls for the course. The amendment would ensure that the student has an opportunity to master the course material before attempting the examination.

The amendment to §535.72 would limit the MCE daily classroom course presentation to 10 hours, consistent with the current limit on core real estate courses. This amendment would help ensure that students are not kept in class when they are no longer receptive to instruction because of fatigue and thus provide them a greater opportunity to master the course material.

Mark A. Moseley, general counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the sections.

Mr. Moseley also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be consistent application and renewal processes for the agency's licensees and registrants. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Comments on the proposal may be submitted to Mark A. Moseley, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Civil Statutes, Article 6573a, §5(h), which authorize the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

The statute which is affected by this proposal is Texas Civil Statutes, Article 6573a.

§535.71. Mandatory Continuing Education: Approval of Providers, Courses and Instructors.

(a)-(o) (No change.)

(p) Correspondence courses. The commission may approve a provider to offer an MCE course by correspondence subject to the following conditions:

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

(4) written course work required of students must be graded by an approved instructor or the provider's coordinator or director, who is available to answer students' questions or provide assistance as necessary, using answer keys approved by the instructor or provider; [~~and~~]

(5) final examinations must be graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; and

(6) final examinations may not be administered sooner than 48 hours after the student has enrolled for the course .

(q) (No change.)

(r) The commission may accept courses offered by alternative delivery methods subject to the following conditions.

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

(5) Every provider offering an approved course under this subsection shall:

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

(C) certify students as successfully completing the course only if the student;

(i) has completed all instructional modules required to demonstrate mastery of the material;

(ii) has attended any hours of live instruction and/or testing required for a given course; and

(iii) no sooner than three days after the student enrolls for the course, has passed either:

(I) a proctored final examination administered under controlled conditions to positively identified students, at a location and by an official approved by the commission and graded by the instructor or, if the examination is being graded mechanically or by use of a computer, by the provider, using answer keys approved by the instructor or provider; or

(II) an examination by use of a computer under conditions that satisfy the commission that the examinee is the same person who seeks MCE credit.

§535.72. Mandatory Continuing Education: Presentation of Courses, Advertising and Records.

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

(e) A provider shall, prior to commencement of a course, announce that the provider will not certify a student for MCE credit unless the student attends all sessions of the course, that partial credit will not be given for partial attendance, that no makeups or written work will be allowed for MCE credit, and that the student must determine if the course is timely and appropriate for the student's MCE requirement. If the provider has not advertised or otherwise made students aware of the provider's refund policy, the pre-course announcement must also contain the refund policy. The provider may allow a ten-minute break for every 50 minutes of session time, but a break must be given at least every two hours, using all accumulated break time, and the daily course presentation may not exceed ten hours.

(f)-(o) (No change.)

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

Filed with the Office of the Secretary of State, on September 29, 2000.

TRD-200006814
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 465-3900

♦ ♦ ♦

CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §§537.11, 537.33, 537.42, 537.46

The Texas Real Estate Commission (TREC) proposes amendments to §§537.11, 537.33, 537.42 and 537.46, concerning standard contract forms. These amendments would adopt by reference three revised contract forms to be used by Texas real estate licensees.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contacts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas and six brokers appointed by TREC.

The amendment to §537.11 would renumber the revised forms in a list of forms promulgated by the commission.

The amendment to §535.33 would adopt by reference revised form TREC No. 26-3, Seller Financing Addendum. The form is an addendum used to create an agreement between the buyer and the seller in a seller-financed transaction to establish the provisions of the promissory note and deed of trust. The form has been rewritten to make it easier to read, primarily by replacing the terms "maker" and "payee", respectively, with "buyer" and "seller", identifying the parties by the same terms used in the main contract.

The amendment to §537.42 would adopt by reference revised form TREC No. 35-2, Mediation Addendum. The form is an addendum used to create an agreement for the parties to the contract, and any broker who signs the addendum, to submit disputes to mediation prior to resorting to litigation. The addendum was rewritten to clarify that a broker who signs the addendum is bound by its terms and that a broker is not a party to the main contract between the buyer and the seller. Minor language changes also were made to make the form easier to read.

The amendment to §537.46 would adopt by reference revised form TREC No. 39-2, Amendment. This form is used to amend an existing contract between the buyer and seller. The form has been revised to remove a caption which restricts use of the form to residential resales, to revise a reference to a paragraph in the contract to make it general enough to apply to all of the TREC contract forms and to clarify that the waiver of the right to terminate the contract under an option clause does not affect other rights of termination in the contract.

Mark A. Moseley, General Counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no anticipated impact on small businesses, micro- businesses or local or state employment as a result of implementing the sections.

Mr. Moseley also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be the availability of current standard contract forms. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed sections, other than the costs of obtaining copies of the forms, which would be available at no charge through the TREC web site, and available from private printers at an estimated cost of $7.50 per set of 50 copies.

Comments on the proposal may be submitted to Mark A. Moseley, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendments are proposed under Texas Civil Statutes, Article 6573a, §5(h), which authorize the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties.

The statute which is affected by this proposal is Texas Civil Statutes, Article 6573a.

§537.11. Use of Standard Contract Forms.

(a) Standard Contract Form TREC No. 9-4 is promulgated for use in the sale of unimproved property where intended use is for one to four family residences. Standard Contract Form TREC No. 10-3 is promulgated for use as an addendum concerning sale of other property by a buyer to be attached to promulgated forms of contracts. Standard Contract Form TREC No. 11-3 is promulgated for use as an addendum to be attached to promulgated forms of contracts which are second or "back-up" contracts. Standard Contract Form TREC No. 12-1 is promulgated for use as an addendum to be attached to promulgated forms of contracts where there is a Veterans Administration release of liability or restoration entitlement. Standard Contract Form TREC No. 15-2 is promulgated for use as a residential lease when a seller temporarily occupies property after closing. Standard Contract Form TREC No. 16-2 is promulgated for use as a residential lease when a buyer temporarily occupies property prior to closing. Standard Contract Form 20-4 is promulgated for use in the resale of residential real estate where there is all cash or owner financing, an assumption of an existing loan, or a conventional loan. Standard Contract Form TREC No. 21-4 is promulgated for use in the resale of residential real estate where there is a Veterans Administration guaranteed loan or a Federal Housing Administration insured loan. Standard Contract Form TREC No. 23-4 is promulgated for use in the sale of a new home where construction is incomplete. Standard Contract Form TREC No. 24-4 is promulgated for use in the sale of a new home where construction is completed. Standard Contract Form TREC No. 25-3 is promulgated for use in the sale of a farm or ranch. Standard Contract Form TREC No. 26-3 [~~26-2~~] is promulgated for use as an addendum concerning seller financing. Standard Contract Form TREC No. 28-0 is promulgated for use as an addendum to be attached to promulgated forms of contracts where reports are to be obtained relating to environmental assessments, threatened or endangered species, or wetlands. Standard Contract Form TREC No. 29-1 is promulgated for use as an addendum to be attached to promulgated forms of contracts where an abstract of title is to be furnished. Standard Contract Form TREC No. 30-2 is promulgated for use in the resale of a residential condominium unit where there is all cash or seller financing, an assumption of an existing loan, or a conventional loan. Standard Contract Form TREC No. 31-2 is promulgated for use in the resale of a residential condominium unit where there is a Veterans Administration guaranteed loan or a Federal Housing Administration insured loan. Standard Contract Form TREC No. 32-0 is promulgated for use as a condominium resale certificate. Standard Contract Form TREC No. 33-0 is promulgated for use as an addendum to be added to promulgated forms of contracts in the sale of property adjoining and sharing a common boundary with the tidally influenced submerged lands of the state. Standard Contract Form TREC Form No. 34-0 is promulgated for use as an addendum to be added to promulgated forms of contracts in the sale of property located seaward of the Gulf Intracoastal Waterway. Standard Contract Form TREC No. 35-2 [~~35-1~~] is promulgated for use as an addendum to be added to promulgated forms of contracts as an agreement for mediation. Standard Contract Form TREC Form No. 36-1 is promulgated for use as an addendum to be added to promulgated forms in the sale of property subject to mandatory membership in an owners' association. Standard Contract Form TREC Form No. 37-1 is promulgated for use as a resale certificate when the property is subject to mandatory membership in an owners' association. Standard Contract Form TREC Form No. 38-0 is promulgated for use as a notice of termination of contract. Standard Contract Form TREC Form No. 39-2 [~~39-1~~] is promulgated for use as an amendment to promulgated forms of contracts.

(b) - (j) (No change.)

§537.33. Standard Contract Form TREC No. 26-3 [~~26-2~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No.26-3 [~~26-2~~] approved by the Texas Real Estate Commission in 2000 [~~1993~~]. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

§537.42. Standard Contract Form TREC No. 35-2 [~~35-1~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No.35-2 [~~35-1~~] approved by the Texas Real Estate Commission in 2000 [~~1998~~]. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

§537.46. Standard Contract Form TREC No. 39-2 [~~39-1~~].

The Texas Real Estate Commission adopts by reference standard contract form TREC No.39-2 [~~39-1~~] approved by the Texas Real Estate Commission in 2000 [~~1999~~]. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

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

Filed with the Office of the Secretary of State, on September 29, 2000.

TRD-200006817
Mark A. Moseley
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 465-3900

♦ ♦ ♦

TITLE 25. HEALTH SERVICES

PART 2. TEXAS DEPARTMENT OF MENTAL HEALTH AND MENTAL RETARDATION

CHAPTER 406. ICF/MR PROGRAMS

SUBCHAPTER A. GENERAL REQUIREMENTS

25 TAC §§406.1-406.4

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

The Texas Department of Mental Health and Mental Retardation (department) proposes the repeals of §§406.1-406.4 of Chapter 406, Subchapter A, concerning General Requirements.

The subject matter of the sections being repealed is addressed in new Chapter 419, Subchapter E, concerning ICF/MR Program,

which is proposed for public review and comment elsewhere in this issue of the *Texas Register*.

The repeals are part of a comprehensive reorganization of chapters and subchapters within the department's portion of the Texas Administrative Code in conjunction with the sunset review of agency rules required by Texas Government Code, §2001.039 (as added by Senate Bill 178, §1.11, 76th Legislature).

Bill Campbell, Deputy Commissioner, Finance and Administration, has determined that for each year of the first five years the repeals are in effect, enforcing or administering the repeal does not have foreseeable implications relating to costs or revenues of state or local government except as discussed in the proposal of the sections replacing the sections being repealed.

Ernest McKenney, Director, Medicaid Administration, has determined that for each year of the first five-year period the repeals are in effect, the public benefit expected is the existence of ICF/MR Program rules that are organized in a manner that maximizes their accessibility by program providers, department and survey agency staff, consumers, family members, advocates, and other stakeholders. It is not anticipated that the repeals will have an adverse economic effect on small businesses or micro-businesses because they do not impose any measurable cost to ICF/MR Program providers. It is not anticipated that there will be an economic cost to persons required to comply with the repeals. It is not anticipated that the repeals will affect a local economy.

Comments concerning the proposed repeals must be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas, 78711, or by fax to (512) 206-4750, within 30 days of publication of this notice.

The repeals are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed repeals affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§406.1. Service Qualifications for the Intermediate Care Facility for the Mentally Retarded (ICF/MR) Program.

§406.2. Compliance with Federal and State Standards for Participation.

§406.3. State Licensing Standards.

§406.4. Definitions.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006851
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

SUBCHAPTER B. CONTRACTING REQUIREMENTS

25 TAC §§406.51-406.63

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

The Texas Department of Mental Health and Mental Retardation (department) proposes the repeals of §§406.51-406.63 of Chapter 406, Subchapter B, concerning Contracting Requirements.

The subject matter of the sections being repealed is addressed in new Chapter 419, Subchapter E, concerning ICF/MR Program, which is proposed for public review and comment elsewhere in this issue of the *Texas Register*.

The repeals are part of a comprehensive reorganization of chapters and subchapters within the department's portion of the Texas Administrative Code in conjunction with the sunset review of agency rules required by Texas Government Code, §2001.039 (as added by Senate Bill 178, §1.11, 76th Legislature).

Bill Campbell, Deputy Commissioner, Finance and Administration, has determined that for each year of the first five years the repeals are in effect, enforcing or administering the repeal does not have foreseeable implications relating to costs or revenues of state or local government except as discussed in the proposal of the sections replacing the sections being repealed.

Ernest McKenney, Director, Medicaid Administration, has determined that for each year of the first five-year period the repeals are in effect, the public benefit expected is the existence of ICF/MR Program rules that are organized in a manner that maximizes their accessibility by program providers, department and survey agency staff, consumers, family members, advocates, and other stakeholders. It is not anticipated that the repeals will have an adverse economic effect on small businesses or micro-businesses because they do not impose any measurable cost to ICF/MR Program providers. It is not anticipated that there will be an economic cost to persons required to comply with the repeals. It is not anticipated that the repeals will affect a local economy.

Comments concerning the proposed repeals must be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas, 78711, or by fax to (512) 206-4750, within 30 days of publication of this notice.

The repeals are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental

Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed repeals affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§406.51. Participation Requirements.
§406.52. Application for Enrollment (General Provisions).
§406.53. Provider Application Requirements Specific to ICF/MR.
§406.54. Disclosure of Information about the Provider.
§406.55. Duration of the Contract.
§406.56. Initial Contract Effective Date.
§406.57. Subcontracts.
§406.58. Change of Ownership.
§406.59. Surety Bonds or Letters of Credit.
§406.60. Termination of ICF/MR Participation.
§406.61. Notice of Termination.
§406.62. Sanction Provisions for Violations of Title XIX ICF/MR Contractual Agreements.
§406.63. Debarment and Suspension of Current and Potential Contractor's Rights.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006850
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

CHAPTER 419. MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES SUBCHAPTER E. ICF/MR PROGRAMS

25 TAC §§419.201-419.203, 419.261-419.272, 419.281, 419.282, 419.296, 419.297

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

The Texas Department of Mental Health and Mental Retardation (department) proposes the repeals of §§419.201-419.203, 419.261-419.272, 419.281, 419.282, 419.296, and 419.297 of Chapter 419, Subchapter E, concerning ICF/MR Programs.

The subject matter of the sections being repealed is addressed in new §§419.201-419.203, 419.221-419.223, 419.251-419.262, 419.299, and 419.300, of Chapter 419, Subchapter E, concerning ICF/MR Program, which are proposed for public review and comment elsewhere in this issue of the *Texas Register*.

The repeals permit the department to organize new rules concerning the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) Program into divisions with the subchapter.

Bill Campbell, Deputy Commissioner, Finance and Administration, has determined that for each year of the first five years the repeals are in effect, enforcing or administering the repeal does not have foreseeable implications relating to costs or revenues of state or local government except as discussed in the proposal of the sections replacing the sections being repealed.

Ernest McKenney, Director, Medicaid Administration, has determined that for each year of the first five-year period the repeals are in effect, the public benefit expected is the existence of ICF/MR Program rules that are organized in a manner that maximizes their accessibility by program providers, department and survey agency staff, consumers, family members, advocates, and other stakeholders. It is not anticipated that the repeals will have an adverse economic effect on small businesses or micro-businesses because they do not impose any measurable cost to ICF/MR Program providers. It is not anticipated that there will be an economic cost to persons required to comply with the repeals. It is not anticipated that the repeals will affect a local economy.

Comments concerning the proposed repeals must be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas, 78711, or by fax to (512) 206-4750, within 30 days of publication of this notice.

The repeals are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed repeals affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.201. Purpose.
§419.202. Application.
§419.203. Definitions.
§419.261. Protecting Individuals' Personal Funds.
§419.262. Notice Regarding Personal Funds.
§419.263. Determining Management of Personal Funds.

§419.264. Items and Services Provided by the Program Provider.

§419.265. Items and Services Purchased with Personal Funds.

§419.266. Program Provider-Managed Personal Funds.

§419.267. Requests for Personal Funds from Trust Fund Accounts.

§419.268. Closing Trust Fund Accounts.

§419.269. Refunds.

§419.270. Applied Income.

§419.271. Contributions.

§419.272. Auditing.

§419.281. Children's Durable Medical Equipment.

§419.282. Permanency Planning for Children.

§419.296. References.

§419.297. Distribution.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006849
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

SUBCHAPTER E. ICF/MR PROGRAMS

The Texas Department of Mental Health and Mental Retardation (department) proposes new §§419.201-419.203, 419.206-419.208, 419.221-419.223, 419.251-419.262, 419.266-419.268, and 419.299-419.300, of Chapter 419, Subchapter E, concerning ICF/MR Program.

The new sections replace the existing sections of Chapter 419, Subchapter E, which are proposed for repeal elsewhere in this issue of the *Texas Register*. The new sections also address the subject matter covered in §§406.1-406.4 of Chapter 406, Subchapter A, concerning General Requirements, and §§406.51-406.63 of Chapter 406, Subchapter B, concerning Contracting Requirements, which are proposed for repeal elsewhere in this issue of the *Texas Register*.

The new sections are part of a comprehensive reorganization of chapters and subchapters within the department's portion of the Texas Administrative Code in conjunction with the sunset review of agency rules required by Texas Government Code, §2001.039 (as added by Senate Bill 178, §1.11, 76th Legislature).

The new sections describe requirements for the Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) Program in Texas including provider enrollment, provider service requirements, personal funds, and provider agreement sanctions. The sections on provider service requirements address durable medical equipment for adults and children, permanency planning for children, and discharge from a facility. The sections addressing personal funds are essentially the same as sections in existing Chapter 419, Subchapter E, but have been updated as to terminology and references.

The new sections require a provider applicant to submit a resume or curriculum vita of the provider applicant's employee or contractor who will manage and oversee the provision of ICF/MR Program services. The resume or curriculum vita must demonstrate that the employee or contractor has a minimum of three years of verifiable work experience in planning and providing direct services to people with mental retardation or other developmental disabilities and be accompanied by letter(s) of reference verifying the work experience.

The new sections require a program provider to ensure that durable medical equipment (DME) is suited for the adult or child and is properly fitted, and that staff are trained in the appropriate use of the DME. The new sections also clarify the department's requirement for permanency planning for children.

The new sections describe a new requirement that a program provider obtain written approval from the department prior to discharging an individual for maladaptive behaviors. If the required actions are not feasible prior to discharge, a program provider must complete the required actions within seven days after the individual's discharge.

The new sections describe new criteria for the department's imposition of a vendor hold on a program provider. The new criteria require the department to determine the need for a vendor hold, rather than basing the vendor hold on a recommendation by the state survey agency. The new criteria also prohibit using a vendor hold more than once to terminate a provider agreement. The new sections specify that the department will not enter into a new provider agreement with a program provider until at least two days have elapsed from the effective date of the termination. In addition, the new sections provide that termination of a provider agreement may occur if a facility or program provider has a history of non-compliance.

The new sections describe how the department will review reports of incidents and complaints made to the state survey agency regarding ICF/MR Program facilities. The department may require corrective action by a program provider for substantiated incidents or complaints as identified by the state survey agency. The corrective action may include the implementation of a plan of correction developed by the department with input from the program provider and the participation in or provision of training determined by the department. The department may monitor a program provider to determine if the program provider has implemented or completed required corrective action.

Bill Campbell, Deputy Commissioner, Finance and Administration, has determined that the operational cost of implementing the proposed new sections is $258,417 per year for the next five years; of that total, $129,209 will be state funds and $129,208 will be federal funds. These costs are for the operations of a new sanctions unit in the department's Central Office Medicaid Administration Division. The fiscal impact, if any, of the change in the regulatory process related to contract terminations cannot be estimated.

Ernest McKenney, Director, Medicaid Administration, has determined that for each year of the first five-year period the new sections are in effect, the public benefit expected is additional safeguards for residents to ensure that discharges are made appropriately and that durable medical equipment (DME) is suited for the consumer and is properly fitted and that staff are trained in the appropriate use of the DME, and that additional methods for the department to support program providers in improving the quality of care of consumers residing in their facility. It

is not anticipated that the new sections will have an adverse economic effect on small businesses or micro-businesses because these changes do not impose any measurable cost to the ICF/MR providers. It is not anticipated that there will be an economic cost to persons required to comply with the new sections. It is not anticipated that the new sections will affect a local economy.

A hearing to accept oral and written testimony from members of the public concerning the proposal has been scheduled for 1:30 p.m., Tuesday, November 7, 2000, in the department's Central Office Auditorium in Building 2 at 909 West 45th Street, in Austin, Texas. Persons requiring an interpreter for the deaf or hearing impaired should contact the department's Central Office operator at least 72 hours prior to the hearing at TDD (512) 206-5330. Persons requiring other accommodations for a disability should notify the Tera Cardella, at least 72 hours prior to the hearing at (512) 206-5854 or at the TDY phone number of Texas Relay, 1-800-735-2988.

Comments concerning this proposal must be submitted in writing to Linda Logan, Director, Policy Development, Texas Department of Mental Health and Mental Retardation, by mail to P.O. Box 12668, Austin, Texas, 78711, or by fax to (512) 206-4750, within 30 days of publication of this notice.

DIVISION 1. GENERAL REQUIREMENTS

25 TAC §§419.201-419.203

The new sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed new sections affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.201. Purpose.

The purpose of this subchapter is to describe:

(1) policies and procedures for the Intermediate Care Facilities for the Mentally Retarded (ICF/MR) Program in Texas;

(2) responsibilities of program providers in the ICF/MR Program;

(3) rights and protections for persons applying for and receiving ICF/MR Program services; and

(4) responsibilities of mental retardation authorities (MRAs).

§419.202. Application.

This subchapter applies to provider applicants, program providers, and MRAs.

§419.203. Definitions.

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

(1) Affiliate--An employee or independent contractor of a provider applicant or a person with a significant financial interest in a provider applicant including, but not limited, to the following:

(A) if the provider applicant is a corporation, then each officer, director, stockholder with an ownership of at least 5%, subsidiary, and parent company;

(B) if the provider applicant is a limited liability company, then each officer, member, subsidiary, and parent company;

(C) if the provider applicant is an individual, then the individual's spouse, each partnership and each partner thereof of which the individual is a partner and each corporation in which the individual is an officer, director, or stockholder with an ownership of at least 5%;

(D) if the provider applicant is a partnership, then each partner and parent company; or

(E) if the provider applicant is a group of co-owners under any other business arrangement, then each owner, officer, director, or the equivalent thereof under the specific business arrangement, and each parent company.

(2) Applied income--The portion of an individual's cost of care that the individual is responsible for paying. The amount of an individual's applied income is determined by the policies and procedures authorized by TDHS and depends on the individual's earned and unearned income.

(3) Budgeted amount - The amount of cash that may be disbursed to an individual at regular intervals, e.g., weekly, monthly, for discretionary spending without obtaining a sales receipt for the expenditure.

(4) CFR--Code of Federal Regulations.

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

(6) Department--The Texas Department of Mental Health and Mental Retardation.

(7) Excluded --Temporarily or permanently prohibited by a state or federal authority from participating as a provider in a federal health care program, as defined in 42 USC §1302a-7b(f).

(8) Facility--An intermediate care facility for persons with mental retardation or a related condition.

(9) Fundamental tags--HCFA-designated survey tags that reflect client outcomes with respect to basic rights, safety, health, and participation in active treatment services.

(10) HCFA (Health Care Financing Administration)--The federal agency that administers Medicaid programs.

(11) ICF/MR Program--The Intermediate Care Facilities for Persons with Mental Retardation Program, which provides Medicaid-funded residential services to individuals with mental retardation or a related condition.

(12) IDT (interdisciplinary team)--A group of people assembled by the program provider who possess the knowledge, skills, and expertise to develop an individual's IPP, including the individual, individual's LAR, mental retardation professionals and paraprofessionals and, with approval from the individual or LAR, other concerned persons.

(13) IPP (individual program plan)--A plan developed by an individual's IDT that identifies the individual's training, treatment, and habilitation needs and describes services to meet those needs.

(14) Individual--A person enrolled in the ICF/MR Program.

(15) LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, and may include a parent, guardian, or managing conservator of a minor individual, a guardian of an adult individual, a legal representative of a deceased individual, surrogate decision maker, or surrogate consent committee.

(16) Long Term Care Plan for People with Mental Retardation and Related Conditions--The plan required by THSC, §533.062, which is developed by the department and specifies, in part, the capacity of the ICF/MR Program in Texas.

(17) MRA (mental retardation authority)--Consistent with THSC, §533.035, an entity designated by the commissioner to which the Texas Mental Health and Mental Retardation Board delegates its authority and responsibility for planning, policy development, coordination, and resource allocation, and resource development for and oversight of services and supports in one or more local service areas.

(18) Mental retardation--Significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(19) Permanency planning--A philosophy and planning process that focuses on the outcome of family support by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(20) Personal funds--The funds that belong to an individual, including earned income, social security benefits, gifts, and inheritances.

(21) Petty cash fund--Personal funds managed by a program provider that are maintained for individuals' cash expenditures.

(22) Pooled account--A trust fund account containing the personal funds of more than one individual.

(23) Program provider--An entity with whom the department has a provider agreement.

(24) Provider agreement--A written agreement between the department and a program provider that obligates the program provider to deliver ICF/MR Program services.

(25) Provider applicant--An entity seeking to participate as a program provider.

(26) Related condition--A severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with mental retardation, and requires treatment or services similar to those required for individuals with mental retardation;

(B) is manifested before the individual reaches age 22;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(27) Sales receipt--A written statement issued by the seller that includes:

(A) the date it was created; and

(B) the cost of the item or service.

(28) Sanction team--A group of professionals assembled and employed by the department, which is overseen by the Health and Human Services Commission to ensure consistency in its determinations.

(29) Separate account--A trust fund account containing the personal funds of only one individual.

(30) Specially constituted committee--The committee designated by the program provider in accordance with 42 CFR §483.440(f)(3) that consists of staff, LARs, individuals (as appropriate), qualified persons who have experience or training in contemporary practices to change individuals' inappropriate behavior, and persons with no ownership or controlling interest in the facility. The committee is responsible, in part, for reviewing, approving, and monitoring individual programs designed to manage inappropriate behavior and other programs that, in the opinion of the committee, involve risks to individuals' safety and rights.

(31) THSC--Texas Health and Safety Code.

(32) Trust fund account--An account at a financial institution in the program provider's control that contains personal funds.

(33) Unclaimed personal funds--Personal funds managed by the program provider that have not been transferred to the individual or LAR within 30 days after the individual's discharge.

(34) Unidentified personal funds--Personal funds managed by the program provider for which the program provider cannot identify ownership.

(35) USC--United States Code.

(36) Vendor hold--Temporary suspension of payments from the department to a program provider.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006843
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 2. PROVIDER ENROLLMENT

25 TAC §§419.206-419.208

The new sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed new sections affect the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.206. Application Process.

(a) The department will accept an application for enrollment:

(1) from a provider applicant, if the department determines that new or existing ICF/MR Program beds authorized in the *Long Term Care Plan for People with Mental Retardation and Related Conditions* are available for allocation to a program provider for a new facility not to exceed a capacity of six;

(2) from an assignee, if the department receives notice that a provider agreement is being assigned; or

(3) from a provider applicant, if the provider applicant provides residential services funded with general revenue that have been authorized by the department to be refinanced as ICF/MR Program services.

(b) The department will publish a notice in the *Texas Register*, an official publication of the Texas Office of the Secretary of State (http://www.sos.state.tx.us/texreg/index.html), if it is accepting applications for enrollment in accordance with subsection (a)(1) of this section.

(c) A provider applicant must request an application for enrollment in accordance with the published notice and must submit the application according to the notice and the department's application instructions.

(d) A provider applicant must complete all portions of the application for enrollment and provide information according to the department's application instructions, including but not limited to:

(1) providing an operational or organizational plan that describes in detail how the provider applicant will ensure sufficient staff resources are available to provide all services required by the ICF/MR Program; and

(2) providing the resume or curriculum vita of the provider applicant's employee or contractor who will manage and oversee the provision of ICF/MR Program services, which:

(A) demonstrates that the employee or contractor has a minimum of three years verifiable work experience in planning and providing direct services to people with mental retardation or other developmental disabilities; and

(B) is accompanied by letter(s) of reference verifying the work experience in subparagraph (A) of this paragraph.

(e) The department may reject an application for enrollment for good cause, including but not limited to:

(1) the application is incomplete in any aspect;

(2) the application is not submitted in accordance with the department's application instructions or published notice;

(3) the application was submitted under the circumstances described in subsection (a)(1) of this section and requests a capacity exceeding six;

(4) the application contains false information;

(5) the application does not contain original signatures and dates;

(6) the department has terminated a contract with the provider applicant or its affiliate during the three years prior to the application date;

(7) the provider applicant or its affiliate has been excluded or debarred;

(8) another state or federal agency has terminated a contract, licensure, or certification of the provider applicant or its affiliate during the three years prior to the application date;

(9) the provider applicant or its affiliate has an outstanding Medicaid program audit exception or other unresolved financial liability owed to the State of Texas;

(10) the provider applicant or its affiliate is ineligible to enroll as a Medicaid provider for reasons relating to criminal history records as set forth in department rules; or

(11) the provider applicant or its affiliate terminated a provider agreement in a federal health care program, as defined in 42 USC, §1302a-7b(f), while an adverse action or sanction was in effect.

(f) The department will review an application for enrollment received by the department and provide written notice to the provider applicant stating whether the application was approved or rejected.

(g) The department will not enter into a provider agreement with a provider applicant whose application for enrollment is rejected.

(h) If a provider applicant's application for enrollment is approved:

(1) the department will notify the state survey agency of the application approval; and

(2) the provider applicant must contact the state survey agency to initiate licensure and certification action.

§419.207. Certification and Licensure.

(a) To obtain a provider agreement under §419.208 of this title (relating to Provider Agreement), a provider applicant whose application for enrollment is approved must receive licensure under THSC, Chapter 252, if applicable, and certification as an ICF/MR by the state survey agency within 270 days from the date the department approves the application, except as provided in subsection (b) of this section.

(b) The department may, for good cause, grant an extension of the 270 day period described in subsection (a) of this section for a period of time to be determined by the department if a provider applicant submits to the department a written request for an extension, including supporting documentation, prior to the expiration of the 270 day period. For purposes of this subsection, good cause includes, but is not limited to:

(1) construction of the facility is delayed for causes beyond the provider applicant's control, such as a natural disaster;

(2) the state survey agency is unable to make an on-site visit to the facility within the 270 day period, through no fault of the provider applicant; or

(3) construction of the facility is delayed because of litigation regarding the construction or operation of the facility.

(c) The department will not enter into a provider agreement with a provider applicant who does not obtain licensure and certification in accordance with this section.

§419.208. Provider Agreement.

(a) The department will enter into a provider agreement only with a provider applicant that has received licensure under THSC, Chapter 252, if applicable, and certification by the state survey agency in accordance with §419.207 of this title (relating to Certification and Licensure).

(b) The effective date of an initial provider agreement is the effective date of certification by the state survey agency.

(c) Except as provided in subsection (d) of this section, the term of an initial provider agreement is the certification period of the facility set by the state survey agency, not to exceed twelve months.

(d) For good cause, the department may make the term of an initial provider agreement for less than the certification period of the facility set by the state survey agency.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006844
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 4. PROVIDER SERVICE REQUIREMENTS

25 TAC §§419.221-419.223

The new sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed new sections affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.221. Durable Medical Equipment.

A program provider who arranges for durable medical equipment for an individual residing in the facility must:

(1) ensure that the individual receives the equipment prescribed, the equipment fits properly, if applicable, and the individual's caregivers, as appropriate, receive instruction regarding the equipment's use; and

(2) document compliance with the requirements of paragraph (1) of this section in the individual's record.

§419.222. Permanency Planning for Children.

(a) As required by Texas Government Code, §531.153, a program provider must incorporate permanency planning as an integral part of the IPP for each child under 18 years of age residing in the facility on a temporary or long-term basis.

(b) The program provider must take the following actions to facilitate a child's placement in a family environment:

(1) discuss with the child's family or LAR concerning the problems or issues that led to the child's admission to the program provider's facility;

(2) discuss with the child's family or LAR concerning barriers to having the child reside in the family home;

(3) identify natural supports and family strengths that will enable the child to return to the family home;

(4) identify, in coordination with the child's designated MRA, activities and supports that can be provided by the family, LAR, program provider, or the individual's MRA to prepare the child for an alternate living arrangement;

(5) encourage regular contact between the child and the child's family, LAR, life long advocate, and friends in the community to continue supportive and nurturing relationships;

(6) encourage participation in IDT meetings by the child's family, LAR, life long advocate, and friends in the community; and

(7) provide the IPP summary to the child's designated MRA.

(c) The program provider must document compliance with the requirements of subsection (b) of this section in the child's record.

§419.223. Discharge From a Facility.

(a) If an individual is discharged from a facility, the program provider must comply with 42 CFR §483.440(b)(4) and (5) and this section.

(b) Prior to discharging an individual from a facility, a program provider must take the following action or document why such action is not feasible:

(1) notify the individual, individual's LAR, and the individual's MRA of the proposed discharge at least 30 days before the date of the discharge;

(2) document the reason for the proposed discharge and, if the reason is that the facility can no longer meet the individual's needs, explain why;

(3) counsel the individual or the individual's LAR about the discharge, including the potential outcomes of the discharge; and

(4) develop a final summary and post-discharge plan in accordance with 42 CFR §483.440(b)(5) and provide a copy of both documents to the individual, the individual's LAR, and the individual's MRA.

(c) If any actions required by subsection (b) of this section are not feasible prior to discharge, a program provider must, within 7 days after the individual's discharge, complete the required actions.

(d) Except as provided in subsection (g) of this section, if the reason for discharge is the individual's maladaptive behavior the discharge must be approved, in writing, by the department prior to the discharge. To request approval, the program provider must submit the following documentation to the department's Office of Medicaid Administration:

(1) a description of the maladaptive behavior(s);

(2) a summary of all behavioral interventions attempted, ranging from the most positive to the most restrictive, with the individual's response to these interventions, and reasons the interventions were ineffective in decreasing or eliminating the behavior(s);

(3) chronological psychoactive medication history, including start and stop dates of medications, dose changes to medications, and reasons for discontinuance or changes to dosages (e.g., adverse reactions, allergies, or increase in target symptoms);

(4) evidence of participation by a psychologist in the IDT meeting discussing the recommendation for discharge;

(5) evidence of approval of the discharge by the facility's specially constituted committee;

(6) a description of the proposed living arrangement for the individual following the discharge; and

(7) a written agreement from a representative of the proposed living arrangement to accept the individual following the discharge.

(e) The department will review the documentation submitted in accordance with subsection (d) of this section and, within 14 days after receiving the documentation, provide written notice to the program provider of its approval or denial of the discharge.

(f) If a discharge is approved by the department in accordance with subsection (e) of this section, a psychologist must participate in the development of the post-discharge plan described in subsection (b)(4) of this section.

(g) If the reason for the discharge is that the individual requires immediate admission to a psychiatric facility for inpatient services, the program provider must, within 72 hours of the individual's discharge, notify the Office of Medicaid Administration and the individual's designated MRA of:

(1) the individual's admission to the psychiatric facility; and

(2) whether the program provider intends to re-admit the individual to the facility and, if not, why the individual will not be re-admitted.

(h) Within 72 hours after an individual is discharged from a facility a program provider must:

(1) electronically submit a completed Client Movement Form to the department; and

(2) submit a paper copy of the completed Client Movement Form to the appropriate TDHS Medicaid eligibility worker.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006845
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 6. PERSONAL FUNDS

25 TAC §§419.251-419.262

The new sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed new sections affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.251. Protecting Individuals' Personal Funds.

(a) A program provider must implement this division according to the generally accepted accounting principles of the American Institute of Certified Public Accountants.

(b) A program provider must develop and implement written policies and procedures regarding personal funds that protect the financial interest of individuals and, at a minimum, require the program provider:

(1) to instruct individuals in handling personal funds consistent with the individuals' abilities and understanding; and

(2) to allow individuals to hold and manage their personal funds to the extent of their abilities.

(c) A program provider must reimburse individuals for personal funds lost or stolen while the funds are under the program provider's control.

§419.252. Notice Regarding Personal Funds.

At the time of admission to a facility, and if changes to services or charges occur, a program provider must provide each individual or LAR with written notification containing the following information:

(1) a written explanation of §419.253(d) and (e) of this title (relating to Determining Management of Personal Funds), which describe who may manage personal funds;

(2) a list of items and services included in the program provider's ICF/MR Program reimbursement rate for which the individual will not be charged;

(3) a list of items and services for which the individual may be charged;

(4) a statement that the individual or LAR may have the Social Security Administration appoint a representative payee to receive the individual's federal benefits in accordance with 20 CFR Part 416, Subpart F;

(5) a statement that, if the program provider manages the individual's personal funds, the program provider will make available the individual's personal funds record, as described in §419.256(h) of this title (relating to Program-Provider Managed Personal Funds), upon the request of the individual or LAR within 72 hours after receiving the request; and

(6) a statement that at the request of the individual or LAR, or if the individual is discharged or transferred from the facility, the program provider will disburse the individual's personal funds to the individual or LAR within 30 days after the request or discharge, if the program provider manages the individual's personal funds.

§419.253. Determining Management of Personal Funds.

(a) Within 30 days after an individual is admitted to a facility, the IDT must determine if the individual has the ability to:

(1) manage his or her personal funds; and

(2) decide who manages his or her personal funds.

(b) The determination must be based on an assessment of the individual's understanding of financial management, including:

(1) mathematical concepts;

(2) budgeting personal funds;

(3) monetary denominations; and

(4) financial obligations.

(c) The results of the assessment and the IDT's determination must be documented, signed by the IDT, and made a part of the individual's IPP.

(d) If an individual does not have an LAR and is determined to have the ability to decide who manages his or her personal funds or if an individual has an LAR, a program provider must allow the individual or LAR to choose one of the following to manage his or her personal funds and document such choice in the individual's IPP:

(1) the individual, if the individual is determined to have the ability to manage his or her personal funds;

(2) the individual's LAR;

(3) the program provider; or

(4) another person identified by the individual or LAR who has agreed in writing to manage the individual's personal funds.

(e) If an individual is determined not to have the ability to decide who manages his or her personal funds and the individual has no LAR, a program provider must manage the individual's personal funds in accordance with this subchapter.

(f) A program provider must reassess an individual's understanding of financial management at least annually and if the program provider has reason to believe that the individual's ability has changed.

§419.254. Items and Services Provided by the Program Provider.

A program provider must not charge an individual or require an individual to expend personal funds for items and services that are the program provider's responsibility to provide, except as authorized by §419.255(a)(1) of this title (relating to Items and Services Purchased with Personal Funds), because they are included in the ICF/MR Program reimbursement rate or are covered by other Medicaid programs. These items and services include:

(1) medical services and therapies, e.g., physical exams, physical therapy, occupational therapy, and nutritional, speech, audiological, psychological, social, and medical evaluations;

(2) prescribed and over-the-counter medication;

(3) medical equipment and supplies, e.g., nasogastric tubes, feeding pumps, catheters, sheepskins, and egg crate pads;

(4) laboratory services;

(5) eye exams and eyeglasses, except:

(A) the difference between the Medicaid payment and the actual cost of the eyeglasses as authorized by §419.255(a)(2) of this title (relating to Items and Services Purchased with Personal Funds); or

(B) as authorized by §419.255(a)(6) of this title (relating to Items and Services Purchased with Personal Funds).

(6) non-cosmetic dental services and items, e.g., intra- and extra-oral examinations, prescribed dental treatments and follow-up visits, dentures, braces, crowns, toothbrushes, toothpaste, mouthwash, dental floss, and disclosing solution;

(7) specialized equipment and adaptive devices that are medically necessary or are necessary to meet the objectives in the individual's IPP, e.g., hearing aids, hearing aid batteries, electric razor, shoe closures, and shoe insoles;

(8) training and habilitation services, e.g., vocational training, congregate training, and day activity services;

(9) behavioral reinforcers used in behavior modification programs, e.g., candy, soft drinks, cereal, coffee, toys, and magazines;

(10) meals, snacks, and special diets, as listed on the program provider's menu, whether provided at the facility or elsewhere;

(11) non-cosmetic personal hygiene items, e.g., shampoo, conditioner, soap, deodorant, anti-perspirant, body lotion, insect repellant, suncreen, shaving supplies, comb, hair brush, facial tissues, toilet tissue, sanitary napkins, tampons, and diapers;

(12) shampooing, haircutting, basic hairstyling, and shaving, including mustache and beard trimming;

(13) laundering personal clothing;

(14) facility furnishings and housewares, e.g., bedroom furniture, kitchenware, bath towels, dish towels, and bed linens;

(15) repairing and maintaining the facility's physical plant, including training and day activity areas;

(16) expenses that are associated with activities that are part of the program provider's recreational program e.g., meals, lodging, registrations, and tickets;

(17) transportation costs to and from:

(A) an activity included in an individual's IPP, including health care services, congregate training, day activity services and supported employment, except for competitive employment; or

(B) an activity that is part of the program provider's recreational program.

(18) fees charged by financial institutions, including service fees and check printing charges, if an individual's personal funds are managed in a pooled account or if the program provider chooses to manage those funds in a separate account;

(19) managing an individual's personal funds; and

(20) a charge incurred if the program provider mismanages an individual's personal funds.

§419.255. Items and Services Purchased with Personal Funds.

(a) A program provider may charge an individual or allow an individual to expend personal funds for the following items and services:

(1) an item or service that the program provider is responsible for providing, if the individual requests a specific type or brand of item or service that the program provider does not provide, and the program provider documents in the individual's record:

(A) the individual's written, signed request for a specific type or brand and the reason a specific type or brand has been requested or if the individual is determined not to have the ability to make such a request, the IDT's approval for a specific type or brand;

(B) the type or brand that is provided at the program provider's expense; and

(C) the reason the program provider does not provide the type or brand requested;

(2) the difference between the Medicaid payment and the actual cost of the eyeglasses, if the individual chooses a style or feature not paid for by Medicaid;

(3) clothing;

(4) cosmetic dental procedures;

(5) transportation costs, other than those described in §419.254(17) of this title (relating to Items and Services Provided by the Program Provider):

(A) if reimbursement to a third party for private transportation does not exceed the current state mileage reimbursement rate; and

(B) if adequate documentation is provided by a third party to the program provider to support the expenditure;

(6) repair or replacement of personal property that is damaged, lost, or stolen by the individual, if the expenditure is approved by the committee;

(7) snacks and meals, if the individual chooses items not listed on the program provider's menu;

(8) the individual's budgeted amount;

(9) activities that are not part of the program provider's recreational program and are independently chosen by the individual;

(10) dry cleaning;

(11) hair setting, permanent waves, hair color treatments, and beauty supplies, such as hair rollers and hair spray;

(12) cosmetics and perfume;

(13) cosmetic manicures, pedicures, and facials;

(14) bed hold charges as described in §406.211(d) of this title (relating to Payment for Absences From the Facility).

(15) school supplies, school fees, and other educational expenses;

(16) fees charged by a financial institution, if the individual manages his or her personal funds or the individual requests that the program provider manage his or her personal funds in a separate account; and

(17) applied income.

(b) Items purchased with an individual's personal funds must not be available for general use by program provider staff or other individuals.

§419.256. Program Provider-Managed Personal Funds.

(a) Accounting for personal funds. If a program provider manages personal funds, the program provider must comply with this section and ensure that:

(1) a complete accounting of personal funds entrusted to the program provider is maintained;

(2) personal funds are not commingled with program provider funds or the funds of any person other than another individual for whom the program provider manages personal funds; and

(3) personal funds are only expended for the individual's use and benefit and in a manner and for purposes determined to be in the individual's best interest.

(b) Account Requirements. A program provider must manage personal funds in a trust fund account.

(1) The program provider may manage personal funds in a pooled account or a separate account. If the program provider chooses a pooled account, an individual may request and receive a separate account. The program provider may also maintain some personal funds in a petty cash fund.

(2) Trust fund accounts must be insured under federal or state law.

(3) The program provider must retain all statements from financial institutions regarding trust fund accounts.

(4) The program provider must reconcile such statement with the account ledger as described in subsection (c)(1)(A) and (2)(A) of this section and personal ledger as described in subsection (h)(1)(F) of this section within 30 days after receiving such statement.

(c) Types of Accounts.

(1) Pooled accounts. If a program provider manages personal funds in a pooled account, the program provider must:

(A) maintain an account ledger that separately identifies each financial transaction, including:

(i) the name of the individual for whom the transaction was made;

(ii) the date and amount of the transaction, including interest; and

(iii) the balance after the transaction;

(B) title the account "Trustee (Program provider's Name), Individuals' Trust Fund Account;" and

(C) if the personal funds of Medicaid and private-pay individuals are pooled, obtain a signed, dated statement from private pay individuals allowing the program provider to release financial information to the department, TDHS, Texas Health and Human Services Commission, Texas Attorney General's Medicaid Fraud Control Unit, and US Department of Health and Human Services.

(2) Separate Accounts. If a program provider manages personal funds in a separate account, the program provider must:

(A) maintain an account ledger that identifies each financial transaction, including:

(i) the date and amount of the transaction, including interest; and

(ii) the balance after the transaction; and

(B) title the account "Trustee (Program Provider's Name), (Individual's Name) Trust Fund Account."

(d) Petty Cash Fund. If a program provider maintains some personal funds in a petty cash fund, the program provider must:

(1) set a limit on the amount maintained in the petty cash fund;

(2) set a limit on the amount of a single expenditure from the petty cash fund;

(3) maintain a petty cash fund ledger that includes:

(A) the date and amount of each transaction;

(B) the name of the individual for whom each transaction was made; and

(C) the balance after each transaction.

(e) Interest. If personal funds accrue interest, a program provider must prorate and distribute the interest earned to each participating individual.

(f) Depositing personal funds. A program provider must deposit in a trust fund account all funds that it receives on behalf of the individual. If the deposit slip documents deposits for more than one individual, the program provider must indicate on the deposit slip the amount allocated to each individual.

(g) Access to personal funds.

(1) An individual's must, based on the individual's assessment described in §419.263 of this title (relating to Determining Management of Personal Funds), determine:

(A) if there is a need for a budgeted amount and, if so, set the amount; and

(B) if there is a need to restrict the individual's use of personal funds and, if so, make a recommendation to the specially constituted committee.

(2) If the individual's IDT makes a recommendation to the specially constituted committee to restrict an individual's use of to personal funds, the specially constituted committee's decision is documented, signed by the specially constituted committee members, and made a part of the individual's IPP.

(h) Personal funds record.

(1) A program provider must maintain a personal funds record for each individual that includes:

(A) the name of the individual;

(B) the name of the individual's LAR and representative payee, as applicable;

(C) the date of the individual's admission to the facility;

(D) the individual's budgeted amount;

(E) the account number and location of all accounts in which the individual's personal funds are managed;

(F) a personal ledger that includes the date and amount of each transaction and the balance after each transaction; and

(G) any contribution acknowledgment as described in §419.271 of this title (relating to Contributions).

(2) The personal ledger reconciled in accordance with subsection (b)(4) of this section must not be less than zero. If reconciled balance is less than zero, the program provider must deposit in and credit to the individual's trust fund account the amount that increases such balance to zero.

(3) At least quarterly, and within 72 hours after receiving a request from the individual or LAR, the program provider must provide to the individual or LAR a copy of the individual's personal ledger.

(i) Documenting expenditures and deposits.

(1) Expenditures.

(A) Except as provided in subparagraph (C) of this paragraph, a program provider must retain a sales receipt for each expenditure.

(i) If a sales receipt documents an expenditure for more than one individual, the program provider must indicate on the sales receipt the amount allocated to each individual.

(ii) If a sales receipt does not include the specific item or service purchased or the name of the seller, the program provider must attach such documentation.

(B) The program provider must explain each expenditure to the individual and request that the individual sign the receipt. If the program provider determines that the individual does not understand the explanation, the individual does not sign the receipt, or the individual's signature is illegible, a witness to the expenditure must sign the receipt. The witness must not be responsible for managing personal funds or responsible for supervising persons performing such duties.

(C) A sales receipt is not required for an expenditure:

(i) if the program provider makes a purchase on behalf of an individual from a vending machine;

(ii) if an expenditure is within the individual's budgeted amount and the program provider obtains an acknowledgment signed by the individual indicating that the funds were received;

(iii) if the program provider releases funds in response to a written request in accordance with §419.257 of this title (relating to Requests for Personal Funds from Trust Fund Accounts); or

(iv) if the program provider obtains written approval for alternative documentation from the department's Office of Medicaid Administration before the expenditure is made.

(2) Deposits. Except for deposits made electronically, a program provider must retain a deposit slip issued by the financial institution for each deposit.

§419.257. Requests for Personal Funds from Trust Fund Accounts.

If a program provider receives a request from an individual or other person except program provider staff to expend an individual's personal funds without obtaining a receipt and the individual's IDT determines that the expenditure is in the best interest of the individual, the program provider may release such funds to the requestor.

(1) The request must be written, signed by the requestor, and specify the amount and purpose of the expenditure.

(2) A check is not considered a written request for personal funds, even if it is written and signed by the individual.

§419.258. Closing Trust Fund Accounts.

(a) Ownership change. Within 30 days after the effective date of a change in facility ownership, the previous program provider must:

(1) reconcile each statement issued by a financial institution with the account ledger and the personal ledger;

(2) provide the new program provider with a list of all individuals whose personal funds were managed by the previous program provider and their trust fund account balances and personal ledger balance as of the effective date of the transfer;

(3) transfer to the new program provider all personal funds managed by the previous program provider;

(4) retain a receipt from the new program provider indicating the amount of the transfer; and

(5) submit to the department any unidentified personal funds.

(b) Written notice. If the individual or LAR provides written notice that another person has been chosen to manage the individual's personal funds, a program provider must, within 30 days after receiving the notice:

(1) reconcile the individual's statement issued by the financial institution with the account ledger and the personal funds ledger;

(2) transfer all of the individual's personal funds to the person chosen;

(3) retain a receipt from the person indicating the amount of the transfer; and

(4) provide to the person a copy of the individual's current personal funds record.

(c) Discharge. If the individual is discharged from the facility, a program provider must, within 30 days after the discharge:

(1) reconcile the individual's statement issued by a financial institution with the account ledger and personal funds ledger;

(2) transfer all personal funds managed by the program provider:

(A) to the admitting facility, if the individual is discharged to another facility; or

(B) to the individual or LAR, if the individual is not discharged to another facility;

(3) retain a receipt from the admitting facility, individual, or LAR indicating the amount of the transfer; and

(4) provide to the admitting facility, individual, or LAR the individual's current personal funds record.

(d) Unclaimed personal funds. Within 180 days after identifying any unclaimed personal funds, a program provider must make a good faith effort to locate the individual to whom the funds belong or LAR. If the individual or LAR:

(1) is located, the program provider must transfer the funds to the individual or LAR; or

(2) is not located, the program provider must send to TDMHMR, Attention: Cashier, P.O. Box 12668, Austin, Texas 78691:

(A) a statement that the funds are unclaimed;

(B) the program provider's name, address, and vendor identification number;

(C) the individual's name, social security number, date of birth, and last known address;

(D) the LAR's name and address;

(E) a check payable to TDMHMR for the amount of the unclaimed personal funds; and

(F) documentation of the program provider's efforts to locate the individual or LAR.

§419.259. Refunds.

A program provider must refund any private payment it received for services provided during a period covered by Medicaid, including retroactive coverage, within 30 days after accepting the Medicaid payment.

§419.260. Applied Income.

(a) A program provider may only collect applied income in accordance with the procedures authorized by TDHS.

(b) If an individual's applied income has not been determined or the individual's earned or unearned income changes, a program provider must report such information to the TDHS Medicaid eligibility worker.

(c) A program provider must maintain an applied income ledger for each individual that includes the amount of:

(1) applied income owed by the individual;

(2) applied income paid by the individual;

(3) the difference between the applied income owed and the applied income paid by the individual; and

(4) bed hold charges paid by the individual as described in §406.211(d) of this title (relating to Payment for Absences From the Facility).

(d) Within 72 hours after receiving a request from the individual or LAR, a program provider must provide to the individual or LAR a copy of the individual's applied income ledger.

§419.261. Contributions.

If the individual or LAR makes a contribution to a program provider using personal funds, the program provider and the contributor must sign and date an acknowledgement that the program provider's services are not predicated on a contribution and the contribution is voluntary. The acknowledgement must be made a part of the individual's personal funds record.

§419.262. Auditing.

(a) The department periodically audits a program provider to monitor compliance with this subchapter. The department notifies the program provider of its audit date.

(b) The records required by this subchapter must be made available during an audit, including:

(1) personal funds records;

(2) account ledgers;

(3) applied income ledgers;

(4) statements issued by financial institutions for trust fund accounts;

(5) sales receipts; and

(6) petty cash fund ledger.

(c) If the records required by this division are not made available by a program provider or the department determines that the records are not auditable, the department may impose a vendor hold on payments due to the program provider under the provider agreement until the records are available and auditable. If the program provider does not provide such records in accordance with instructions from the department, the department may terminate the provider agreement.

(d) The department will provide a program provider with a report of the audit findings, including corrective actions that must be taken by the program provider and internal control recommendations that may be followed by the program provider. Corrective actions include making refunds to individuals, entering ledger adjustments, submitting unidentified funds to the department, and establishing and maintaining records and systems. The program provider may request an administrative hearing in accordance with Chapter 409, Subchapter B of this title (relating to Adverse Actions) to contest corrective actions required by the department pursuant to this subsection.

(e) If the report of audit findings requires corrective actions and a program provider does not make a request for an administrative hearing in accordance with Chapter 409, Subchapter B of this title, the program provider must complete corrective actions within 60 days after receiving the report of audit findings.

(f) If a program provider does not complete corrective actions required by the department within 60 days after receiving the report of audit findings, the department may:

(1) impose a vendor hold on payments due to the program provider under the provider agreement until the program provider completes corrective actions;

(2) recoup payments due to the program provider under the provider agreement to make refunds to individuals; or

(3) terminate the provider agreement.

(g) Notwithstanding the other provisions set forth in this section, the department may terminate a provider agreement for repeated non-compliance with this division.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006846
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 7. PROVIDER AGREEMENT SANCTIONS

25 TAC §§419.266-419.268

The new sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed new sections affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.266. Department Review of State Survey Agency Findings.

(a) The department may impose a vendor hold if:

(1) a facility of the program provider is determined by the state survey agency to not meet one or more of the following conditions of participation (CoPs), identified by their HCFA ID prefix tags, and the sanction team determines that the facility's failure to meet such CoPs resulted in or may result in a serious injury or death of an individual residing in the facility:

(A) W122, Client Protections;

(B) W266, Client Behavior and Facility Practices; or

(C) W318, Health Care Services; or

(2) a facility of the program provider is determined by the state survey agency to not meet one or more of the HCFA-designated fundamental standards of participation and the sanction team determines that the facility's failure to meet such standards has resulted in or may result in serious harm, injury, or death to an individual; or

(3) a facility of the program provider is determined by the state survey agency to not meet one or more of the HCFA-designated fundamental standards of participation and the sanction team determines that the facility's failure to meet such standards has resulted in a regression in or loss of an individual's functional abilities or indicates a pervasive lack of active treatment.

(b) A copy of the CoPs with the HCFA-designated fundamental standards of participation may be obtained by contacting the Office of Medicaid Administration, Texas Department of Mental Health and Mental Retardation, P.O. Box 112668, Austin, Texas 78711 or from the department's website at (http://www.mhmr.state.tx.us/CentralOffice/Medicaid/i.html).

(c) When making a determination in accordance with subsection (a) of this section, the sanction team will review the state survey agency's report documenting the facility's failure to meet the CoPs or standards of participation which may include a description of:

(1) the situation or occurrence that lead to the deficiency;

(2) the facility's response to the situation or occurrence; and

(3) the facility's practices at the time of the situation or occurrence.

(d) The department will release a vendor hold imposed in accordance with subsection (a) of this section if the state survey agency determines that the facility meets the CoPs or the HCFA-designated fundamental standard of participation that caused the vendor hold.

(e) The department may terminate a provider agreement if, during an 18-month period, three vendor holds are imposed on payments due under that provider agreement in accordance with subsection (a) of this section.

(1) A vendor hold may be used to terminate a provider agreement in accordance with this subsection regardless of whether there was an actual interruption of payment to the program provider.

(2) A vendor hold may be used no more than once to terminate a provider agreement in accordance with this subsection.

§419.267. Department Review of Incidents and Complaints.

(a) The sanction team will review reports of incidents and complaints substantiated by the state survey agency regarding facilities.

(b) The department may require a program provider to implement a directed plan of correction developed by the department if the sanction team determines that the incidents or complaints regarding one or more facilities of the program provider, indicate:

(1) a pattern of error in a particular discipline, such as nursing or psychology; or

(2) deficient facility practices or procedures, such as inadequate staffing or insufficient staff training.

(c) If the department intends to require implementation of a directed plan of correction, the department will send written notice to the program provider of its intent and the basis for the sanction team's determination made in accordance with subsection (b) of this section.

(d) Within 10 days after receipt of the notice provided in accordance with subsection (c) of this section, the program provider may submit written recommendations to the department regarding the content of the directed plan of correction.

(e) The department will develop and send the directed plan of correction to the provider within 30 days after the date of the notice in accordance with subsection (c) of this section.

(f) The department will monitor a program to determine if the program provider has implemented or completed the directed plan of correction. Such monitoring may include reviews of documentation and on-site facility visits.

(g) The department may impose a vendor hold on payments due under one or more provider agreements or terminate one or more provider agreements if the department determines that a program provider has failed to implement the directed plan of correction in accordance with instructions from the department.

(h) The department will release a vendor hold imposed in accordance with subsection (g) of this section if the department determines that the program provider has implemented the directed plan of correction.

§419.268. Termination of Provider Agreement.

(a) The department may terminate a provider agreement:

(1) for reasons set forth in federal or state laws, rules or regulations, including this subchapter and 1 TAC Chapter 355;

(2) if the program provider fails to comply with the terms of the provider agreement, including failure of the facility to maintain certification as an ICF/MR;

(3) if federal or state laws, rules or regulations are enacted, amended, repealed or judicially interpreted so as to render the fulfillment of the provider agreement by either the program provider or the department unfeasible or impossible, and the department and program provider cannot agree upon amendments to the provider agreement necessary to comply with such changes to laws, rules or regulation; or

(4) if a certification made by the program provider in the provider agreement is false or becomes inaccurate.

(b) If a provider agreement is terminated by the department, the department will not enter into a new provider agreement with the program provider until at least two days have elapsed from the effective date of the termination.

(c) The department may enter into a new provider agreement with a program provider that has had its provider agreement terminated if:

(1) within 30 days after termination, the program provider requests a new provider agreement; and

(2) within 90 days after termination, the department or the state survey agency, as appropriate, determines that all deficiencies or actions that led to termination of the provider agreement have been corrected and the program provider is otherwise qualified to enter into a provider agreement.

(d) In determining whether to enter into a new provider agreement in accordance with subsection (c) of this section, the department will consider:

(1) the nature, severity, and pervasiveness of the deficiencies or actions that led to termination of the provider agreement; and

(2) the facility's or the program provider's history of compliance with ICF/MR Program requirements.

(e) The term and effective date of a new provider agreement entered into in accordance with subsection (c) of this section will be determined by the department.

(f) If the department determines not to enter into a new provider agreement:

(1) an MRA must assist the department in relocating individuals who choose to move from the facility; and

(2) the program provider must assist the department or MRA in relocating individuals who choose to move from the facility.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006847
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

DIVISION 11. REFERENCES AND DISTRIBUTION

25 TAC §419.299, §419.300

The new sections are proposed under the Texas Health and Safety Code, §532.015(a), which provides the Texas Board of

Mental Health and Mental Retardation with broad rulemaking authority; the Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a), which provide the Texas Health and Human Services Commission (THHSC) with the authority to administer the federal medical assistance (Medicaid) program in Texas; Acts 1995, 74th Texas Legislature, Chapter 6, §1, (Senate Bill 509), which clarifies the authority of THHSC to delegate the operation of all or part of a Medicaid program to a health and human services agency; and the Human Resources Code, §32.021(c), which provides an agency operating part of the Medicaid program with the authority to adopt necessary rules for the proper and efficient operation of the program. THHSC has delegated to the department the authority to operate the ICF/MR Program.

The proposed new sections affect Texas Government Code, §531.021(a), and the Texas Human Resources Code, §32.021(a) and (c).

§419.299. References.

Regulations and statutes referenced in this subchapter include:

(1) 42 USC, §1302a-7b(f);

(2) 20 CFR Part 416, Subpart F;

(3) 42 CFR §483.440(f)(3);

(4) Texas Government Code, §531.153;

(5) THSC, Chapter 252;

(6) THSC, §533.035;

(7) THSC, §533.062;

(8) Texas Human Resources Code, §32.024;

(9) 1 TAC Chapter 355;

(10) Section 406.211(d) of this title (relating to Payment for Absences from the Facility); and

(11) Chapter 409, Subchapter B of this title (relating to Adverse Actions).

§419.300. Distribution.

(a) Copies of this subchapter shall be distributed to:

(1) members of the Texas Mental Health and Mental Retardation Board;

(2) executive, management, and program staff of the department's Central Office;

(3) chairs of boards of trustees of local MRAs;

(4) CEOs of local MRAs and designated providers; and

(5) interested advocates and advocacy organizations.

(b) The CEOs of local MRAs and designated providers are responsible for distributing copies of this subchapter to:

(1) appropriate staff;

(2) program providers;

(3) agents;

(4) any consumer receiving services and supports who requests a copy;

(5) family members and advocates of consumers who request a copy;

(6) any employee who requests a copy; and

(7) any other person who requests a copy.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006848
Andrew Hardin
Chair, Texas MHMR Board
Texas Department of Mental Health and Mental Retardation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 206-5232

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER Q. ACTUARIAL OPINION AND MEMORANDUM REGULATION

28 TAC §§3.1605 - 3.1609

The Texas Department of Insurance proposes amendments to §§3.1605-3.1609 concerning the adoption by reference of the Actuarial Standards of Practice of the Actuarial Standards Board and exemptions from the actuarial opinion requirement. Insurance Code Article 3.28 §2A(a) requires every life insurance company doing business in this state to annually submit to the department the opinion of a qualified actuary as to whether the reserves and related actuarial items held in support of the policies and contracts of the insurer are computed appropriately, are based on assumptions which satisfy contractual provisions, are consistent with prior reported amounts and comply with applicable laws of this state. The statute directs the commissioner of insurance to define the specific requirements of this opinion by rule. The commissioner adopted Subchapter Q, Actuarial Opinion and Memorandum Regulation (28 Texas Administrative Code §§3.1601-3.1611) in response to the statute's directive. The proposed amendments delete the adoption by reference of the Actuarial Standards of Practice of the American Academy of Actuaries (Academy). The department adopted the standards of the Academy so the department would be able to monitor compliance with these standards independent of the Academy. Since the adoption of the standards in 1992 the department has not found it necessary to take any independent disciplinary actions against an actuary, therefore the department believes the requirements are unnecessary and intends to refer any matters requiring additional action to the Academy for appropriate handling.

The proposed amendments also make changes to §3.1606(c), paragraphs (1)(D), (2)(D) and (5)(D) concerning the criteria for determining the type of actuarial opinion required. The proposed amendments delete the provision concerning designations by the National Association of Insurance Commissioners Examiner

Team since that function of the Examiner Team has been eliminated. The proposed amendment to §3.1605(d) and (f) replaces the language reflecting the adoption of the Standards of Practice of the Actuarial Standards Board with the standard language used in the actuarial profession. The proposed amendment to §3.1606(c) deletes an unnecessary reference to the National Association of Insurance Commissioners model regulation entitled "Model Actuarial Opinion and Memorandum Regulation.

The department will consider the proposed amendments to §§3.1605-3.1609 in a public hearing under Docket No. 2467, scheduled for 10:00 a.m. on November 7, 2000 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas.

Mike Boerner, managing actuary, actuarial division, has determined that for the first five-year period the amended sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended sections as proposed. There will be no impact on local employment or local economy as a result of the proposal.

Mr. Boerner has determined that for the first five years the amended sections are in effect, the public benefit anticipated as a result of the amendments will be more efficient and effective financial regulation of the reserves established by life insurance companies doing business in this state. The sections, as amended, will provide clarification and guidance to the appointed actuaries in rendering their opinions. Insurance Code Article 3.28 §2A(a) requires the actuary rendering the opinion to be a member of the American Academy of Actuaries. The Actuarial Standards Board is the rule making arm of the American Academy of Actuaries. All members of the Academy must comply with the standards adopted by the Actuarial Standards Board, therefore the actuary rendering an opinion under these sections must comply with these standards due to their membership in the Academy. Since the actuarial opinion is required by Insurance Code Article 3.28, the general cost of compliance is a result of the statute, not due to the proposal. Some insurers may be exempt from providing the department an actuarial opinion with an asset adequacy analysis as a result of criteria established in this regulation, which will reduce the cost of compliance with the statute for those insurers. The department finds it is neither legal nor feasible to waive the proposed regulation for micro or small businesses as Insurance Code Article 3.28 requires all insurers to provide the department an actuarial opinion.

To be considered, all comments must be in writing and received no later than 5:00 p.m. on November 13, 2000 by Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The amendments are proposed under Insurance Code Article 3.28 and §36.001. The Insurance Code Article 3.28, §2A, authorizes and requires the Commissioner of Insurance to define the specific requirements of actuarial opinions required under Article 3.28, including matters deemed to be necessary to the scope of such opinions. Section 36.001 authorizes the Commissioner to determine rules for general and uniform application for the conduct and execution of the duties and functions of the department.

Sections 3.1605 - 3.1609 affect Insurance Code Article 3.28.

§3.1605. General Requirements.

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

(d) Standards for asset adequacy analysis. The asset adequacy analysis required by this regulation [~~:~~]

[~~(1)~~] shall conform to accepted standards of actuarial practice required of qualified actuaries [~~the Standards of Practice as adopted by the Actuarial Standards Board, as of October 1, 1994,~~] and any additional standards under this regulation [~~, which standards are to form the basis of the statement of actuarial opinion in accordance with §3.1608 of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis);~~]

[~~(2) shall be based on methods of analysis as are deemed appropriate for such purposes by the Actuarial Standards Board~~].

(e) (No change.)

(f) Standards for an actuarial opinion not based on an asset adequacy analysis. The actuarial opinion rendered under §3.1607 of this title [~~(relating to Statement of Actuarial Opinion Not Including an Asset Adequacy Analysis)~~]shall conform to accepted standards of actuarial practice required of qualified actuaries [~~the Standards of Practice as adopted by the Actuarial Standards Board as of October 1, 1994,~~] and any additional standards under this regulation.

§3.1606. Required Opinions.

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

(c) Exemption eligibility tests. Exemption eligibility shall be in accordance with criteria set forth in paragraphs (1)-(7) of this subsection. [~~which include the criteria in the adopted model regulation by the National Association of Insurance Commissioners, as of September 15, 1992, entitled "Actuarial Opinion and Memorandum Regulation."~~]

(1) Any Category A company that, for any year beginning with the year in which this subchapter becomes effective, meets all of the following criteria shall be eligible for exemption from submission of a statement of actuarial opinion in accordance with §3.1608 of this title (relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis) for the year in which these criteria are met. The ratios in subparagraphs (A), (B), and (C) of this paragraph shall be calculated based on amounts as of the end of the calendar year for which the actuarial opinion is applicable.

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

[~~(D) The Examiner Team for the National Association of Insurance Commissioners has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or the company has resolved the first or second priority status to the satisfaction of the commissioner of the state of domicile and the commissioner has so notified the chair of the NAIC Life and Health Actuarial Task Force and the NAIC Staff and Support Office.~~]

(2) Any Category B company that, for any year beginning with the year in which this subchapter becomes effective, meets all of the following criteria shall be eligible for exemption from submission of a statement of actuarial opinion in accordance with §3.1608 of this title [~~(relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis)~~] for the year in which the criteria are met. The ratios in subparagraphs (A), (B), and (C) of this paragraph shall be calculated based on amounts as of the end of the calendar year for which the actuarial opinion is applicable.

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

[(D) The Examiner Team for the National Association of Insurance Commissioners has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or the company has resolved the first or second priority status to the satisfaction of the commissioner of the state of domicile and the commissioner has so notified the chair of the NAIC Life and Health Actuarial Task Force and the NAIC Staff and Support Office.]

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

(5) Any Category C company that, after submitting an opinion in accordance with §3.1608 of this title [(relating to Statement of Actuarial Opinion Based on an Asset Adequacy Analysis)], meets all of the following criteria shall not be required, unless required in accordance with paragraph (7) of this subsection, to submit a statement of actuarial opinion in accordance with §3.1608 of this title more frequently than every third year. Any Category C company which fails to meet all of the following criteria for any year shall submit a statement of actuarial opinion in accordance with §3.1608 of this title for that year. The ratios in subparagraphs (A), (B), and (C) of this paragraph shall be calculated based on amounts as of the end of the calendar year for which the actuarial opinion is applicable.

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

[(D) The Examiner Team for the National Association of Insurance Commissioners has not designated the company as a first priority company in any of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or a second priority company in each of the two calendar years preceding the calendar year for which the actuarial opinion is applicable, or the company has resolved the first or second priority status to the satisfaction of the commissioner of the state of domicile and the commissioner has so notified the chair of the NAIC Life and Health Actuarial Task Force and the NAIC Staff and Support Office.]

(6)-(7) (No change.)

(d) (No change.)

§3.1607. Statement of Actuarial Opinion Not Including an Asset Adequacy Analysis.

(a) (No change.)

(b) Recommended language. The language provided in paragraphs (1) - (10) of this subsection is that which in typical circumstances would be included in a statement of actuarial opinion in accordance with this section. The language may be modified as needed to meet the circumstances of a particular case, but the appointed actuary should use language which clearly expresses his or her professional judgment. Regardless of language used, the opinion shall retain all pertinent aspects of the language provided this section.

(1)-(5) (No change.)

(6) The opinion paragraph should include the following: In my opinion the amounts carried in the balance sheet on account of the actuarial items identified above: are computed in accordance with appropriate actuarial standards consistently applied; are based on actuarial assumptions which produce reserves at least as great as those called for in any contract provision as to reserve basis and method, and are in accordance with all other contract provisions; meet the requirements of the insurance law and regulations of the state of (state of domicile) and are at least as great as the minimum aggregate amounts required by the state in which this statement is filed; are computed on the basis of assumptions consistent with those used in computing the corresponding items in the annual statement of the preceding year-end (with any exceptions as noted below); and include provision for all actuarial reserves and related statement items which ought to be established. The actuarial methods, considerations and analyses used in forming my opinion conform to the appropriate Standards of Practice as adopted by the Actuarial Standards Board [, as of October 1, 1994].

(7) The concluding paragraph should document the eligibility for the company to provide an opinion as provided by this section. It shall include the following items.
Figure: 28 TAC §3.1607(b)(7)

(8)-(10) (No change.)

§3.1608. Statement of Actuarial Opinion Based on an Asset Adequacy Analysis.

(a) (No change.)

(b) Recommended language. The following paragraphs are to be included in the statement of actuarial opinion in accordance with this section. Language is that which in typical circumstances should be included in a statement of actuarial opinion. The language may be modified as needed to meet the circumstances of a particular case, but the appointed actuary should use language which clearly expresses his or her professional judgment. However, in any event the opinion shall retain all pertinent aspects of the language provided in this section.

(1)-(5) (No change.)

(6) The opinion paragraph should include the following:
Figure: 28 TAC §3.1608(b)(6)

(c)-(e) (No change.)

§3.1609. Description of Actuarial Memorandum.

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

(c) Conformity to standards of practice. The memorandum shall include a statement with wording substantially similar to that of this subsection as follows: Actuarial methods, considerations and analyses used in the preparation of this memorandum conform to the appropriate Standards of Practice as adopted by the Actuarial Standards Board, [as of October 1, 1994] which standards form the basis for this memorandum.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006859
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

The Texas Department of Insurance proposes the repeal of §§7.10, 7.11, 7.12, 7.16, 7.17, 7.18, 7.21, 7.615, and

7.1101-7.1107 concerning certain accounting treatments. The repeal is necessary to permit the department to adopt certain accounting standards, treatments and practices in proposed new §7.18 that is published elsewhere in this issue of the *Texas Register*. The new §7.18 will replace, to the extent applicable, all of the repealed sections. The repeal of these sections is necessary to provide consistency in the regulations applicable to the accounting standards, treatments and practices of insurers doing business in Texas. The department will consider the proposed repeal of §§7.10, 7.11, 7.12, 7.16, 7.17, 7.18, 7.21, 7.615, and 7.1101-7.1107 in a public hearing under Docket No. 2468, scheduled for 10:00 a.m. on November 7, 2000, in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas.

Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program has determined that, for the first five-year period the repeal of the sections will be in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal, and there will be no effect on local employment or local economy.

Ms. Patterson also has determined that, for each year of the first five years the repeal of the sections will be in effect, the public benefit anticipated as a result of the repeal of the sections will be more efficient and standardized accounting by insurers and health maintenance organizations licensed to do business in Texas. There is no economic cost to persons who are required to comply with the repeal as proposed. The department finds it is neither legal nor feasible to reduce the effect of the proposed section for micro or small businesses. The solvency of an insurer must be measured fairly and objectively, regardless of the size of the insurer.

To be considered, all comments must be in writing and received no later than 5:00 p.m. on November 13, 2000 by Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be submitted to Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §§7.10, 7.11, 7.12, 7.16, 7.17, 7.18, 7.21

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

The repeal of the sections is proposed under the Insurance Code, Articles 1.11, 1.32, 3.10, 3.28, 5.75-1, 20A.10, 20A.22, 21.39-B, and 21.49-1 and §36.001. These articles authorize the Commissioner of Insurance to adopt rules to establish or set standards for the evaluation of the financial condition of insurers and health maintenance organizations, including reinsurance transactions, reserves and insurance holding company system transactions. Section 36.001 authorizes the Commissioner of Insurance to adopt rules for the conduct and execution of the duties and functions of the department as authorized by statute.

Insurance Code, Articles 1.11, 1.32, 3.10, 3.28, 5.75-1, 20A.10, 20A.22, 21.39-B, and 21.49-1 and §32.041 are affected by the repeal of the sections.

§7.10. Admitted Assets-Insurance Code, Article 3.01, §10(b).

§7.11. National Association of Insurance Commissioners Examiners Handbook.

§7.12. Calculation of the Liability for Unrealized Profit on the Sale of Real Estate.

§7.16. National Association of Insurance Commissioners Purposes and Procedures of the Securities Valuation Office Manual.

§7.17. Premium Notes and Other Memoranda or Evidences of Premiums Payable as Admissible Assets of Fire and Casualty Insurance Companies.

§7.18. National Association of Insurance Commissioners Accounting Practices and Procedures Manuals.

§7.21. Admitted Assets, the Texas Insurance Code, Article 6.12, §5, and Article 8.07, §2.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006854
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

SUBCHAPTER F. REINSURANCE

28 TAC §7.615

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

The repeal is proposed under the Insurance Code, Articles 1.11, 1.32, 3.10, 3.28, 5.75-1, 20A.10, 20A.22, 21.39-B, and 21.49-1 and §36.001. These articles authorize the Commissioner of Insurance to adopt rules to establish or set standards for the evaluation of the financial condition of insurers and health maintenance organizations, including reinsurance transactions, reserves and insurance holding company system transactions. Section 36.001 authorizes the Commissioner of Insurance to adopt rules for the conduct and execution of the duties and functions of the department as authorized by statute.

Insurance Code, Articles 1.11, 1.32, 3.10, 3.28, 5.75-1, 20A.10, 20A.22, 21.39-B, and 21.49-1 and §32.041 are affected by the repeal of this section.

§7.615. Regulation of Accounting for Reinsurance Agreements by Property and Casualty Insurers.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006855
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

SUBCHAPTER K. PURCHASING AND SELLING OF EXCHANGE-TRADED CALL AND PUT OPTIONS CONTRACTS

28 TAC §§7.1101 - 7.1107

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

The repeals are proposed under the Insurance Code, Articles 1.11, 1.32, 3.10, 3.28, 5.75-1, 20A.10, 20A.22, 21.39-B, and 21.49-1 and §36.001. These articles authorize the Commissioner of Insurance to adopt rules to establish or set standards for the evaluation of the financial condition of insurers and health maintenance organizations, including reinsurance transactions, reserves and insurance holding company system transactions. Section 36.001 authorizes the Commissioner of Insurance to adopt rules for the conduct and execution of the duties and functions of the department as authorized by statute.

Insurance Code, Articles 1.11, 1.32, 3.10, 3.28, 5.75-1, 20A.10, 20A.22, 21.39-B, and 21.49-1 and §32.041 are affected by the repeal of the sections.

§7.1101. Authority.

§7.1102. Definitions.

§7.1103. Purchase of Exchange-Traded Put and Call Options.

§7.1104. Sale of Exchange-Traded Call Options.

§7.1105. Accounting for Hedges of Items Carried at Market Value or Amortized Cost.

§7.1106. Administration and Recordkeeping.

§7.1107. Severability Provision.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006856
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.18, §7.85

The Texas Department of Insurance proposes new §7.18 and amendments to §7.85 concerning examination and financial analysis. Proposed §7.18 will provide for the adoption by reference of statutory accounting principles which provide guidance to independent accountants, industry accountants and department analysts and examiners as to how to properly record business transactions for the purpose of accurate statutory reporting. This new section is necessary to provide independent accountants, insurance companies, and department examiners and analysts with more complete accounting guidance, to permit the use of a widely used regulatory tool, and to enhance regulatory efficiency. Simultaneously with this proposal the department is proposing the repeal of §7.18, which is published elsewhere in this issue of the *Texas Register*. According to information available to the department, all 50 states have or will propose adoption of the Accounting Practices and Procedures Manual (Manual) published by the National Association of Insurance Commissioners (NAIC). The Manual, previously known as "Codification," is designed to provide a nationwide standard method of accounting which most insurers, including health maintenance organizations, will be required to use for statutory financial reporting guidance, thus creating a more consistent regulatory environment. The principles in the Manual will be updated from time to time as accounting issues arise. When new versions of the Manual are made available by the NAIC, the Commissioner of the Texas Department of Insurance will consider the new version and, if he deems appropriate, propose for public comment adoption of the new version, with any necessary modifications, by rule. The Manual is a single source intended to replace three accounting manuals and accounting guidance contained in the NAIC examiner's handbook which the department previously adopted by rule. The Manual contains a preamble, Statements of Statutory Accounting Principles (SSAPs), and Appendices. There are a total of 73 SSAPs, with each SSAP providing specific guidance on the accounting treatment to be afforded insurance transactions. The SSAPs are designed to capture the accounting concepts of conservatism, recognition, and consistency. Conservatism is a concept which mandates that when there is exposure to uncertainty and risk, a company's accounting measurement and disclosure should be cautious and prudent until the given situation is more certain. The concept of recognition addresses the issue of when a transaction should be recorded; recognition generally takes place when the data is reliable, measurable, relevant and meets a definition for the purposes of classification. The concept of consistency means that the accounting procedure used should conform with the procedure that has been previously used to record that particular type of transaction. In addition, the Manual furthers the accounting concept of comparability in that it is a single source of statutory accounting guidance which will ensure that all insurers report their financial information in a format that allows for reconciliation between differing state requirements. The comparability of insurers' financial statements increases the usefulness of financial information to the public and the department and also eases the regulatory burden upon insurers doing business in more than one state. For instance, under the Manual, a foreign insurer, need only prepare one set of statutory documents in accordance with its domiciliary state requirements and limitations and then merely prepare a reconciliation indicating the impact resulting from differences between that domiciliary state's accounting requirements and limitations and the requirements of the Manual. Conversely, a Texas domestic insurer need only prepare one set of statutory documents for the department and prepare a reconciliation

indicating the differences between Texas' accounting requirements and the Manual for other states. The Manual is not intended to preempt state legislative or regulatory authority, but is rather to serve as guidance for Texas' statutory accounting principles subject to the pronouncements of the Texas Legislature and the Commissioner of Insurance. To the extent the Manual conflicts with Texas law and regulations, Texas law and regulations prevail. Nothing in this proposal alters the investment or managerial decisions that an insurer may legally make under the Texas Insurance Code or applicable rules. If a transaction is not permitted by the Texas Insurance Code, the transaction continues to be prohibited even if the Manual provides a method to account for such transaction. If an item is not admitted as an asset by the Texas Insurance Code or by rule, it is still not admitted even if the Manual indicates otherwise. Also, if an item is admitted by the Texas Insurance Code or by rule, that asset will continue to be admitted notwithstanding the provisions of the Manual. Furthermore, any liabilities or reserves which are required by the Texas Insurance Code or by rule must still be established even if such reserves are not contemplated by the Manual. Again, this proposed adoption by reference of the Manual merely provides guidance as to the proper accounting methods to be used, in the absence of any statutory or regulatory mandate, to record transactions into which an insurer enters. To ensure that the Commissioner reserves the discretion necessary to direct companies that are placed in supervision or conservation, the directives of his appointed supervisor or conservator are placed in new §7.18 as a source of accounting guidance. Also, to further ensure the Commissioner reserves needed discretion, instructions, such as those contained in permitted practice letters, are listed as a source of accounting guidance that may be used to resolve statutory accounting issues as they may arise from time to time. The department has identified, as of the date of this publication, the following provisions of the Texas Insurance Code that preempt, in part, SSAPs contained in the Manual: Articles 2.10, 3.01, 3.33, 3.39, 3.40, 6.01, 6.08, 6.12, 8.07, 8.19, 9.18, and 21.49-1. The subsequent summaries highlight the portions of the SSAPs that are ineffective. The SSAPs are not applicable, in whole or in part, to the extent an article of the insurance code or section of the administrative code preempts them. However, preemption shall not affect the application of other portions of the SSAPs which can be given effect without the preempted provision. Texas Insurance Code Article 2.10 preempts SSAPs 37 and 48 insofar as SSAP 37 classifies investments in mortgage loans prohibited by Article 2.10 as admissible assets and SSAP 48 defines admitted assets to include investments in general partnerships. Texas Insurance Code Article 3.01 preempts SSAP 6 insofar as SSAP 6 requires any uncollectible receivable, including uncollected premiums, to be written off and charged to income in the period the insurer determines the item is uncollectible and insofar as the definition of an admitted asset differs from the article's definition of "net asset." Article 3.01 preempts SSAP 16 insofar as SSAP 16 does not admit electronic machines and data processing systems to the extent that the total actual cash market value of such systems, among other items, exceeds $2000 and constitutes not more than 10% of the otherwise admitted assets of companies subject to Article 3.01. Article 3.01 also preempts SSAP 16 insofar as SSAP 16 admits electronic data processing systems in an amount that does not exceed $2000 of the total actual cash market value of such systems and/or constitutes more than 10% of the otherwise admitted assets of a company subject to Article 3.01. Article 3.01 also preempts SSAP 16 insofar as SSAP 16 admits electronic data processing systems in an amount that does not exceed $2000 and/or constitutes more than 10% of the otherwise admitted assets of the company subject to Article 3.01. Article 3.01 preempts SSAP 19 insofar as SSAP 19 would not admit office equipment, furniture, machines and labor-saving devices, along with the value of other items listed in Article 3.01 §10(b), to the extent that the total actual cash market value constitutes no more than 10% of the otherwise admitted assets of such company and does not exceed $2000. Article 3.33 preempts, in part, SSAPs 19, 30, 37, and 48 insofar as SSAP 19 would not admit as an asset leasehold estate improvements and fixtures thereon as permitted by law, SSAP 30 would admit as an asset an investment as a general partner, SSAP 37 would admit construction loans on residential property and ownership of residential property, except such property acquired through foreclosure, and SSAP 48 admits investments as a general partner. Article 3.33 and Article 3.40 preempt SSAP 40 insofar as SSAP 40 requires a building to be occupied by a company and an affiliate more than 50% before it is classified as an admitted asset, does not require the sale of real property within 10 years of acquisition for satisfaction of a debt if such acquisition causes the real estate investment to exceed 33-1/3% of an insurer's assets, and requires that, to be admitted as an asset, an insurer must occupy greater than 50% of a branch office. Article 3.33 also preempts SSAP 40 insofar as SSAP 40 does not provide that the admissible value of the property acquired pursuant to Article 3.33 is subject to the review and approval of the Commissioner. Article 3.39 preempts SSAP 38 insofar as SSAP 38 would admit construction loans on residential property. In addition to the aforementioned preemption, Article 3.40 also preempts SSAP 40 insofar as SSAP 40 does not permit, after the cost basis of real estate has been written down, an insurer to change the basis of real estate to recover subsequent increases in fair value without department approval. Article 6.01 preempts SSAP 53 insofar as SSAP 53 mandates that insurers compute the unearned premium reserve with either the daily pro-rata method or the monthly pro-rata method. Article 6.08 preempts SSAP 40 insofar as SSAP 40 does not require that real estate purchases shall be appraised by two disinterested citizens of Texas and does not limit such investment to no more than 33-1/3% of an insurer's admitted assets. Article 6.12 preempts SSAP 16 insofar as SSAP 16 does not admit, as an asset, electronic data processing equipment to the extent the total actual cash value of all such systems, along with the value of other items listed in Article 6.12 §5, exceeds $2000 and constitutes less than 5.0% of the otherwise admitted assets of companies subject to Article 6.12. Article 6.12 also preempts SSAP 16 insofar as SSAP 16 does admit as an asset, electronic data processing equipment that does not exceed $2000 and/or constitutes more than 5.0% of the otherwise admitted assets of companies subject to Article 6.12. Article 8.07 preempts SSAP 16 insofar as it classifies the value of electronic data processing equipment as an admitted asset, up to 3.0% of adjusted capital and surplus, and contradicts the limitation on such admission as contained in Article 8.07. Article 8.19 preempts SSAP 40 insofar as SSAP 40 does not require that real estate purchases shall be appraised by two disinterested citizens of Texas and does not limit such investment to no more than 33 1/3% of a company's admitted assets. Article 9.18 preempts SSAP 57 insofar as SSAP 57 does not classify title plants which exceed the lessor of 20% of admitted assets or 40% of surplus to policyholders as an admitted asset. Article 21.49-1 preempts SSAP 46 insofar as SSAP 46 includes an official position or corporate office in the definition of "control," does not permit the use of methods

of subsidiary valuation expressly authorized by Article 21.49-1, and mandates that investments for noninsurance subsidiary, controlled, and affiliated entities that have no significant ongoing operations other than to hold assets that are primarily for the direct or indirect benefit or use of the reporting entity or its affiliates and that do not qualify for the market valuation approach, as defined in SSAP 46, must be recorded based on their underlying equity adjusted to a statutory basis of accounting. Article 21.49-1 also preempts SSAP 25 and SSAP 68 insofar as SSAP 25 requires commissioner approval of all loans or advances regardless of amount and SSAP 68 limits goodwill to being calculated only under the methods of subsidiary valuation permitted by SSAP 46. The department has identified several provisions of Title 28 of the Texas Administrative Code (TAC) which conflict with the Manual. The department proposes to amend §7.85 concerning audited financial statements to harmonize the section with the Manual. Elsewhere in this issue of the *Texas Register* the department proposes to amend §11.803, concerning investments, loans and other assets of HMO to bring the section into harmony with the Manual. The department also proposes to amend §§3.1605-3.1609, which state the general requirements for actuarial opinions, to harmonize the section with the manual. Sections 7.10, 7.12, 7.16, 7.17, 7.18, 7.21, 7.615, and 7.1101-1105 are simultaneously proposed for repeal and are published elsewhere in this issue of the *Texas Register*. However, §7.7 is not proposed for repeal or modification and preempts SSAP 41, paragraphs 9 and 10, in their entirety. Sections 3.1501 - 3.1505, among other things, permit the use of the 1983 Group Annuity Mortality Table and are not proposed for repeal or modification and will preempt any contrary provisions of the Manual. Section 3.1606(c)(6), which exempts certain stipulated premium companies from the requirement to perform an asset adequacy analysis, is not proposed for repeal or modification and will preempt any such requirements in the Manual. Section 3.7004, which relates to required contract reserves for individual and group accident and health insurance, is not proposed for repeal or modification and will preempt any contrary requirements in the Manual. Statement of Statutory Accounting Principles 7 mandates the recognition of liabilities for an Asset Valuation Reserve (AVR) and an Interest Maintenance Reserve (IMR). Some Texas domestic companies historically have not been required to establish such reserves. To ease the burden on such Texas domestic companies this proposal will only require Texas domestic companies to establish an IMR for those investments disposed of after December 31, 2000. Furthermore, this proposal will only require such Texas domestic companies to establish an AVR on investments held as of January 1, 2001, and acquired thereafter. The Manual, in SSAP 26, would require companies to obtain a Committee on Uniform Securities Identification Procedures number for certificates of deposit with a maturity of greater than one year and also require a company to submit the certificate of deposit to the Securities Valuation Office of the NAIC for valuation purposes. This has not previously been required in Texas and this proposal does not impose any such requirements.

The department will consider proposed new §7.18 and the proposed amendments to §7.85 in a public hearing under Docket No. 2466, scheduled for 10:00 a.m. on November 7, 2000 in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas. Copies of the documents proposed for adoption by reference are available for inspection in the Financial Division and Chief Clerk's Office of the Texas Department of Insurance, William P. Hobby Jr. State Office Building, 333 Guadalupe, Austin, Texas.

Ms. Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, has determined that, for the first five years the proposed sections are in effect, there will be no fiscal implications for state or local government as a result of this proposal, and there will be no effect on local employment or the local economy.

Ms. Patterson has also determined that, for each year of the first five years the proposed sections are in effect, the public benefit will be the more efficient regulation of insurance and a decrease in costs to insurers that are currently required to file multiple financial statements in multiple states. The proposed adoption of the Manual will provide for a more consistent regulatory environment and will become a single source for accounting guidance replacing three accounting practice and procedures manuals previously adopted by the department. The March 2000 Manual is available from the NAIC at a cost of $200 for a soft cover manual and $395 on CD-ROM. The cost to comply with the provisions of the Manual will vary from insurer to insurer. Based upon the department's experience, each company will have to ensure that at least one employee familiar with the company's accounting practices is instructed in the provisions of the Manual. This instruction will either be accomplished through self-study, attendance at a seminar, or a combination of the two methods. The NAIC offers a self-study course at a cost of $175 per copy. Seminars which offer instruction on the Manual cost approximately $850 per attendee for a two day course. The number of employees sent to training is largely dependent on the size and expertise of the company's accounting staff, but is not dependent on the overall size of the company. As the size of the accounting staff increases, so does the likelihood that the company will choose to send more than one employee to a seminar for training. The department estimates that companies with five or fewer accounting employees will either require the use of self-study training or send one employee to a seminar. Those companies with six to ten employees on the accounting staff will likely send one to three employees to seminars for instruction and supplement that training with self-study materials. Those companies with eleven or more employees on the accounting staff will likely send three or more employees to seminars and supplement with self-study materials. Each employee is estimated to be compensated at a rate of $17 to $30 an hour. These estimates are based upon the department's discussions with industry representatives. Implementation of the Manual may also require changes to a company's electronic accounting system. The cost of changes to accounting systems is dependent on the company's line of insurance, the complexity of the company's transactions, and whether the system is proprietary or created by third party vendors. Costs due to system changes increase with the complexity of transactions and the percentage of proprietary computer code in the system. In the department's experience, small companies do not usually rely upon internally created proprietary systems and do not generally enter complex transactions on a regular basis. Large companies are more likely to have an internally created proprietary system and enter into complex transactions. Accordingly, system change costs will be greater for large companies. As an example a large insurer with assets greater than $400 million dollars has estimated that its approximate internal implementation costs will be $250,000. Furthermore, implementation of the Manual may lead to increased consultation with outside accounting firms. The cost of the consultation will vary from insurer to insurer and will cost from $100 to $350 per hour. It also appears that a smaller company will incur a lower cost. Also, as the complexity of the transactions

a company enters into is reduced, so does the cost of consultation. A large company, for instance, may incur approximately $150,000 in costs from consultations with outside accounting firms. Thus, based upon all of the foregoing, it is the department's position that the adoption of the Manual will have no adverse economic effect on small and micro businesses. Farm mutual insurance companies, mutual assessment companies, mutual aid associations, and mutual burial associations will incur no costs from the adoption of the Manual, as they are specifically excepted from the requirements of the Manual. Such companies have traditionally accounted for their business on a cash basis and the department has determined that compliance with the provisions of the Manual is not necessary for these types of companies. Regardless of the fiscal effect, the requirements of this rule are mandated by the underlying state statutes, and considering the statute's purposes, it is neither legal nor feasible to waive or modify the requirements of these sections for small and micro businesses, as doing so would result in a disparate effect on enrollees, policyholders, and other persons affected by these rules.

To be considered, all comments on the proposal must be received in writing no later than 5:00 p.m. on November 13, 2000. All comments should be submitted to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be submitted simultaneously to Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, P.O. Box 149104, Austin, Texas 78714-9104.

The sections are proposed under the Texas Insurance Code Articles 1.11, 1.15, 1.32, 3.01, 3.33, 5.61, 6.12, 8.07, 20A.22, 21.28-A, 21.39, 21.49-1, and §§32.041 and 36.001. Article 1.15 mandates that the department of insurance examine the financial condition of each carrier organized under the laws of Texas or authorized to transact the business of insurance in Texas and, by rule, adopt procedures for the filing and adoption of examination reports. Article 1.11 and §32.041 authorize the Commissioner to provide required financial statement forms. Article 21.39 authorizes the Commissioner to adopt rules for establishing reserves applicable to each line of insurance recommended by the NAIC. Article 1.32 authorizes the Commissioner to establish standards for evaluating the financial condition of an insurer. Article 20A.22 authorizes the Commissioner to promulgate rules as are necessary to carry out the provisions of the Texas Health Maintenance Organization Act. Article 5.61 provides that reserves shall be computed in accordance with rules adopted by the Commissioner for the purpose of adequately protecting insureds. Article 21.28-A authorizes the Commissioner to adopt rules necessary to accomplish the purposes of the act. Articles 6.12, 8.07 and 3.01 authorize the Commissioner to adopt rules defining electronic machines and systems, office equipment, furniture, machines and labor saving devices and the maximum period for which each such class may be amortized. Article 3.33 authorizes the Commissioner to adopt such rules, minimum standards, or limitations as may be appropriate for the implementation of the article. Article 21.49-1 authorizes the Commissioner to issue rules, and orders necessary to implement the provisions of the article. Section 36.001 authorizes the Commissioner to adopt rules for the conduct and execution of the powers and duties of the department only as authorized by statute.

The following articles of the Texas Insurance Code are affected by this proposal: Articles 1.11(b), 1.15, 3.01, 6.12, 8.07, 21.39 and §32.041.

§7.18. NAIC Accounting Practices and Procedures Manual.

(a) The purpose of this section is to adopt statutory accounting principles, which will provide independent accountants, industry accountants and department analysts and examiners guidance as to how to properly record business transactions for the purpose of accurate statutory reporting. The March 2000 version of the National Association of Insurance Commissioners Accounting Practices and Procedures Manual (Manual) will be utilized as the guideline for statutory accounting principles in Texas to the extent the Manual does not conflict with provisions of the Texas Insurance Code or rules of the department. The Commissioner reserves all authority and discretion to resolve any accounting issues in Texas. When making a determination on the proper accounting treatment for an insurance or health plan transaction the Commissioner shall refer to the sources in paragraphs (1)-(6) of this subsection in the respective order of priority listed. Furthermore, §§ 3.1501-3.1505, 3.1605, 3.1606, 3.7004, 7.7, 7.85 and 11.803of this title (relating to Annuity Mortality Tables, General Requirements, Required Opinions, Contract Reserves, Subordinated Indebtedness, Audited Financial Reports and Investments, Loans and Other Assets), preempt any contrary provisions in the Manual.

(1) Texas statutes;

(2) department rules;

(3) directives, instructions and orders of the Commissioner;

(4) the Manual;

(5) other NAIC handbooks, manuals, and instructions, adopted by the department; and

(6) Generally Accepted Accounting Principles.

(b) The Commissioner adopts by reference the March 2000 version of the Accounting Practices and Procedures Manual published by the NAIC, with the exceptions and additions set forth in subsections (c) and (d) of this section, as the source of accounting principles for the department when examining financial reports and for conducting statutory examinations and rehabilitations of insurers and health maintenance organizations licensed in Texas, except where otherwise provided by law. This adoption by reference shall be applied to examinations conducted as of January 1, 2001 and thereafter and also shall be used to prepare all financial statements filed with the department for periods after January 1, 2001.

(c) The Commissioner adopts the following exceptions and additions to the Manual:

(1) Unless a Texas domestic insurer is licensed in a state that requires an Interest Maintenance Reserve (IMR), a Texas domestic insurer need only establish an IMR, as would be required by Statement of Statutory Accounting Principles number 7, for applicable investments disposed of after December 31, 2000.

(2) Unless a Texas domestic insurer is licensed in a state that requires an Asset Valuation Reserve (AVR), a Texas domestic insurer need only establish an AVR, as would be required by Statement of Statutory Accounting Principles number 7, on investments held as of January 1, 2001, and acquired thereafter.

(3) Electronic machines, constituting a data processing system or systems and operating systems software used in connection with the business of an insurance company acquired after December 31, 2000, may be an admitted asset as permitted by Texas Insurance Code Articles 3.01, 6.12, 8.07, and any other applicable law and shall be amortized as provided by the Manual. All such property acquired prior

to January 1, 2001, may be an admitted asset as permitted by Texas Insurance Code Articles 3.01, 6.12, 8.07, and any other applicable law, and shall be amortized in full over a period not to exceed ten years.

(4) Furniture, labor-saving devices, machines, and all other office equipment may be admitted as an asset as permitted by Texas Insurance Code Articles 3.01, 6.12, 8.07, and any other applicable law and, for such property acquired after December 31, 2000, depreciated in full over a period not to exceed five years. All such property acquired prior to January 1, 2001, may be an admitted asset as permitted by Texas Insurance Code Articles 3.01, 6.12, 8.07, and any other applicable law, and shall be depreciated in full over a period not to exceed ten years.

(5) Written premiums for all property and casualty contracts, other than contracts for workers' compensation, shall be recorded as of the effective date of the contract rather than on the effective date of the contract as stated in Statement of Statutory Accounting Principles number 53.

(6) Goodwill, as reported on a regulated entity's statutory financial statements as of December 31, 2000, and any additional goodwill acquired thereafter, beginning January 1, 2001, shall be admitted as an asset and accounted for as permitted by Statements of Statutory Accounting Principles numbers 61 and 68. All other amounts of goodwill, including, but not limited to, such amounts that may have been previously expensed, shall not be allowed as an admitted asset. However, notwithstanding the provisions of Statements of Statutory Accounting Principles numbers 61 and 68, all methods of non-insurer subsidiary and affiliate valuation permitted by Article 21.49-1 §6A may be used for the purposes of goodwill calculation.

(7) All certificates of deposit, of any maturity, may be classified as cash and are subject to the accounting treatment contained in Statement of Statutory Accounting Principles number 2, notwithstanding the provisions of Statement of Statutory Accounting Principles number 26.

(d) A farm mutual insurance company, statewide mutual assessment company, local mutual aid association, or mutual burial association that has less than $5 million in annual direct written premiums need not comply with the Manual.

(e) This section shall not be construed to either broaden or restrict the authority provided under the Texas Insurance Code to insurers, including health maintenance organizations.

§7.85. Audited Financial Reports.

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

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

(11) Material--As defined in the NAIC Accounting Practices and Procedures Manual adopted in §7.18 of this title (relating to NAIC Accounting Practices and Procedures Manual.) [~~An item of information that should be reported if it is significant enough to have an effect on the decision maker. Materiality is dependent upon the relative size of an item, the precision with which the item can be estimated, the nature of the item, and the dollar amount above which the auditor's perspective of the item will be influenced. An item is material for accounting purposes if the omission or misstatement of it, in light of surrounding circumstances, makes it probable that the judgment of a reasonable person relying on the information would have been changed or influenced by the omission or misstatements~~].

(b) Priority of Accounting Guidance [~~Hierarchy of Authority~~]. The priority for determination of accounting standards is set out in §7.18 of this title [~~paragraphs (1)-(3) of this subsection. For guidance on matters not specifically addressed by the resources set out in paragraphs (1)-(3) of this subsection, the Department shall first rely upon other NAIC handbooks, manuals, and instructions, and if further direction is needed, shall rely upon GAAP. GAAP is prescribed to the extent not conflicting with the hierarchy of authority set out in this subsection~~].

[~~(1) Texas statutes.~~]

[~~(2) Department rules and regulations.~~]

[~~(3) Directives and orders of the Commissioner, and any examiner's handbooks, manuals, bulletins, and/or instructions adopted by the Department.~~]

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

(e) Conduct of audit. The annual audit required by the Insurance Code, Article 1.15A, shall be conducted in accordance with GAAS. It is not the department's intent to expand audit testing beyond the requirements of GAAS. To the extent not inconsistent with GAAS, consideration shall be given to the procedures and conventions set out in paragraphs (1)-(4) of this subsection, as follows:

(1) audit procedures and format contained in the NAIC Examiners Handbook;

(2) accounting treatments for the particular line(s) of insurance contained in §7.18 of this title [~~the NAIC Accounting Practices and Procedures manuals~~] and the NAIC Annual Statement Instructions adopted by the Commissioner;

(3) valuation procedures contained in the NAIC Purposes and Procedures of the Securities Valuation Office manual; and

(4) any order(s) of the Commissioner issued to a particular company.

(f) Contents of audited financial reports. In addition to the contents specified in the Insurance Code, Article 1.15A, §10(a)-(c), audited financial reports shall contain the statements and reports set out in paragraphs (1)-(3) of this subsection.

(1) (No change.)

(2) The statement of gain or loss from operations, statement of changes in capital and surplus, and the statement of cash flow prepared in accordance with the Texas Administrative Code and the NAIC Annual Statement Instructions adopted by the Commissioner.

(3) In addition to the items that must be recorded in the notes to the financial statements as required by the Insurance Code, Article 1.15A, §10(c), any exceptions to compliance with the financial, investment, and holding company provisions of the Insurance Code or the Texas Administrative Code noted during the audit and a schedule and explanation of material non-admitted assets shall also be recorded in notes. The notes shall also include those items required by the appropriate NAIC Annual Statement Instructions and the NAIC Accounting Practices and Procedures Manual. Furthermore, the notes shall include a reconciliation of any differences, if any, between the audited statutory financial statements and the Annual Statement filed with the department, with written description of the nature of these differences.

(g) Contents of work papers.

(1) For those items subjected to detailed tests by the accountant during the course of the audit, the work papers shall contain notation of whether any material exceptions exist for each of the items set out in subparagraphs (A) and (B) of this paragraph.

(A) For invested assets:

(i) compliance as an authorized investment has been determined and does not exceed statutory limitations;

(ii) ownership and possession have been verified; and

(iii) securities are valued in accordance with the instructions of the NAIC Purposes and Procedures of the Securities Valuation Office manual.

(B) For assets other than invested assets:

(i) such assets are admitted in accordance with the appropriate provision of the Insurance Code or Texas Administrative Code; and

(ii) such assets are valued in accordance with the Texas Administrative Code and §7.18 of this title [~~the appropriate section of the NAIC Accounting Practices and Procedures manual~~].

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

(h)-(i) (No change.)

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006858
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

The Texas Department of Insurance proposes new §7.401 and amended §7.84 and §7.410 concerning examination and financial analysis and risk-based capital and surplus requirements. The proposal addresses the minimum risk-based capital and surplus requirements for property and casualty insurers as well as for all life insurance companies, fraternal benefit societies, mutual life insurance companies, and stipulated premium companies. The proposal also concerns the frequency of examination of insurance carriers. The proposed new and amended sections are necessary to enable the department to more efficiently and effectively utilize existing resources in the review of companies' financial condition, for the efficient solvency regulation of the aforementioned insurers, to allow the Texas Department of Insurance to adopt a new risk-based capital formula, and to implement the most current risk-based capital requirements. Simultaneously with this proposal the department is proposing the repeal of §7.401, which is published elsewhere in this issue of the *Texas Register*. A risk-based capital requirement is a method of ensuring that an insurer has an appropriate level of policyholders' surplus after taking into account the underwriting, financial, and investment risks of an insurer. The formulas proposed by new §7.401 and by amended §7.410 will provide the department with a more widely used regulatory tool to identify the minimum amount of capital and surplus appropriate for an insurance company to support its overall business operations in consideration of its size and risk exposure. The department is proposing the adoption by reference of the 2000 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies and the 2000 NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies. Furthermore, the department has determined that current §7.84 does not provide the necessary flexibility for the appropriate allocation of resources. Thus, the proposed amendment to §7.84 removes several conditions that were to be met before the approval of an examination deferral and restates the risk-based capital condition that a carrier must meet prior to a deferral. It is anticipated that a greater number of companies will be eligible for deferment as a result of this proposal. The proposed amendment of §7.84 focuses the conditions for an examination deferral on those items that are more reliable for predicting financial stability and removes those conditions that are redundant in actual application.

The department will consider new 28 TAC §7.401 and amendments to §§7.84 and 7.410 in a public hearing under Docket No. 2464, scheduled for 10:00 a.m., November 7, 2000 in Room 100 of the William P. Hobby State Office Building, 333 Guadalupe Street in Austin, Texas. Copies of the documents proposed for adoption by reference are available for inspection in the Financial Division of the Texas Department of Insurance, William P. Hobby Jr. State Office Building, 333 Guadalupe, Austin, Texas.

Ms. Betty Patterson, Senior Associate Commissioner, Financial Program, has determined that, for the first five years the proposed sections are in effect, there will be no fiscal implications for state or local government as a result of the proposal and there will be no measurable effect on local employment or local economy.

Ms. Patterson has also determined that, for each year of the first five years the new §7.401 and amended §7.84 and §7.410 are in effect, the sections will provide for the efficient regulation of insurance and greater assurance of the financial solvency of insurers for the protection of policyholders. The department does not anticipate any additional costs to industry resulting from the proposed risk-based capital formulas as companies are currently required to comply with risk-based capital requirements. The cost to complete the risk-based capital report varies from insurer to insurer. Each insurer subject to the proposed sections would be required to acquire a risk-based capital kit from the National Association of Insurance Commissioners at a cost of $350. The labor cost to transfer the information from an insurer's records to the applicable report will vary depending on the size of the insurer and the character of its investments. If an insurer uses special software to prepare its annual report, and if that software can be linked to the risk-based capital formula, the department estimates that the information can be transferred and the formula completed in four hours or less. If the software cannot be linked to the risk-based capital formula, the department estimates an insurer can transfer the information from its records to the risk-based formula in 8-16 hours. The department's estimations are based upon discussions with industry representatives who are responsible for maintaining accounting records. Based upon the department's experience, an insurer would utilize an employee who is familiar with the accounting records of the company and accounting practices in general and who is compensated from $17 to $30 an hour. On the basis of cost per hour of labor, there is no anticipated difference in the cost of completing the formula between insurers who are micro, small, and large businesses. After the completion of the formula, it will likely be reviewed by an officer of the insurer who is responsible for the

preparation of the financial reports of the insurer. In small insurers such officers are compensated at approximately $40 per hour, while such officers at large insurers are compensated at approximately $100 per hour. Based on the department's experience, the cost of compliance for small insurers would be less than the cost of compliance for large insurers in reviewing the risk-based capital formula. Therefore, it is the department's position that the adoption of the proposed sections will have no adverse economic effect on small or micro businesses. The department does not expect the new formulas to require a level of capital that is significantly different from the current capital requirements. For those companies previously subject to the risk-based capital requirements, the department does not anticipate any material increase in cost resulting from a required capital contribution. However, the formulas' intended function, to protect policyholders from the effects of insolvency, will require some companies to increase capital. Those companies so required will incur the cost of the additional capital contribution. There will be no additional costs as a result of the amendment to §7.84 as insurance companies must currently permit the department to conduct examinations and the department anticipates that more insurers will be eligible for deferment. Indeed, the department anticipates costs for the industry as a whole will decrease as a result of the amendment to §7.84 as the rule will allow more insurers to be eligible for an examination deferral. Regardless of the fiscal effect, the requirements of these rules are mandated by the underlying state statutes, and considering the statutes' purposes, it is neither legal nor feasible to waive or modify the requirements of these sections for small and micro businesses, as doing so would result in a disparate effect on policyholders and other persons affected by these rules.

To be considered, all comments on the proposal must be received in writing no later than 5:00 p.m. on November 13, 2000. All comments should be submitted to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Betty Patterson, Senior Associate Commissioner - Financial Program, Mail Code 305-2A, P.O. Box 149104, Austin, Texas 78714-9104.

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.84

The new and amended sections are proposed under the Insurance Code Articles 1.10, 1.15, 1.32, 2.01, 2.02, 2.20, 3.02, 21.21, 22.13 and §36.001. Article 1.10, §5 addresses the duties of the department when an insurer's solvency is impaired. Article 1.15 authorizes the commissioner to adopt rules for the determination of an insurance company's financial strength in order to establish the appropriate examination interval for that insurance company. Article 1.15 also provides that the Commissioner of Insurance may conduct examinations of companies at intervals not to exceed five years. Article 1.32 authorizes the commissioner to fix standards for evaluating the financial condition of an insurer. Articles 2.01, 2.02 and 2.20 provide that the commissioner may adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory levels to assure financial solvency of insurers for the protection of policyholders and insurers. Article 3.02 authorizes the commissioner to issue rules designed to ensure the financial solvency of companies for the protection of policyholders. Article 21.21, §13 authorizes the commissioner to adopt rules necessary to regulate trade practices in the business of insurance. Article 22.13 authorizes the commissioner to adopt rules regarding the minimum capital and surplus for certain insurers. Section 36.001 authorizes the commissioner to adopt rules for the conduct and execution of the duties and functions of the department.

The following statutes are affected by this proposal: Insurance Code Articles 1.10, 1.32, 2.01, 2.02, 2.20, 21.21, 21.44, 1.15 1.32, 3.02, and 22.13.

§7.84. Examination Frequency.

(a) (No change.)

(b) Applicability. This section applies only to those carriers that have been incorporated or organized for more than three years and are due for a regular examination as of December 31, 1999 [~~1993~~], or later.

(c) Deferment of regular examination. Two years following each carrier's regular examination, [~~Annually, each carrier due for a regular examination to be conducted in the following year shall be reviewed by the associate commissioner for~~] the Financial Program of the Texas Department of Insurance shall review the carrier's financial information to determine whether the carrier's financial strength justifies a deferment of the regular examination. The commissioner may defer the regular examination of a carrier for a period not to exceed five years from that carrier's previous regular examination, provided[~~one year if the carrier has undergone a regular examination within the preceding four years and~~] the following conditions are [~~have been~~] met at the time such deferral is considered [~~all times subsequent to that last regular examination~~]:

(1) (No change.)

(2) the carrier is subject to the requirements of the Insurance Code[~~,~~] Article 1.15A, and has filed, on or before June 30th, [~~or otherwise provides annually to the department~~] an audit of its financial condition conducted by an independent certified public accountant which does [~~, and the annual audits by its accountant did~~] not indicate the existence of any material adverse financial conditions in the carrier;

(3) the carrier has not been the subject of administrative or regulatory actions taken by the Texas Department of Insurance as provided by the Insurance Code[~~,~~] Articles [~~1.10A,~~] 1.32, [~~or~~] 21.28-A, or §83.051 within the previous five year period; and [~~, or similar actions taken by any other regulatory body;~~]

(4) meets one of the following: [~~all changes in control of the carrier have been properly approved by the Texas Department of Insurance as required by the Insurance Code, Article 21.49-1;~~]

(A) the carrier is subject to risk-based capital and surplus requirements and, if the carrier is a life or accident and health insurer, has at least 400% of the authorized control level as calculated in accordance with the risk-based capital and surplus requirements contained in §7.401 of this title (relating to Minimum Risk-Based Capital and Surplus Requirements for Life, Accident, and Health Insurers), or if the carrier is a property and casualty insurer, has at least 400% of the authorized control level as calculated in accordance with the risk-based capital and surplus requirements contained in §7.410 (relating to Minimum Risk-Based Capital and Surplus Requirements for Property and Casualty Insurers); or

(B) the carrier is subject to the requirements of Insurance Code Article 2.20(f) and reinsures substantially all of its business to one or more affiliates, as defined by Insurance Code Article 21.49-1, if the assuming affiliates have at least 400% of the authorized control level as required by §7.610 of this title (relating to Letters of Credit); or

(C) the carrier is subject to the requirements of Insurance Code Article 2.20(f) and maintains free surplus or guaranty fund and free surplus in an amount equal to 400% of the authorized control level that would be required if the carrier was subject to §7.610 of this title. Further, to qualify for an examination deferral under this subparagraph, a carrier must first calculate the amount of risk-based capital that would be required if the carrier was subject to §7.610 of this title and report the results in the five year historical exhibit of its annual statement in accordance with the NAIC Annual Statement Instructions, as adopted by the Department.

~~[(5) the carrier has the amount of minimum risk-based capital and surplus required by §7.401 of this title (relating to Minimum Risk-Based Capital and Surplus Requirements for Life, Accident and Health Insurers) or §7.410 of this title (relating to Minimum Risk-Based Capital and Surplus Requirements for Stock Property and Casualty Insurers), or meets the requirements of the Insurance Code, Article 2.20, §(f) (concerning Requirements for Non-stock Property and Casualty Insurers);]~~

~~[(6) the carrier's unassigned funds (surplus) account is a positive balance;]~~

~~[(7) the carrier has not experienced an operational (net) loss for any calendar year equal to or greater than 10% of its capital and surplus accounts at the beginning of such calendar year;]~~

~~[(8) the carrier's capital and surplus accounts have not decreased 15% or more during any calendar year;]~~

~~[(9) the carrier's investment in bonds designated as Class 3, 4, 5, or 6 by the Securities Valuation Office of the National Association of Insurance Commissioners is less than 200% of the carrier's capital and surplus accounts;]~~

~~[(10) the carrier's net written accident and health insurance premiums (annualized) are less than 350% of its capital and surplus accounts;]~~

~~[(11) the net written premiums (annualized) of a property and casualty carrier are less than 250% of its capital and surplus accounts;]~~

~~[(12) the National Association of Insurance Commissioners has not deemed the carrier to be a priority one company; and]~~

~~[(13) the carrier has not appeared as one of the top 10 insurers on the complaint ratio listing maintained by the department at any time during the year of the annual review provided for in this subsection.]~~

(d) This section does not apply to health maintenance organizations.

(e) Nothing in this section shall be construed to limit the commissioner's authority to examine a carrier as frequently as the commissioner deems necessary.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006860

Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

SUBCHAPTER D. RISK-BASED CAPITAL AND SURPLUS

28 TAC §7.401, §7.410

The new and amended sections are proposed under the Insurance Code Articles 1.10, 1.15, 1.32, 2.01, 2.02, 2.20, 3.02, 21.21, 22.13 and §36.001. Article 1.10, §5 addresses the duties of the department when an insurer's solvency is impaired. Article 1.15 authorizes the commissioner to adopt rules for the determination of an insurance company's financial strength in order to establish the appropriate examination interval for that insurance company. Article 1.15 also provides that the Commissioner of Insurance may conduct examinations of companies at intervals not to exceed five years. Article 1.32 authorizes the commissioner to fix standards for evaluating the financial condition of an insurer. Articles 2.01, 2.02 and 2.20 provide that the commissioner may adopt rules to require an insurer to maintain capital and surplus levels in excess of statutory levels to assure financial solvency of insurers for the protection of policyholders and insurers. Article 3.02 authorizes the commissioner to issue rules designed to ensure the financial solvency of companies for the protection of policyholders. Article 21.21, §13 authorizes the commissioner to adopt rules necessary to regulate trade practices in the business of insurance. Article 22.13 authorizes the commissioner to adopt rules regarding the minimum capital and surplus for certain insurers. Section 36.001 authorizes the commissioner to adopt rules for the conduct and execution of the duties and functions of the department.

The following statutes are affected by this proposal: Insurance Code Articles 1.10, 1.32, 2.01, 2.02, 2.20, 21.21, 21.44, 1.15 1.32, 3.02, and 22.13.

§7.401. Minimum Risk-Based Capital and Surplus Requirements for Life, Accident, and Health Insurers.

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

(1) Annual financial statement--The annual statement to be used by life insurance companies, as promulgated by the National Association of Insurance Commissioners (NAIC) and as adopted by the Texas Department of Insurance under this chapter (relating to Corporate and Financial Regulation) or any other annual statement blank adopted by the Texas Department of Insurance or requested to be filed by the Texas Department of Insurance.

(2) Authorized control level--The number determined under the Risk-Based Capital (RBC) formula in accordance with the RBC instructions.

(3) Commissioner--The commissioner of insurance of the Texas Department of Insurance.

(4) NAIC--National Association of Insurance Commissioners.

(5) RBC formula--NAIC risk-based capital formula.

(6) RBC instructions--2000 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies published by the NAIC.

(7) Total adjusted capital--An insurer's statutory capital and surplus as determined in accordance with the statutory accounting applicable to the annual financial statements required to be filed pursuant to the Insurance Code, and such other items, if any, as the RBC instructions provide.

(b) Scope. This section applies to any insurer authorized to do business in Texas as an insurance company that writes or assumes life insurance, annuity contracts or liability on, or indemnifies any one person for, any risk under a health, accident, sickness, or hospitalization policy, or any combination of those policies, in an amount in excess of $10,000 including: capital stock companies, mutual life companies, fraternal benefit societies, and stipulated premium companies doing business in other states. This section does not apply to stipulated premium companies doing business in Texas only.

(c) Purpose. The purpose of implementing a risk-based capital and surplus provision is to require a minimum level of capital and surplus to absorb the financial, underwriting, and investment risks assumed by an insurer. In determining the adequacy of its capital and surplus, an insurer that establishes an asset valuation reserve and an interest maintenance reserve will be allowed credit for these reserves.

(d) Adoption of RBC formula by reference and filing requirements. The commissioner adopts by reference the 2000 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies which includes the RBC formula and the required diskettes. All companies subject to this section are required to file the diskettes with the NAIC in accordance with and by the due date specified in the RBC instructions.

(e) Conflicts. In the event of a conflict between the Insurance Code, any rule of the department or any specific requirement of this section, and the RBC formula and/or the RBC instructions, the Insurance Code, rule or specific requirement of this section shall take precedence and in all respects control. It is the express intent of this section that the adoption by reference of the 2000 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies not repeal or modify or amend any rule of the department or any provision of the Insurance Code.

(f) Actions of commissioner. The commissioner of insurance may take the following actions against an insurer who fails to maintain, at a minimum, 70% of the authorized control level risk-based capital in the RBC Report as calculated in accordance with the RBC instructions:

(1) place the insurer in supervision or conservation;

(2) determine the insurer to be in hazardous financial condition as provided by the Insurance Code Article 1.32, and §8.3 of this title (relating to Hazardous Conditions) regardless of percentage of assets in excess of liabilities;

(3) determine the insurer to be impaired as provided by the Insurance Code Article 3.60; or

(4) subject the insurer to any other applicable sanctions provided by rules of the department.

(g) Prohibition on announcements. Except as otherwise required under the provisions of this section, the making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly to be made, published, disseminated, circulated or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing an assertion, representation or statement with regard to any component derived in the calculation, by any insurer, agent, broker or the person engaged in any manner in the insurance business would be misleading and is, therefore, prohibited.

(h) Prohibition on use in ratemaking. The RBC instructions and any related filings are intended solely for use by the commissioner in monitoring the solvency of insurers subject to this section and in taking corrective action with respect to insurers and shall not be used by the commissioner for ratemaking nor considered or introduced as evidence in any rate proceeding nor used by the commissioner to calculate or derive any elements of an appropriate premium level or rate of return for any line of insurance which an insurer or any affiliate is authorized to write.

(i) Limitations. In no event shall the requirements of this section reduce the amount of capital and surplus otherwise required by provisions of the Insurance Code or the Texas Administrative Code, or by authority of the commissioner of insurance.

§7.410. Minimum Risk-Based Capital and Surplus Requirements for Property/Casualty Insurers.

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

(1) - (5) (No change.)

(6) RBC instructions - 2000 [~~1997~~] NAIC Property and Casualty Risk-Based Capital Report including Overview and Instructions for Companies published by the NAIC.

(7) (No change.)

(b) - (c) (No change.)

(d) Adoption of RBC formula by reference and filing requirements. The commissioner adopts by reference the 2000 [~~1997~~] NAIC Property and Casualty Risk-Based Capital Report including Overview and Instructions for Companies which includes the RBC formula and the required diskettes. All companies subject to this section are required to file the diskettes with the NAIC in accordance with and by the due date specified in the RBC instructions.

(e) - (i) (No change.)

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006853
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

SUBCHAPTER D. RISK-BASED CAPITAL AND SURPLUS

28 TAC §7.401

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the

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

The Texas Department of Insurance proposes the repeal of §7.401 concerning the minimum risk-based capital and surplus requirements for life, accident and health insurers. The repeal is necessary to eliminate unnecessary provisions and to allow the Texas Department of Insurance simultaneously to adopt new §7.401 which replaces the repealed section with a new risk-based capital formula. Notification of the proposed new section appears elsewhere in this issue of the *Texas Register*.

Ms. Betty Patterson, Senior Associate Commissioner, Financial Program, has determined that, for the first five years the repeal is in effect, there will be no fiscal implications for state or local government as a result of this repeal and there will be no measurable effect on local employment or local economy.

Ms. Patterson has also determined that, for each year of the first five years this repeal is in effect, the repeal will provide for the efficient regulation of insurance. There will be no additional costs for those companies who must comply with the repeal. Regardless of the fiscal effects and considering the purpose of the underlying state statutes, it is neither legal nor feasible to waive or modify this proposed repeal for micro or small business as the solvency of an insurer must be measured fairly and objectively, regardless of the size of the insurer and doing so would result in a disparate effect on policyholders and other persons affected by these rules.

To be considered, all comments on the proposal must be received in writing no later than 5:00 p.m. on November 13, 2000. All comments should be submitted to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Betty Patterson, Senior Associate Commissioner - Financial Program, Mail Code 305-2A, P.O. Box 149104, Austin, Texas 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

The repeal of the section is proposed under the Insurance Code Articles 3.02 and 22.13 and §36.001. Article 3.02 authorizes the commissioner to issue rules designed to ensure the financial solvency of companies for the protection of policyholders. Article 22.13 authorizes the commissioner to adopt rules regarding the minimum capital and surplus for certain insurers. Section 36.001 authorizes the commissioner to adopt rules for the conduct and execution of the duties and sanctions of the department.

The following statutes are affected by this proposal: Insurance Code Articles 1.32, 3.02, 22.13.

§7.401. Minimum Risk-Based Capital and Surplus Requirements for Life, Accident, and Health Insurers.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006852

Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

CHAPTER 11. HEALTH MAINTENANCE ORGANIZATIONS

SUBCHAPTER I. FINANCIAL REQUIREMENTS

28 TAC §11.803

The Texas Department of Insurance proposes amendments to §11.803 concerning investments, loans, and other assets of health maintenance organizations (HMOs). The proposed amendments are necessary to update and clarify certain provisions as well as bring the section into harmony with proposed §7.18 which is published elsewhere in this issue of the *Texas Register.* The department proposes the adoption of general statutory accounting practices to be followed by all insurers and HMOs doing business in the State of Texas in §7.18 by adopting the Accounting Practices and Procedures Manual published by the National Association of Insurance Commissioners. The intent of the proposed amendments to §11.803 is to conform the accounting for investments, loans, and other assets of HMOs to proposed §7.18. The proposal inserts "at all times" in the initial sentence of §11.803 to clarify that an HMO must comply with the section at all times. The proposed amendment to paragraph (2)(E) reflects a change in a referenced section number as a result of an earlier amendment to the Chapter. The proposed amendment to paragraph (2)(H) changes "assets" to "worth" to provide consistency. The proposed amendment to paragraph (2)(J) changes "individuals" to "persons" to clarify that an HMO may make loans to business corporations as well as proprietorships and partnerships. Paragraph (2)(K) is proposed to be amended to delete "without limit" to eliminate the conflict with other language in the paragraph which establishes a limit. The proposed amendments to paragraphs (2)(F), (I), (L) and (M), (3)(C) and (D), and (4) and new paragraph (3)(F) are for consistency with proposed §7.18. The proposed amendment to paragraph (2)(F) designates the Securities Valuation Office of the National Association of Insurance Commissioners for the rating of corporate obligations to conform to proposed §7.18. The proposed amendment to subparagraph (I) improves clarity and conforms the language to proposed §7.18. Proposed paragraph (2)(L) is amended to make the language consistent with §7.18. Paragraph (2)(M) is proposed to be amended by deleting "the value of which real estate and improvements shall be depreciated cost or market value, whichever is less." The investments in improved, income-producing real estate authorized under paragraph (2)(M) will be governed by proposed §7.18. The proposed amendment to paragraph (3)(C) provides for the transition of the authorized investments to be consistent with proposed §7.18. Paragraph (3)(D) is proposed to be amended to conform with proposed §7.18. A new paragraph (3)(F) is proposed concerning claim overpayments. Paragraph (4) is amended to replace "liquidating" with "fair."

The department will consider the proposed amendments to §11.803 in a public hearing under Docket No. 2465, scheduled for 10:00 a.m. on November 7, 2000 in Room 100 of the William

P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas.

Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal implications for state and local governments as a result of enforcing or administering the section as amended. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Patterson has determined that for each year of the first five years the proposed amendments to the section are in effect, the public benefit anticipated as a result of the amended section will be the safe and sound investment of an HMO's funds. There is no probable economic cost to persons required to comply with the section as amended. There is no adverse economic effect on HMOs that are small or micro businesses as a result of the proposed amendments. The department finds it is not feasible to waive the proposed section for small or micro businesses since HMOs that are small or micro businesses should have the same investment authority as the largest HMOs in order to compete fairly with them.

To be considered, all comments must be in writing and received no later than 5:00 p.m. on November 13, 2000 by Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Betty Patterson, CPA, AFE, Senior Associate Commissioner, Financial Program, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The amendments to the section are proposed under the Insurance Code Article 20A.22 and §36.001. Article 20A.22(b) authorizes the commissioner of insurance to adopt rules to prescribe authorized investments for HMOs for all investments for which provision is not otherwise made in Insurance Code, Chapter 20A. Section 36.001 provides the commissioner of insurance may adopt rules to execute the duties and functions of the Texas Department of Insurance only as authorized by statute.

Insurance Code Article 20A.22 is affected by this proposal.

§11.803. Investments, Loans, and Other Assets.

The admitted assets of domestic and foreign HMOs must at all times comply with the provisions of this section.

(1) (No change.)

(2) Investments to support uncovered liabilities. An HMO may invest its funds in excess of minimum net worth in an amount at least equal to uncovered liabilities only in the following:

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

(E) investments issued by insurers or HMOs subject to the following conditions:

(i) an HMO may not make an investment under this subparagraph in any other HMO or insurer unless such other HMO or insurer is duly licensed to do business in its domestic state and at the time of such investment is in compliance with the minimum capital and surplus requirements then applicable under the provisions of that state's statutes and regulations; provided, however, an HMO may make an investment pursuant to this paragraph in another HMO which has not yet received its certificate of authority to conduct the business of an HMO in its domestic state or which does not yet possess the minimum capital and surplus required by its domestic state if such investment will be sufficient to give the investing HMO at least 50% control in such other HMO, as the term "control" is defined in §11.2 [~~§11.1201~~] of this title (relating to Definitions);

(ii) an HMO may not invest, except as provided in subparagraphs (F) and (G) of this paragraph, in any other HMO or insurer unless such investment with subsequent investments shall result within 180 days of the first investment in the investing HMO having control in such other HMO or insurer, as the term "control" is defined in §11.2 [~~§11.1201~~] of this title [~~(relating to Definitions)~~];

(iii)-(v) (No change.)

(F) bonds, debentures, bills of exchange, commercial notes, or any other bills and obligations of any corporation incorporated under the laws of any state of the United States of America or of the United States of America, which issuing corporation is designated highest quality (NAIC designation 1) or high quality (NAIC designation 2) in the NAIC Valuation of Securities Manual [~~has an investment grade rating according to Standard and Poors or Moody's~~];

(G) (No change.)

(H) shares of mutual funds doing business under the Investment Company Act of 1940 (15 U.S.C. §80a-1, et seq.) and shares in real estate investment trusts as defined in the Internal Revenue Code of 1986 (26 U.S.C. §856), provided that such mutual funds and real estate investment trusts be solvent with at least $1 million of net worth [~~assets~~] as of the date of its latest annual, or more recent, certified audited financial statement;

(I) mortgage loans by an HMO that are secured by valid first liens on improved real estate, provided that:

(i) there is a title insurance policy or attorney's opinion evidencing that the borrower owns the real estate;

(ii) there is an appraisal of the real estate and its improvements and the loan does not exceed 75% of such appraised value;

(iii) there is an executed note evidencing the loan;

(iv) there is a recorded deed of trust;

(v) the value of such improvements is adequately insured [~~if any part of the value of buildings is included in the value of the real estate:~~]

[~~(I)~~ ~~each such building is insured against loss~~] by a company authorized to do business in Texas or in the state in which the real estate is located; and

[~~(II)~~] the insurance policy must be [~~is~~] made payable to the HMO [~~and is~~] in an amount equal to at least 50% of the value of such building, provided that such insurance coverage need not exceed the outstanding balance owed to the HMO when the outstanding balance falls below 50% of the value of such building;

(vi) the commissioner has the right to obtain an independent appraisal, at the HMO's expense, of real estate securing any loan;

(J) loans to persons [~~individuals~~] secured by collateral, specified in paragraph (1) of this section and subparagraphs (A)-(D) of this paragraph, but the amount loaned may not exceed the value of the securities held as collateral;

(K) loans, [~~without limit,~~] whether secured or unsecured, that are not in default, to medical and other health care providers under contract with the HMO for the provision of health care services, but in no event shall the value of any such loan or loans made under this subparagraph exceed the maker's ability to repay the loan or loans;

the maker's ability to repay the loan or loans shall be determined by allowing only assets that an HMO may hold to be considered toward determining any excess of assets over all liabilities of the maker;

(L) real estate acquired in satisfaction of debt [~~by way of security for loans previously contracted or for moneys due~~]; all such real property not qualifying under any other provisions of this section shall be sold and disposed of within five years after the HMO has acquired title to same unless the time for disposal is extended by the commissioner;

(M) investments in improved, income-producing real estate[~~, the value of which real estate and improvements shall be depreciated cost or market value, whichever is less~~];

(N) (No change.)

(3) Other assets. An HMO may have assets beyond those required to be held for its minimum net worth and uncovered liabilities which are either necessary for its operations or invested as permitted by this section. Assets an HMO may find necessary in its operations include, but are not limited to, the following:

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

(C) The following assets may be admitted provided a detailed inventory is maintained with each item marked by any identifying number and the proof of cost maintained:

(i) Furniture, labor-saving devices, machines and all other office equipment used in the administration of the HMO may be admitted as an asset and for such property acquired after December 31, 2000, amortized in full over a period not to exceed five years. All such property acquired prior to January 1, 2001, may be admitted and shall be amortized in full over a period not to exceed ten years.

(ii) Furniture, medical equipment and vehicles used in connection with the direct provision of health care services may be admitted as an asset and for such property acquired after December 31, 2000, amortized in full over a period not to exceed five years. All such property acquired prior to January 1, 2001, may be admitted and shall be amortized in full over a period not to exceed ten years.

(iii) Electronic machines, constituting a data processing system or systems and operating systems software used directly for the provision of medical services and the administration of the HMO may be admitted as an asset and for such property acquired after December 31, 2000, amortized as provided by the March 2000 version of the Accounting Practices and Procedures Manual. All such property acquired prior to January 1, 2001 may be admitted and shall be amortized in full over a period not to exceed ten years [~~equipment, vehicles, furniture, office equipment, and other labor saving devices used both directly and indirectly for the provision of medical services and the administration of the HMO, provided a detailed inventory is maintained with each item marked by an identifying number and a proof of cost is maintained, the items being required to be valued at depreciated costs, depreciation being based on a method permitted in accordance with generally accepted accounting principles~~];

(D) inventories of necessary pharmaceutical and surgical supplies used directly in the treatment of medical conditions, it being the duty of the HMO to sufficiently prove the value of such inventories; and

(E) (No change.)

(F) Claims overpayments, with the right of offset supported by a contractual agreement, that are specifically identifiable payments, may be admitted to the extent a liability to that provider exists.

(4) Valuation. Except where elsewhere specifically provided, investments, loans and assets are valued in accordance with the Purposes and Procedures of the Securities Valuation Office of the National Association of Insurance Commissioners as it applies to entities not required to maintain an asset valuation reserve. If no such standard applies, then the valuation shall be their fair [~~liquidating~~] value.

(5)-(6) (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 October 2, 2000.

TRD-200006857
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-6327

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 7. MEMORANDA OF UNDERSTANDING

30 TAC §7.124

The Texas Natural Resource Conservation Commission (commission) proposes new §7.124, Natural Resource Trustees Memorandum of Understanding (MOU). This proposed MOU is between the commission and state and federal natural resource trustees.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The commission, Texas Parks and Wildlife Department, Texas General Land Office, National Oceanic and Atmospheric Administration, and the United States Department of the Interior are all natural resource trustees (Trustees).

In September of 1999, the commission adopted Chapter 350, the Texas Risk Reduction Program (TRRP) rules. These rules and the preamble to the rules (24 TexReg 7436) reference certain interactions between the executive director and the Trustees in regard to an ecological risk assessment (ERA) and an ecological services analysis (ESA).

Specifically, the preamble to the TRRP rules states that the Trustees plan to develop a MOU that facilitates the coordination of the Trustees and their interaction in the ERA and ESA processes. The preamble also states that the Trustees may choose to participate in the ERA process to ensure that natural resources under their jurisdiction are adequately protected and that the agency will notify the Trustees of affected property with chemicals of concern which remain after a particular stage of development within the Tier 2 screening-level ERA.

Additionally, §350.33(a)(3)(B) and §350.77(f)(2) require the executive director to consult with the Trustees prior to approval of a person's request to conduct an ESA. Furthermore, §350.33(a)(3)(B) requires the person to conduct any compensatory ecological restoration and other activities associated with the ESA with the approval of and in cooperation with the Trustees.

Thus, this proposed MOU sets forth the procedures by which the agency and the Trustees will interact regarding the ERA and the ESA processes under the TRRP rules.

SECTION BY SECTION DISCUSSION

Section 7.124(a) sets forth the purpose of the MOU as facilitating the interactions between the commission and the Trustees in the ERA and the ESA processes.

Section 7.124(b) names the parties to the MOU as the commission, Texas Parks and Wildlife Department, Texas General Land Office, National Oceanic and Atmospheric Administration, and the United States Department of the Interior.

Section 7.124(c) recites the authority, both state and federal, by which the parties enter into the MOU.

Section 7.124(d) sets forth and defines acronyms used in the MOU.

Section 7.124(e) sets forth and defines certain terms used in the MOU.

Section 7.124(f) sets forth the procedure by which each Trustee designates a primary and secondary contact to facilitate interaction under the MOU.

Section 7.124(g) sets forth the procedure by which the agency and the Trustees will interact during the ERA process. The first step in this process is the agency's initial notification to the Trustees. The agency then sends pertinent documents to Trustees participating on a particular affected property. Trustees then have an opportunity to comment on the ERA for that affected property. This section also sets forth the process for the coordination of the parties on any meetings pertaining to the ERA.

Section 7.124(h) sets forth the procedure by which the agency and the Trustees will interact during the ESA process. This section is divided into two main parts, with a small third part outlining how a Trustee may waive its role in the ESA process. The first part establishes the interaction process when the executive director is consulting with the Trustees, as required, prior to approval of a person's request to conduct an ESA. This process is very similar to the interaction under the ERA process, with notification, document exchange, opportunity for comments, and coordination of meetings. The second part addresses the parties' interaction while the ESA is actually being conducted, including performance of any compensatory restoration.

Section 7.124(i) explains that certain procedures under subsections (g) and (h)(1) may be combined to achieve efficiencies.

Section 7.124(j) sets forth the procedures by which a Trustee may exit or reenter the ERA and ESA processes.

Section 7.124(k) sets forth the requirements for notifying or coordinating with the agency's project manager prior to certain activities on an affected property.

Section 7.124(l) states that the natural resource trustees' 1995 Memorandum of Agreement governs issues, responsibilities, or activities not specifically addressed in this MOU.

Section 7.124(m) explains that the MOU does not compromise or affect any legal rights of the parties or narrow the scope of any party's authority or jurisdiction unless it is specifically stated in the MOU.

Section 7.124(n) explains that the MOU may not be the basis for third party challenges or appeals and that it does not create any rights or causes of action in any persons not parties to the MOU.

Section 7.124(o) clarifies that the MOU does not obligate the parties to expend funds beyond those appropriated.

Section 7.124(p) allows for the termination and amendment of the MOU pursuant to appropriate rulemaking.

Section 7.124(q) allows the MOU to be signed in counterparts and identifies the effective date as the date of the last signature.

FISCAL NOTE: COST TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, has determined for the first five-year period the proposed rule is in effect, there will be no significant fiscal impacts for units of state and local government as a result of administration or enforcement of the proposed rule. The proposed rule would create a MOU between the state and federal natural resource trustees regarding ERAs and ESAs conducted under the TRRP rules in Chapter 350.

The Trustees consist of the commission, Texas Parks and Wildlife Department, Texas General Land Office, National Oceanic and Atmospheric Administration, and the United States Department of the Interior.

The proposed MOU specifies the procedures by which the agency and the Trustees will interact regarding the ERA and the ESA processes under the TRRP rules, ensuring a rapid response to releases of potentially hazardous materials. The MOU procedures include notification, document exchange, opportunity for comments, and coordination of meetings.

Beginning May 1, 2000, accidents involving a release of potentially hazardous chemicals of concern (COC) come under the TRRP rules if the spill is not cleaned up within six months, if the party responsible for the spill requests that the cleanup be handled under the TRRP rules, or if the type of spill is already covered by the TRRP rules. If the accident is handled under the TRRP rules, then an ERA is performed to characterize the ecological status of the affected property and to ensure that proper corrective actions are taken to protect the environment. If the ERA concludes that there is unacceptable ecological risk, then ecological protective concentration levels (PCLs) are established. The PCL identifies what levels of each COC can remain at the affected property without creating an unacceptable risk to the environment.

If COCs are proposed to be left at the affected property in excess of established ecological PCLs, an ESA must be conducted. An ESA is a risk management process which evaluates the present and predicted impacts to the environment associated with different remediation alternatives, and provides clear justification for leaving COCs in place above established PCLs. In order to perform an ESA, an individual must request permission from the executive director. The executive director must then consult with

the Trustees and make the decision whether an ESA is appropriate (determining whether COCs are to be left in place above established PCLs).

The proposed rule only sets forth procedures for a MOU between the agency and the Trustees. No additional fiscal implications are anticipated for units of state and local government as a result of the proposed rule because the TRRP rules already cover the specific requirements of ERAs and ESAs. Additionally, the commission anticipates there will be no additional costs to persons responsible for the release of COCs as a result of this rule because the proposed rulemaking does not add any additional regulatory requirements, besides what is related to the MOU, that are not already included in the TRRP rules.

PUBLIC BENEFIT AND COSTS

Mr. Davis also has determined for each year of the first five years the proposed rule is in effect, the public benefit anticipated from enforcement of and compliance with the proposed rule will be the establishment of an effective process for facilitating the coordination of the Trustees and their interaction in the ERA and ESA processes, which should help ensure timely and efficient cleanups under the TRRP rules. Additionally, the ESA process could likely result in the setting aside of unimpacted ecological habitat or the creation of new ecological habitat resulting in net environmental gain for the public.

There will be no additional fiscal implications to individuals and businesses as a result of administration and enforcement of the proposed rule because the creation of a MOU is an administrative action that has no fiscal impact to any individual or business. Additionally, the commission anticipates there will be no additional costs to persons responsible for the release of COCs as a result of this rule because the proposed rulemaking does not add any additional regulatory requirements, besides what is related to the MOU, that are not already included in the TRRP rules.

The proposed rule would create a MOU between the agency and the Trustees regarding ERAs and ESAs conducted under the TRRP rules. The proposed MOU sets forth the procedures for interaction between the commission and the Trustees, which includes: notification, document exchange, opportunity for comments, and coordination of meetings.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse economic effects are anticipated to any small or micro-business as a result of implementing the proposed rule because the creation of a MOU is an administrative action that has no fiscal impact to any small or micro-business. The commission anticipates there will be no additional costs to persons responsible for the release of COCs as a result of this rule because the proposed rulemaking does not add any additional regulatory requirements, besides what is related to the MOU, that are not already included in the TRRP rules. There are no known small or micro-businesses that would be adversely affected by implementation of the proposed rule.

The proposed rule would create a MOU between the commission and the Trustees regarding ERAs and ESAs conducted under the TRRP rules. The proposed MOU sets forth the procedures for interaction between the commission and the Trustees, which includes: notification, document exchange, opportunity for comments, and coordination of meetings.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. The proposal would not adversely effect, in a material way, the economy, a section of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed rule will formalize the requirement and procedures for cooperation between the Trustees regarding ERA and ESA matters. The proposed rule does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. Section 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.

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for this proposed rule pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of this proposed rule is to set forth the procedures by which the agency and the natural resource trustees will interact regarding the ERA and the ESA processes under the TRRP rules. The proposed rule will substantially advance this specific purpose by setting forth detailed procedures for such interaction including initial notification, document exchange, comments, and meetings. The proposed rule will not burden private real property and the action under the proposed rule does not constitute a takings.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the proposed rulemaking and found that the rule is neither identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will it affect any action/authorization identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the CMP.

SUBMITTAL OF COMMENTS

Comments may be submitted to Angela Slupe, Office of Environmental Policy, Analysis, and Assessment, MC 205, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. All comments must be received by 5:00 p.m. on November 13, 2000 and should reference Rule Log Number 2000-012-007-AD. For further information, please contact Michael Bame, Policy and Regulations Division, at (512) 239-5658.

STATUTORY AUTHORITY

The new section is proposed under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties. Additionally, the new section is proposed under TWC, §5.104 and Texas Health and Safety Code, §361.016, which provide the commission with the authority to enter into a MOU.

The proposed new section implements the procedures by which the executive director and the natural resource trustees will interact regarding the ERA and the ESA processes under Chapter 350 concerning the TRRP.

§7.124. Natural Resource Trustees Memorandum of Understanding.

(a) Purpose. The Texas Risk Reduction Program (TRRP) rules (30 Texas Administrative Code (TAC) Chapter 350) and the preamble to those rules (24 TexReg 7436) reference certain interactions between the Texas Natural Resource Conservation Commission (TNRCC) and the natural resource trustees (Trustees) in regard to an ecological risk assessment and an ecological services analysis. The purpose of this memorandum of understanding (MOU) is to facilitate these interactions between the TNRCC and the Trustees in both these processes. In addition, the parties recognize the following as pertinent to the development of this MOU.

(1) The TNRCC is the agency of the State of Texas given the primary responsibility for implementing the constitution and laws of the state relating to the conservation of natural resources and the protection of the environment.

(2) As public trustees for natural resources, the Trustees have statutory authority to pursue claims for injury to, destruction of, or loss of natural resources as a result of a release of a hazardous substance or a discharge of oil, seek restoration or replacement of such natural resources, and pursue recovery of reasonable assessment costs.

(3) Due to some dependent and even overlapping responsibilities, it is beneficial for the TNRCC and the Trustees to coordinate on the performance of certain tasks concerning the ecological risk assessment and ecological services analysis.

(4) Integration of natural resource damages considerations into risk reduction decisions may efficiently and cost effectively resolve certain natural resource damage liability and alleviate the need for further investigations or legal proceedings.

(b) Parties. The parties to this MOU are as follows:

(1) TNRCC, both as administrator of TRRP and a natural resource trustee;

(2) Texas Parks and Wildlife Department, solely as a natural resource trustee;

(3) Texas General Land Office, solely as a natural resource trustee;

(4) National Oceanic and Atmospheric Administration of the United States Department of Commerce, solely as a natural resource trustee; and

(5) United States Department of the Interior, solely as a natural resource trustee.

(c) Authorities.

(1) The Trustees enter into this MOU in accordance with the legal authorities provided to each Trustee by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 United States Code (USC) §§9601 et seq.; the Clean Water Act (CWA), 33 USC §§1251 et seq.; the Oil Pollution Act of 1990 (OPA), 33 USC §§2701 et seq.; the National Contingency Plan, 40 Code of Federal Regulations (CFR) Part 300; the Natural Resource Damage Assessment Regulations, 43 CFR Part 11; and 15 CFR Part 990; and any other applicable laws or authorities.

(2) The State of Texas Trustees also enter into this MOU in accordance with the legal authorities provided by the Texas Natural Resources Code, Oil Spill Prevention and Response Act of 1991, §40.107; the Texas Natural Resource Damage Assessment Regulations, 31 TAC Chapter 20; and any other applicable laws or authorities.

(3) The TNRCC additionally enters into this MOU in accordance with the legal authority provided to it by the Texas Water Code, §5.104 and Texas Health and Safety Code, §361.016.

(d) Acronyms.

(1) COCs - chemicals of concern;

(2) CFR - Code of Federal Regulations;

(3) CERCLA - Comprehensive Environmental Response, Compensation, and Liability Act;

(4) CWA - Clean Water Act;

(5) LOAEL - lowest observed adverse effect level;

(6) MOA - memorandum of agreement;

(7) MOU - memorandum of understanding;

(8) NOAEL - no observed adverse effect level;

(9) OPA - Oil Pollution Act of 1990;

(10) PCLs - protective concentration levels;

(11) TAC - Texas Administrative Code;

(12) TNRCC - Texas Natural Resource Conservation Commission;

(13) TRRP - Texas Risk Reduction Program;

(14) TNRCC PM - Texas Natural Resource Conservation Commission Remedial/Corrective Actions Project Manager; and

(15) TTT - Trustee technical team.

(e) Definitions. Any words not specifically defined herein which are defined in 30 TAC §350.4, shall have the same meaning as defined in that section.

(1) Person - An individual, corporation, organization, government, or governmental subdivision or agency, business trust, partnership, association, or any other legal entity utilizing the TRRP rules or any other equivalent TNRCC rules.

(2) Paragraph 7 - 30 TAC §350.77(c)(7) corresponds to a point in the Tier 2 screening-level ecological risk assessment where the initial risk estimate is refined based on the use of less conservative exposure assumptions. Paragraph 7 is a requirement that the person must perform as part of the Tier 2 screening-level ecological risk assessment if the assessment progresses past 30 TAC §350.77(c)(6). Paragraph 7 reads as follows: "(The person shall:) justify the use of less conservative assumptions to adjust the exposure and repeat the hazard quotient exercise in paragraph (6) of this subsection, once again eliminating COCs that pose no unacceptable risk and adding comparisons to the LOAELs for those COCs indicating a potential risk (i.e., NOAEL hazard quotient >1); however, when multiple members of a class of COCs are present which exert additive effects, it is also appropriate to utilize an ecological hazard index methodology (if all COCs are eliminated at this point, the ecological risk assessment process ends and the items listed in paragraphs (8) - (9) of this subsection are not required);"

(3) Trustees - The federal agencies as designated by the President of the United States and the state agencies as designated by the Governor of the State of Texas pursuant to the OPA and CERCLA to act on behalf of the public as trustees of natural resources (e.g., water, air, land, wildlife).

(4) Parties - The signatories to this MOU as specified in subsection (b) of this MOU.

(f) Trustee contacts. The TNRCC Natural Resource Trustee Program (TNRCC Trustee) shall designate a primary TNRCC Trustee contact in writing to the other Trustees no later than ten calendar days after the effective date of this MOU. The TNRCC shall designate a secondary TNRCC Trustee contact in the initial notifications of both an ecological risk assessment and an ecological services analysis. Each of the other Trustees shall designate a primary and a secondary contact in writing to the other Trustees no later than ten calendar days after the effective date of this MOU. Initial notifications and all subsequent electronic mail correspondence shall be sent to both the primary and secondary contacts for each Trustee. The TNRCC Trustee shall send copies of pertinent documents to the primary contacts by regular mail (unless an alternate contact or method is identified in advance). A Trustee may change its primary or secondary contact by providing the other Trustees not less than ten calendar days written notice of such change.

(g) Ecological risk assessment process. The preamble to TRRP rules (24 TexReg 7455) states that the Trustees may choose to participate in the ecological risk assessment process to ensure that natural resources under their jurisdiction are adequately protected. The preamble also states that the TNRCC will notify the Trustees of affected property with chemicals of concern (COCs) which remain after a particular stage of development within the Tier 2 screening-level ecological risk assessment. The purpose of an ecological risk assessment is to characterize the ecological setting of the affected property, identify complete or reasonably anticipated to be completed exposure pathways and representative ecological receptors, scientifically eliminate COCs that pose no unacceptable risk, and develop protective concentration levels (PCLs) for selected ecological receptors where warranted. The parties agree that an ecological risk assessment should be conducted in a manner that is designed to result in the protection of ecological receptors that may be subject to management by federal and state agencies. Furthermore, the Trustees acknowledge that the potential for continuing injury to ecological resources should be negligible at sites which have undergone corrective actions where remedial decisions were based on appropriate application of the proposed ecological risk assessment process.

(1) Initial notification. After the TNRCC learns through a person's submittal that the ecological risk assessment at an affected property has progressed to Paragraph 7 and prior to the development of TNRCC-approved ecological PCLs, the TNRCC Trustee shall provide timely notification to the other Trustees. The parties agree that further evaluation of ecological risk at an affected property is not warranted for purposes of making response or corrective action decisions under the TRRP rules when: 1) an appropriately applied ecological risk assessment is conducted consistent with the most recent TNRCC guidance on the subject at the time the ecological risk assessment is performed; and 2) the affected property does not progress to Paragraph 7.

(A) Method of initial notification. Notification by the TNRCC Trustee shall be provided via electronic mail, or via another mutually agreed upon method, to the primary and secondary contacts for each Trustee.

(B) Content of initial notification. The initial notification shall include the affected property name, location, status of the ecological risk assessment, and to the extent practical, the type of habitat, receptors at risk, COCs, and other relevant information necessary to allow the Trustees to evaluate their level of interest in the affected property. The TNRCC secondary contact, the TNRCC ecological risk assessor, and the deadline constraints of the TNRCC remedial/corrective actions project manager (TNRCC PM) shall also be provided in the initial notification.

(C) Trustee response to initial notification. A written response (electronic mail is acceptable) from each Trustee to the initial notification must be provided to both the primary and secondary TNRCC Trustee contacts within five working days of the initial notification. This response shall specifically state the Trustee's intent as to whether or not the Trustee chooses to participate in the ecological risk assessment process. In the event that any Trustee fails to respond within the five working days, the TNRCC will proceed as if the Trustee chose not to participate in the ecological risk assessment process for that affected property. Subsection (j) of this MOU explains how a Trustee may enter the process at a later date.

(2) Documents. After the timely receipt of a Trustee's written intent to participate in the ecological risk assessment process, the TNRCC Trustee shall send copies of pertinent documents to the primary contacts by regular mail (unless an alternate contact or method is identified in advance). The TNRCC Trustee shall provide the primary and secondary contacts with electronic mail notification (unless an alternate method of notification has been mutually agreed to in advance) that the documents have been mailed. The TNRCC shall provide documents in a timely manner to ensure that the Trustees have the maximum time available for the review of documents. The TNRCC Trustee shall coordinate the review of ecological risk assessment work plans, reports, and other relevant documents with the Trustees.

(3) Trustee comments. Unless otherwise mutually agreed, the participating Trustees shall submit a unified set of written comments, if any, on the ecological risk assessment to the TNRCC ecological risk assessor. Trustee comments on ecological risk assessment documents must be technically defensible and relevant to the ecological risk assessment process.

(A) Deadline for comments and extensions.

(i) The Trustees shall have 20 calendar days from the date of postmark on any documents received to respond to both the TNRCC Trustee contacts with comments. This time period may be reduced to coincide with a deadline of less than 20 calendar days if necessary to meet the TNRCC PM's deadline. In the event that a greater period of time is available, as determined by the TNRCC PM, an extended deadline shall be provided to the Trustees.

(ii) The Trustees may request an extension of the comment period of up to seven calendar days by writing (electronic mail is acceptable) to both the TNRCC Trustee contacts not less than three calendar days prior to the comment deadline. The TNRCC may, in its sole discretion, grant or deny such requests for extensions. The TNRCC will respond to all participating Trustees regarding such requests within 24 hours after receipt. If the Trustees do not receive a response from the TNRCC, the request for an extension is presumed to be denied.

(iii) In the event that any Trustee fails to provide comments within the prescribed deadline (including any extension), the TNRCC will proceed as if the Trustee has no comments.

(B) Reconciliation of comments. Prior to submitting comments to the TNRCC ecological risk assessor, the participating Trustees shall first coordinate all comments among themselves and provide a unified Trustee response through a mutually agreed upon Trustee representative. In the event that the TNRCC ecological risk assessor or TNRCC PM disagrees with any comments provided by the Trustees, the TNRCC will make diligent efforts to reach resolution between the parties. The TNRCC ecological risk assessor shall be responsible for

coordinating the resolution of conflicting comments and shall schedule and coordinate comment resolution meetings as appropriate. Each participating Trustee's primary contact shall be copied on all ecological risk assessment related correspondence to the person and shall be provided copies of all ecological risk assessment related correspondence from the person to the TNRCC. In the event that differences cannot be resolved, the Trustees maintain the right to independently provide comments to the TNRCC PM and/or person conducting the ecological risk assessment, either as a unified group of two or more Trustees or as a single Trustee.

(C) Recognition of comments. The TNRCC ecological risk assessor shall evaluate the Trustee comments and the TNRCC PM shall incorporate them into the TNRCC's response to the person, as appropriate. The TNRCC shall use its regulatory authority to ensure that the incorporated Trustee comments are recognized in the development of the ecological risk assessment. If any Trustee comments are not incorporated, the Trustees shall be informed.

(4) Coordination of meetings. After the timely receipt of a Trustee's written intent to participate in the ecological risk assessment process, the TNRCC shall, to the extent practical, coordinate with the Trustees concerning their availability at least ten calendar days in advance of meetings concerning the ecological risk assessment. The TNRCC shall provide the Trustees notification of the ecological risk assessment meetings via electronic mail or via another mutually agreed upon method. The TNRCC and the Trustees shall work together to ensure that all parties to this MOU which are participating in the ecological risk assessment process have input into that process and that reasonable timelines are established and met to ensure that Trustee involvement in the ecological risk assessment does not impede progression of the ecological risk assessment. In the event that any participating Trustee is unable to attend a meeting concerning the ecological risk assessment, any absent Trustee shall contact the other Trustees to obtain information regarding the meeting, and if necessary, shall contact the TNRCC ecological risk assessor within a reasonable time after the meeting to be briefed on the issues discussed.

(h) Ecological services analysis process. The TRRP rules require that the TNRCC consult with the Trustees prior to approval of a person's request to conduct an ecological services analysis (30 TAC §350.33(a)(3)(B) and §350.77(f)(2)). Furthermore, TRRP rules also require the person to conduct any compensatory ecological restoration and other activities associated with the ecological services analysis with the approval of and in cooperation with the Trustees (30 TAC §350.33(a)(3)(B)). The parties agree that an ecological services analysis must be conducted whenever concentrations of COCs which exceed ecological PCLs are proposed to be left in place with the potential for continuing exposure in accordance with 30 TAC §350.33(a)(3)(B).

(1) Consultation on person's request to perform an ecological services analysis. Although the following sets forth a separate process for consultation on a person's request to perform an ecological services analysis, subsection (i) of this MOU explains how the processes under subsections (g) and (h)(1) of this MOU may be combined to achieve efficiencies.

(A) Notification. After the TNRCC receives a person's written request to perform an ecological services analysis, the TNRCC Trustee shall provide timely notification to the other Trustees.

(i) Method of notification. Notification by the TNRCC Trustee shall be provided via electronic mail, or via another mutually agreed upon method, to the primary and secondary contacts for each Trustee.

(ii) Content of notification. The notification shall include the affected property name, location, the fact that the person is requesting to perform an ecological services analysis, and to the extent practical, the type of habitat, receptors at risk, COCs, and other relevant information necessary to evaluate the level of interest in the affected property. The TNRCC secondary contact, the TNRCC ecological risk assessor, and the deadline constraints of the TNRCC PM shall also be provided in the notification.

(iii) Trustee response to notification. A written response (electronic mail is acceptable) from each Trustee to the notification must be provided to both the TNRCC Trustee contacts within five working days of the notification. This response shall specifically state the Trustee's intent as to whether or not the Trustee chooses to be consulted on the person's request to perform an ecological services analysis. In the event that any Trustee fails to respond within the five working days, the TNRCC will proceed as if the Trustee chose not to participate in the consultation on the person's request to perform an ecological services analysis. Subsection (j) of this MOU explains how a Trustee may enter the process at a later date.

(B) Documents and other information. After the timely receipt of a Trustee's written intent to be consulted on the person's request to perform an ecological services analysis, the TNRCC Trustee shall send copies of pertinent documents to the primary contacts by regular mail (unless an alternate contact or method is identified in advance). The TNRCC Trustee shall provide the primary and secondary contacts with electronic mail notification that the documents have been mailed.

(i) The TNRCC shall provide documents in a timely manner to ensure that the Trustees have the greatest time available for the review of documents. The TNRCC Trustee shall coordinate the review of such documents with the Trustees.

(ii) Any participating Trustee may make a request for additional information not less than three calendar days prior to the comment deadline, but such request must be very specific as to the type of information requested.

(C) Trustee comments. Unless otherwise mutually agreed, the participating Trustees shall submit a unified set of written comments, if any, on the person's request to perform an ecological services analysis to the TNRCC ecological risk assessor. Trustee comments must be technically defensible and relevant to the ecological services analysis process. Such Trustee responses shall specifically include a statement of each participating Trustee's recommendation for approval or disapproval of the person's request to perform an ecological services analysis. If feasible, the Trustee responses shall also include any response action recommendations for the affected property. If the person's request to perform an ecological services analysis is not recommended for approval by any Trustee, a reasoned explanation must be provided.

(i) Deadline for comments and extensions. The Trustees shall have 20 calendar days from the date of postmark on any documents received to respond to the TNRCC primary and secondary contacts with comments. The TNRCC may request that the Trustees respond within a shorter time. In the event that a greater period of time is available, as determined by the TNRCC PM, an extended deadline shall be provided to the Trustees. The Trustees may request an extension of the comment period of up to seven calendar days by writing (electronic mail is acceptable) to the TNRCC primary and secondary contacts not less than three calendar days prior to the comment deadline. The TNRCC may, in its sole discretion, grant or deny such requests for extensions. The TNRCC will respond to all participating Trustees regarding such requests within 24 hours after receipt. If the Trustees do not receive a response from the TNRCC, the request for an extension is presumed to be denied. In the event

that any Trustee fails to provide comments within the prescribed deadline (including any extension), the TNRCC will proceed as if the Trustee concurs with the TNRCC's decision on the person's request to perform an ecological services analysis.

(ii) Reconciliation of comments. Prior to submitting comments to the TNRCC, the participating Trustees shall first coordinate all comments among themselves and provide a unified Trustee response through a mutually agreed upon Trustee representative. In the event that the TNRCC ecological risk assessor or TNRCC PM disagrees with any comments provided by the Trustees, the TNRCC shall make diligent efforts to reach resolution between the parties. The TNRCC ecological risk assessor shall be responsible for coordinating the informal resolution of conflicting comments and shall schedule and coordinate comment resolution meetings as appropriate. Each participating Trustee's primary contact shall be copied on all ecological services analysis related correspondence to the person and shall be provided copies of all ecological services analysis related correspondence from the person to the TNRCC. In the event that differences cannot be resolved, the Trustees maintain the right to independently provide comments to the TNRCC PM and/or person requesting to conduct the ecological services analysis, either as a unified group of two or more Trustees or as a single Trustee.

(iii) Recognition of comments. The TNRCC ecological risk assessor shall evaluate the Trustee comments and the TNRCC PM shall incorporate them into the TNRCC's response to the person, as appropriate. The TNRCC PM shall inform the person in writing of the results of the TNRCC/Trustee consultation and shall copy the Trustees on such correspondence. If any Trustee comments are not incorporated, the Trustees shall be informed.

(D) Coordination of meetings. After the timely receipt of a Trustee's written intent to participate in the consultation on the person's request to perform an ecological services analysis, the TNRCC shall, to the extent practical, coordinate with the Trustees concerning their availability at least ten calendar days in advance of meetings concerning the person's request to perform an ecological services analysis. The TNRCC shall provide the Trustees notification of these meetings via electronic mail or via another mutually agreed upon method. The TNRCC and the Trustees shall work together to ensure that all parties to this MOU which are participating in the ecological services analysis process have input into that process and that reasonable time lines are established and met to ensure that Trustee involvement in the ecological services analysis does not impede progression of the ecological services analysis. In the event that any participating Trustee is unable to attend a meeting concerning the ecological services analysis, any absent Trustee shall contact the other Trustees to obtain information regarding the meeting and if necessary, shall contact the TNRCC ecological risk assessor within a reasonable time after the meeting to be briefed on the issues discussed.

(2) Ecological services analysis cooperation and approval process. To enhance the coordination between the Trustees and the person and provide efficiencies in the development of the ecological services analysis, the Trustees will initiate a dialogue with the person in a timely manner to establish the nature and scope of a cooperative ecological services analysis. The Trustees will maintain open communications with the person and actively participate in the entire ecological services analysis.

(A) Trustee interaction. Unless otherwise specified herein, cooperation between the Trustees in the development, review, and approval of the ecological services analysis shall be consistent with the September 1995 Memorandum of Agreement between the Trustees. The Trustees shall strive for consensus on all decisions related to the development and implementation of the ecological services analysis. The Trustees shall coordinate their efforts to ensure a single unified Trustee position is provided on all written comments/statements to the person.

(B) Trustee technical team (TTT). For each affected property involving significant participation by two or more Trustees, the Trustees shall create a TTT to which a representative shall be designated by each Trustee. The Trustees agree to designate representatives to the TTT who, at a minimum, have: 1) the level of knowledge and expertise needed to effectively guide the ecological services analysis process; and 2) the level of authority necessary to make decisions on issues presented to the TTT. The TTT shall be responsible for, among other things, communications with the person, outlining the scope and objectives of the ecological services analysis with the person, identifying additional data needs, reviewing and approving ecological services analysis reports and work plans, overseeing implementation of such plans, and certifying the satisfactory completion of the compensatory ecological restoration, where appropriate. The TTT may take any other actions as necessary to carry out its duties under this MOU. The TNRCC Trustee shall act as Trustee team leader unless otherwise agreed to by all Trustees. The Trustee team leader shall be responsible for, among other things, the coordination and monitoring of the progress of the development of technical comments, and implementation of the ecological services analysis. The Trustee team leader shall also be responsible for the scheduling of meetings of the TTT and notifying TTT members of those meetings on a timely basis, preparing agendas for those meetings, acting as a central contact point for the TTT, and establishing and maintaining records and relevant documents related to the ecological services analysis. The Trustee team leader may delegate any of his or her duties to another Trustee with the concurrence of the TTT. The duties of the Trustee team leader do not provide the Trustee team leader with any decision-making rights beyond those normally held by each Trustee member of the TTT.

(i) Approval and performance of the ecological services analysis. The Trustees agree that the TTT shall act timely to either approve the ecological services analysis or disapprove with comments which may include a recommendation for additional work. This process shall be repeated each time the revised ecological services analysis report is resubmitted until the ecological services analysis report is approved, rejected, or is withdrawn. If the TTT cannot reach agreement with the person or the person fails to perform the ecological services analysis as proposed, the Trustees shall refer the affected property back to the TNRCC for further decisions on remedial/corrective action. The TNRCC PM shall be kept informed of all TTT activities, shall be copied on all comments, and shall be invited to participate in all meetings with the person concerning performance of the ecological services analysis.

(ii) Approval and completion of the compensatory ecological restoration. Upon reaching a final decision on all reports which involve compensatory ecological restoration, the Trustees shall provide a written statement to the person and the TNRCC PM of the Trustees' final decision. When the compensatory ecological restoration is completed consistent with Trustee-approved criteria, the TTT shall also provide a written statement to both the person and the TNRCC PM certifying satisfactory completion of the compensatory ecological restoration. If the compensatory ecological restoration is not completed to the Trustees' satisfaction, the Trustees shall refer the affected property back to the TNRCC for further decisions on remedial/corrective action.

(C) Agreement. Where determined appropriate by the Trustees, the Trustees shall pursue a written agreement with a person conducting an ecological services analysis to govern Trustee coordination with that person. The agreement will include issues such as the

payment of Trustees' costs associated with the ecological risk assessment and ecological services analysis processes, public participation requirements, and a mechanism for addressing natural resource damages.

(D) Dispute resolution. In the event of a dispute between any of the parties concerning activities under subsection (h)(2) of this MOU, the Trustee contacts shall attempt to resolve the dispute informally. If the dispute is not resolved informally at the Trustee contact level, any Trustee may invoke the following dispute resolution procedures by sending notice to all primary Trustee contacts involved in the dispute. Such notice must include a brief description of the disputed issue(s) and acceptable alternatives for resolution. The Trustee contacts shall elevate the dispute to the appropriate first tier agency representatives with successive elevations to second tier agency representatives and third tier agency representatives as necessary.

(i) Within four calendar days after receiving the notice invoking dispute resolution, the Trustees involved in the dispute shall designate the names and titles of their first, second, and third tier agency representatives via electronic mail (or another mutually agreed upon method) to all primary Trustee contacts involved in the dispute.

(ii) Within 14 calendar days after receiving the notice invoking dispute resolution, the first tier agency representatives involved in the dispute shall discuss the disputed issue(s), assisted by other technical or legal staff as appropriate. If the disputed issue(s) cannot be resolved by the first tier agency representatives within the 14 calendar days after receiving the notice, the disputed issue(s) shall be elevated by the first tier agency representatives to the second tier agency representatives within five calendar days after the expiration of the discussion period. The second tier agency representatives shall have 14 calendar days within which to discuss and attempt to resolve the disputed issue(s), assisted by other technical or legal staff as appropriate. If the disputed issue(s) cannot be resolved by the second tier agency representatives within the 14 calendar days after it is elevated, the disputed issue(s) shall be elevated by the second tier agency representatives to the third tier agency representatives within five calendar days after the expiration of the discussion period. The third tier agency representatives shall have 14 calendar days within which to discuss and attempt to resolve the disputed issue(s), assisted by other technical or legal staff as appropriate. If the third tier agency representatives cannot resolve the dispute, then the dispute resolution process is terminated and each agency may proceed independently according to its rights under state and federal law.

(iii) Each Trustee may automatically obtain one 14-calendar-day extension in this process by sending notice of such to all primary Trustee contacts involved in a particular dispute. Additionally, the 14- calendar-day period may be extended by mutual agreement of all Trustee involved in a particular dispute.

(3) Waiver of a trustee's role in the ecological services analysis process. If a Trustee has waived its involvement in the ecological services analysis process outlined in this MOU (either specifically or through failure to respond to notification within the required time frame) and has not reentered the process pursuant to subsection (j) of this MOU, then the Trustee has waived its role in the ecological services analysis process as set forth by TRRP rules, specifically 30 TAC §350.33(a)(3)(B) and §350.77(f)(2).

(i) Efficiencies. The parties recognize that due to the nature of a person's submittal, efficiencies may be gained by combining the notification and other processes under subsections (g) and (h)(1) of this MOU. Any such combined notification shall be clearly identified as such and shall serve to satisfy both of these subsections.

(j) Trustee re-entry and early exit from process.

(1) If a Trustee has waived its involvement in the ecological risk assessment or ecological services analysis process (either specifically or through failure to respond to notification within the required time frame), the Trustee may resume its involvement in the process by advising the TNRCC Trustee in writing (electronic mail *not* acceptable) of its intent to participate in subsequent notification and coordination activities. However, upon re-entry to the ecological risk assessment or ecological services analysis process, the Trustee involvement shall be prospective only and may not challenge previous decisions regarding the ecological risk assessment and ecological services analysis.

(2) Likewise, a Trustee participating in the ecological risk assessment or ecological services analysis process may decline future involvement by advising the TNRCC Trustee in writing (electronic mail *not* acceptable) of its intent not to participate in future notification and coordination activities.

(3) In the event that all the Trustees have waived involvement in the ecological services analysis process (either specifically or through failure to respond to notification within the required time frame), the TNRCC Trustee shall provide oversight of and approval or disapproval with comments on the compensatory ecological restoration and other activities associated with the ecological services analysis.

(k) Affected property activities. The Trustees shall promptly notify the TNRCC PM prior to initiating any Trustee activities on an affected property and shall coordinate with the TNRCC PM on any such activities which may affect the remedial/corrective action at an affected property.

(l) September 1995 Memorandum of Agreement. Any Trustee activities, issues, or responsibilities not specifically addressed herein, shall be governed by the September 1995 Memorandum of Agreement between the Trustees.

(m) Reservation of rights. Except as specifically stated herein, this MOU does not compromise or affect any legal rights of the parties, nor does it narrow the scope of any party's authority or jurisdiction.

(n) Third party challenges or appeals. The rights and responsibilities contained in this MOU may not be the basis of any third party challenge or appeal. Nothing in this MOU creates any rights or causes of action in persons not parties to this MOU.

(o) Appropriated funds. Nothing in this MOU shall be construed as obligating the United States, the State of Texas, or any public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

(p) Termination and amendment. This MOU shall terminate by written agreement of all the parties. Any party may withdraw from this MOU for any reason. In the event that any party withdraws from the MOU, it must provide written notice to the other parties. In the event of such withdrawal, the MOU remains in full force and effect for the remaining parties. This MOU may also be amended by written agreement of all the parties. Any termination, withdrawal, or amendment must be preceded by appropriate rulemaking.

(q) Effective date. This MOU may be signed by each of the parties in two or more counterparts which together shall constitute one and the same document and shall become effective upon the date of last signature.

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

Filed with the Office of the Secretary of State, on September 29, 2000.

TRD-200006816
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: November 13, 2000
For further information, please call: (512) 239-4712

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 11. OFFICE OF THE FIRE FIGHTERS' PENSION COMMISSION

CHAPTER 301. RULES OF THE TEXAS STATEWIDE EMERGENCY SERVICES RETIREMENT FUND

34 TAC §§301.1-301.3, 301.5, 301.6, 301.9, 301.12

The Board of Trustees of the Texas Statewide Emergency Services Personnel Retirement Fund (TSESRA Fund) for the Office of the Fire Fighters' Pension Commission (FFPC) proposes amendments to §§301.1-301.3, 301.5, 301.6, 301.9, and 301.12, concerning Rules of the TSESRA Fund.

The amendments are proposed as a result of the review of Chapter 301 in accordance with the Appropriations Act of 1997, House Bill 1, Article IX, Section 167. The proposed review was published in the May 28, 1999, issue of the *Texas Register* (24 TexReg 4032). These sections were previously amended and adopted in the April 21, 2000, issue of the *Texas Register* (25 TexReg 3555). With further review of Chapter 301, the commission is proposing additional changes to those sections. The original amendments to §301.5 and §301.6, which were published in the November 19, 1999, issue of the *Texas Register* (24 TexReg 10305), were withdrawn in the April 21, 2000, issue of the *Texas Register* (25 TexReg 3504) and reproposed for public comment in the same issue. Those changes are now being withdrawn elsewhere in this issue of the *Texas Register* so that a revised version can be republished.

These amendments will clarify existing rules, delete language that merely restates the law, and will provide penalties for failure to file annual reports in a timely fashion.

Section 301.1 adds and amends the following definitions: (2) "Commissioner", (3) "Department" (4) "Dependent", and (5) "Disability", (6)(D) will lay out the number of drill hours mandated, (7) clarifies that House Bill 358 is also known as TLFFRA, (8) states that the pension system does not recognize leaves of absence, (9) lays out the protocol for dealing with members who are called to active duty in the military, (10) defines "monetary enumeration", (12) defines "on duty death" and "on duty disability", (13) clarifies that Senate Bill 411 is also known as TSESRA, (14) lays out different methods for handling service time under prior pension systems, (15) defines "temporary disability", (16) and (17) states that TLFFRA is also known as House Bill 258 and that TSESRA is also known as Senate Bill 411.

Section 301.2(a)-(f) and (g)(5) defines the scope and the composition of "Emergency Services Districts". Subsection (g)(6)-(7) clarifies dual benefits and the required designation between retirement benefits and disability benefits. Subsection (g)(8) allows members unable to obtain a certificate of physical fitness to remain within the system.

Section 301.3(a)(1)-(8) defines "prior service" and lays out procedures to deal with prior service. Subsections (b) and (c) explain the government's control over dues. Subsection (d) lays out the requirements for vesting in the pension fund. Subsection (e) clarifies death benefits and the procedure for payment of death benefits.

Section 301.4(a)-(c) states that a payee may revoke or reduce his or her benefits.

Section 301.5(a) sets out how the governing body may be billed. Subsection (b) sets out the procedures for annual reports.

Section 301.6(a)-(d) sets out the composition, duties and terms of local boards.

Section 301.9(a) states the benefits spouses may receive. Subsection (b) deals with the payment of benefits after the merger of pension systems. Subsection (c) deals with administrative costs. Subsection (d) explains how local board may continue paying benefits to the spouse of a deceased fire fighter. Subsection (e) explains the duties of a local board. Subsection (g) clarifies the effect of pension benefits on social security benefits.

Section 301.12(a)-(d) defines "disability" and clarifies how disability benefits are paid.

Morris Sandefer, Commissioner, Fire Fighters' Pension Commission, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Sandefer also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be efficiencies resulting from clarification on existing rules, and another benefit will be, increased compliance with statutorily-required reporting by local governments, resulting from the provision of penalties for failure to file annual reports in a timely fashion. There will be no effect on small or micro businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Comments on the proposal may be submitted to Morris Sandefer, Commissioner, Fire Fighters' Pension Commission, P.O. Box 12577, Austin, Texas 78711-2577.

The amendments are proposed under Texas Civil Statutes, Article 6243e.3, Secs. 19(i) and 21(b), (Senate Bill 411) 65th Legislature (1977), revised in the 72nd Legislature (1991), and revised in the 75th Legislature (1997), which provide the TSESRA Board of Trustees with the authority to promulgate rules necessary for the administration of the pension fund.

Other statutes, articles, or sections affected by the proposed amendments are: §301.1(2)--Article 6243e.3 Sec. 1(12), (3) Article 6243e.3 Sec. 1, (4) affects on Article 6243e.3 Sec. 1(4), (5) Article 6243e.3 Sec. 5, (6)(D) affects Article 6243e.3 Sec. 1, (7) Article 6243e.3, (8) Article 6243e.3, (9) Article 6243e.3, (10) Article 6243e3.3 Sec. 1, (12) Article 6243e.3 Sec. 3 and Article 6243e.3 Sec. 4, (13) Article 6243e.3, (14) Article 6243e.3 Sec. 11, (15) Article 6243e.3 Sec. 4, and (16)-(17) Article 6243e.3; §301.2 (a)-(g)(5) Article 6243e.3 and Article 6243e.3 Sec. 2-2A, (g)(6)-(7) Article 6243e.3 Sec. 2A - Sec. 5, and (g)(8) Article 6243e.3 Sec. 8; §301.3 (a)(1)-(8) Article 6243e.3 Sec. 11(a), (b)-(c) Article 6243e.3 Sec. 2, (d) Article 6243e.3 Sec. 6, and

(e) Article 6243e.3 Article Sec. 5; §301.4 (a)-(c) Article 6243e.3; §301.5 (a) Article 6243e.3 Sec. 2, and (b) Article 6243e.3 Sec. 19 and Article 6243e.3 Sec. 23; §301.6 (a)-(d) Article 6243e.3 Sec. 22 and Article 6243e.3 Sec. 23; §301.9 (a) Article 6243e.3 Sec. 5, (b) Article 6243e.3 Sec.11, (c) Article 6243e.3, (d) Article 6243e.3 Sec. 5, (e) Article 6243e.3 Sec. 5 and (g) Article 6243e.3; §301.12 (a)-(d) Article 6243e.3 Sec. 4.

§301.1. Definitions.

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

(1) (No change.)

(2) Commissioner--The Fire Fighters' Pension Commissioner under Texas Local Fire Fighters' Retirement Act (TLFFRA) and Texas Statewide Emergency Services Retirement Act (TSESRA), Texas Revised Civil Statutes, Annotated, Article 6243e and Article 6243e.3, respectively.

(3) Department--Refers to participating department, defined in Article 6243e.3 as a public entity that performs fire, rescue, or emergency medical services and participates in the pension system under this Act.

(4) [~~(2)~~] Dependent--

(A) Effective September 1, 1991, an unmarried child, natural or adopted, who is less than 18 years of age; is less than 19 years of age and a full-time student at an elementary or secondary school; or became disabled before the child's 22nd birthday and remains disabled.

(B) Until September 1, 1991, a dependent was defined by the U.S. Internal Revenue Code, Subtitle A, Chapter 1B Part V, Section 152, and any subsequent amendments. Any dependents who were eligible to receive benefits prior to September 1, 1991, are defined by the U.S. Internal Revenue Code. See §301.3(e)(11)(B) of this title (relating to Determination of Costs and/or Benefits) for required forms.

(5) [~~(3)~~] Disabled--Refers to a member decided disabled by the local board. The causative disability may include mental impairment. Such disability shall be deemed ceased:

(A) Upon a doctor's determination that the member can perform his/her duties as an emergency service member and the duties of any other occupation for which the person is reasonably suited by education, training, and experience. Both criteria must be met to claim a disability.

(B) In the case of a student, upon the student's return to classes.

(6) [~~(4)~~] Emergencies and Drills --

(A) Emergency--An emergency as determined by the local board should be included on the Annual Report. The local board may substitute the duties performed by the member for actual emergencies.

(B) A member who misses drill hours while in recognizable certified training or education, may count that training or education for that week's drill if the local board approves.

(C) If a department does not hold at least 48 drill hours in a calendar year, no member will receive credit toward retirement for the year.

(D) A department may hold more drill hours than required by law. A [~~, but a~~] member must complete [~~only has to make~~] 40% of the 48 drill hours [~~number~~] required by law. All members of the department must attend drills. Members shall not [~~cannot~~] be excused from attending [~~less than~~] the minimum number of drill[~~drills~~] hours the member is required to attend as required by Article 6243e.3, Section 1(1), Qualified Service.

(E) A department must schedule drills and drill hours so that members entering or leaving the department during the calendar year have the ability to attend the required percentage during the calendar year.

(F) Emergencies must be prorated for members entering and leaving the department during the calendar year.

(G) All decisions by the local board regarding what constitutes an emergency, excused absences from emergencies, and all other pension matters should be documented in the local board's meeting minutes and kept on file by the local board. Members shall not [~~cannot~~] be excused from attending [~~less than~~] the minimum number of emergencies required by Article 6243e.3, Section 1(1), Qualified Service.

(7) HB 258 System--House Bill 258--Texas Revised Civil Statutes, Article 6243e, also known as TLFFRA, the act creating and governing the pension fund and system under that act.

(8) [~~(5)~~] Leave of absence--There is no leave of absence under Senate Bill 411. A member is either active and dues are being paid; or the member is terminated and no dues are paid. The suggested procedure is to terminate the member if the absence is for an extended period of time and reinstate when the member returns to the pension system. The exception is absence caused by military duty which does not affect qualified service and during which no dues are being paid, and absence caused by temporary disability, during which dues must be paid.

(9) [~~(6)~~] Military Duty--Called for active military duty for 30 days or more. The member is given credit for emergencies and drills and the governing body does not have to pay dues during that time. If the member is killed during the time he/she is called up, the system pays the lump sum off-duty death benefits to any beneficiary and a monthly pension to the spouse if applicable.

(10) [~~(7)~~] Monetary remuneration--Refers to payment to the member by coin, currency, check or money order, not including the furnishing of water, and not including compensation for expenses incurred for the purpose of attending drills and fires.

(11) Office--The Office of the Fire Fighters' Pension Commissioner.

(12) [~~(8)~~] On-duty death/On-duty disability--On duty death or disability is incurred in the course of the performance of duties as a member of the pension system based on authorization by tone, page-out, or verbal or written authorization by the member's department officer in charge and/or the department head.

[~~(9) Physical Fitness--§8, Certification of Physical Fitness, of the pension fund law, Texas Statewide Emergency Services Retirement Fund, was amended so that those members of the department not physically fit to participate in emergency services could remain in the system and earn credit toward retirement. The local board decides on the type of physical it feels meets the department's needs.~~]

[~~(A) The physician's certification of physical fitness remains in department files unless requested by the commissioner.~~]

[~~(B) The local board must notify the agency if a member cannot participate in emergency services.~~]

[~~(C) A member who cannot participate in emergency services should be assigned to support duties by the local board to earn credit on the Annual Report.~~]

[(D) The state board recommends updating physicals at least every five years.]

(13) Senate Bill 411 System--Senate Bill 411 - Texas Revised Civil Statutes, Article 6243e.3, also known as TSESRA, the Act creating and governing the pension fund and system under that Act.

(14) [(10)] Service Time--

(A) Buyback is time counted as SB 411 service [time] before a department's entry in the TSESRA [this] program.

(B) Accrued time is time counted as TLFFRA (HB 258 the old pension system) service before a department's entry in the TSESRA [this] program.

(C) Future service is time served in SB 411 after the department's entry in the TSESRA [this] pension program.

(15) [(11)] Temporary disability--

(A) A disability which, in the opinion of a physician, may be subject to improvement although in the interim rendering the member unable to perform his/her duties as a member or the duties of any other occupation for which the person is reasonably suited by education, training, and experience.

(B) If the doctor's statement says that a disability is permanent or will last more than three months, the member does not have to submit a new statement every three months. It is the responsibility of the local board to keep this office informed of the status of the disability. The governing body will continue to pay dues on a member on temporary disability. No dues are paid for a member on permanent disability since that person is considered to be on a disability-retirement.

(16) TLFFRA--The Texas Local Fire Fighters Retirement Act, Texas Revised Civil Statutes, Article 6243e.3 (Vernon's) establishing and governing the pension system and fund created by that Act also referred to as "HB 258."

(17) TSESRA-Texas Statewide Emergency Services Retirement Act, Texas Revised Civil Statutes, Article 6243e.3 (Vernon's). Also referred to as "Senate Bill 411."

§301.2. Scope.

(a) The Texas Statewide Emergency Services Retirement Act (TSESRA) [The law] applies to the governing body of any political subdivision of the state. If the participating department is situated in more than one political subdivision, the governing bodies of such political subdivisions shall contribute equally toward a total of at least $12 for each member for each month of service.

(b) Governing Body/Emergency Services Districts.

(1) (No change.)

(2) If [By law] a department is in more than one political subdivision the governing body of each political subdivision shall contribute equally toward the cost for each member's service. It is the responsibility of the department and the governing bodies to inform the commissioner if this section of the law applies.

(3) An emergency services district which is composed of the members of a city or county emergency services department which has been in the TLFFRA system cannot be forced to assume the liability of the TLFFRA payees. If the district refuses to accept the payment of this liability the district cannot be in the Senate Bill 411 system.

(4) (No change.)

(c) Exemption.

(1) This retirement fund need not apply to a public agency whose governing body exempted itself from its operation no later than [within] 60 days after [of] August 28, 1977. The requirement to provide for participation in the fund pertains to all other public agencies whose governing bodies did not choose to exempt themselves prior to October 28, 1977.

(2) If a governing body acts to rescind its order exempting itself from the Texas Statewide Emergency Services Retirement Fund, its action will amount to a repeal; and the governing body will begin making its contributions at the time the rescission [recession] becomes effective.

(3) (No change.)

(d) Eligibility of a Public Agency. A department, to enter into the SB 411 [this] retirement system [fund], must have at least ten active members. A subsequent drop of the number of active members will not affect the department's eligibility.

(e) (No change.)

(f) Non-TLFFRA Departments. Entities which have not been in any pension system prior to entering the TSESRA (Senate Bill 411) system follow the same procedures as entities in the Texas Local Fire Fighters' Retirement Fund (TLFFRA, formerly House Bill 258) system on voting to enter this pension system and follow the same rules [and regulations] as departments merging into the TSESRA (SB 411) [this] system from TLFFRA.

(g) Individual Eligibility.

(1) Status. Qualified members of a department, whether involved in prevention, suppression, investigation, maintenance, or clerical work are eligible to participate in the retirement fund provided, however, that the member's eligibility to join is dependent on the status of the public agency under whose control the member [he/she] is. The prospective member cannot override the public agency's status simply by the payment of contributions. If the person does not receive a certification of physical fitness or assignment to support duties, that person cannot be a member of the department. The following are specifically barred as members of the pension system:

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

(C) If the person is a probationary member for whom dues are not being paid. The maximum period during which dues are not paid is six months at which time the member must be placed in the TSESRA system. Entry dates cannot be back dated to cover the probationary period unless all prospective members are covered from the date they joined the [entered fire] department.

(2)-(3) (No change.)

(4) Start of Membership.

(A) (No change.)

(B) A department may have a probationary period of up to six months during which dues are not paid for the member. Dues will be charged based on the date the member entered the pension system as listed on the Personnel Form 502, as long as it is not more than six months after the [from] date the member entered [member] the department.

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

(E) If the date the member entered pension system is more than six months after the [from] date the member entered department, the commission will change the date the member entered pension system reflected on the Form 502 to within six months after the [of] date the member entered the department and shall send a corrected copy to

the department. Dues will be charged from the date established by the commission.

(5) Credit.

(A) Under various versions of TLFFRA law any fire fighter who was terminated from the department for one or more years lost any service earned before that period unless the local board ruled that the interruption in service was through no fault of the fire fighter. A local board entering the SB411 system may rule that a member's service is to be reinstated for the purpose of computing prior service for cost studies. This is local decision.

(B)-(C) (No change.)

(6) Dual Benefits.

(A) Death and Retirement. In order to be eligible for retirement benefits from two or more different departments, the member's service in the other departments must start before retirement from the primary department and he/she must start as a new member (without transferring time from the other department). See TSESRA, §2A, Membership, paragraphs (b)(5) and (c). [~~in the pension fund law book.~~]

(B) (No change.)

(7) Once a governing entity has elected to participate it can not rescind that election (§2(b) of TSESRA[~~the law~~]). The membership of the department may withdraw from the pension system as outlined in §12 of TSESRA [~~the law~~].

(8) Physical Fitness--§8, Certification of Physical Fitness, of the pension fund law, Texas Statewide Emergency Services Retirement Act, was amended so that those members of the department not physically fit to participate in emergency services could remain in the system and earn credit toward retirement. The local board decides on the type of physical it feels meets the department's needs.

(A) The physician's certification of physical fitness remains in department files unless requested by the commissioner.

(B) The local board must notify the agency if a member cannot participate in emergency services.

(C) A member who cannot participate in emergency services should be assigned to support duties by the local board to earn credit on the Annual Report.

(D) The state board recommends updating physicals at least every five years.

§301.3. Determination of Costs.

(a) Prior Service.

(1) Prior service includes service performed by every active member of the department who is at least 18 years old. The department does not have to include prior service with other departments or time that the TLFFRA law would deem forfeited. This is a local decision.

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

(5) Departments do not have to purchase prior service for those members who reenter the department, but were not active at the time the [~~fire~~] department entered the pension system. If the department decides to purchase prior service on members who were not active at the time the department entered the system, the department must pay the additional service in a lump sum payment. Interest is charged back to the date of the department's entrance into the system if it has been more than [~~over~~] three years since the department's entrance in the system. The rate is set by the stateboard based on recommendations of the actuary.

(6)-(7) (No change.)

(8) Cost studies for departments interested in entering Senate Bill 411 must be revised every 6 months [~~Cost study amounts are good for six months~~].

(b) Increase/Decrease of Dues Paid.

(1) Since a governing entity has the right to increase the dues it pays on its members, it also has the right to lower dues paid as long as it is not below the minimum set by law. In either case, retirements are figured on the average paid. Changes must be for at least $1.00, (one dollar) and they must be effective the first day of any month.

(2) (No change.)

(c) Transfer of Funds. Upon a public agency's merging into this retirement fund, it must transfer its local pension fund to the Senate Bill 411 system. These funds will be applied to the public agency's prior service costs and/or the cost of TLFFRA (House Bill 258) retirees and surviving spouses, if any. After the payment of these costs, any balance remaining will be applied, until spent, to the monthly contributions for the members of the former local pension fund of that public agency. The amount applied to the public agency's account consists of cash, investments, and any interest earned as of the date of merger. Monies earned on the transfer after the date of merger, are credited to the Senate Bill 411 fund as a whole.

[~~(d) Retirement.~~]

(d) [~~(e)~~] Vesting.

(1) A member who is not vested in this pension fund, but who has a total of 20 or more creditable [~~good~~] years of service, may retire under the TLFFRA fund amount used in the cost study for that department if accrued time was purchased. If [~~Since~~] the member was on the cost study, the member [~~he/she~~] will be carried as a Senate Bill 411 fund retiree with only TLFFRA service (accrued time); and the public agency will not be charged as it is for TLFFRA fund retirees.

(2) Members terminating on or after January 1, 1998, must have served a total of 59 months 28 days (60 months-five years) to vest. After vesting, each month served from 60 through 120 (five years-ten years) increases a member's pension .4167% a month and for months 120 to 180 (10 years to 15 years) it increases a member's pension .8333% a month. Because a monthly increase of .4167% results in an increase of the pension by more than 5% over 12 months, and a monthly increase of .8333% results in an increase of the pension by less than 10% vesting over 12 months, the computer will adjust and correct the percentage at the end of every 12 months of qualified service to reflect the 5% and 10% increase respectively. Credit is given for portions of months of qualified service. [~~Members retiring or terminating on or after January 1, 1998, must have served a total of 59 months 28 days (60 months-five years) to vest. After vesting each month served from 60 through 120 (five years-ten years) increases a member's pension .4167% and for months 120 to 180 (10 years to 15 years) it increases .8333%. Because .4167% is a little more than 5.0% and .8333% is a little than 10%, the computer will adjust and correct itself at the end of every 12 months of qualified service. If the combination of days in the first month and last month served after 60 months equals 15 or more days then the fire fighter receives credit for that month assuming it is qualified service.~~]

(3) Retirement benefits vest as outlined in §6, Vesting of Benefits, of TSESRA [~~the pension fund law~~]. A member must have 15 years of creditable service (180 months) in Senate Bill 411 before the Senate Bill 411 portion of the monthly retirement is affected by the 7.0% compounding factor.

(4) A member who was considered to be Active-Retired prior to September 1, 1989, may continue in that status. If an active

retiree[~~Should he/she~~] terminates [~~terminate~~] as an active member, the retiree cannot return to the Active-Retired status at a later date.

(5) The Fire Fighters' Pension Commission cannot pay benefits at a greater rate than specified in TSESRA §3, Retirement Benefits, paragraph (b) [~~of the pension fund law~~].

(6) In departments where the contribution rate has changed, if a member terminates service before the end of a month the average is figured on the fraction [~~fractions~~] of the month [~~months~~] served.

(7) Retirement forms can be backdated to the member's 55 birthday or termination date, whichever occurs later [~~depending on which is the latest~~]. The first check will be prorated back to the effective date of retirement, disability, etc.

(8) All payees whose pensions are not effective the first day of the month will have their first checks prorated.

(9) In the event of a pensioner's death (and there are no beneficiaries), if this office is not notified and retirement checks continue to be mailed, and the over-payment is not returned to the Commissioner within 30 days after the Commissioner requests repayment, [~~this office~~], then the commissioner shall charge the over-payment to the governing entity.

(10) The commission does not and shall not comply with requests towithhold IRS taxes from pension checks. A letter and postcard are mailed with the first pension check to every payee giving them this information. The payee must sign and return the postcard to the commission office. This card states that the payee requests that no tax be withheld. Failure to return the postcard shall not obligate the Commissioner to withhold IRS taxes.

(11) Pension checks for the month are due at the end of the month. Checks are mailed from the commission office between the 24th and 28th of every month except December when they are mailed to arrive at the payee's residence or bank before Christmas.

[~~(12) The commission at this time does not have direct deposit for payee pensions.~~]

(12) [~~(13)~~] All first checks to payees are accompanied by notification that cashing or depositing the first check indicates that the payee is retired and agrees with the pension amount.

(e) [~~(f)~~] Death.

(1) Beneficiaries. It is the responsibility of the member and the local board to update the member's record with the commission. This record should name any beneficiaries for lump-sum death benefits. Lump sum death benefits are paid to the beneficiary (ies) listed on the most recent, original, notarized personnel form (502) or beneficiary change form (503).

(2) Monthly Pension if Decedent Was on Active Status (On-Duty Death). The member is automatically vested with at least 15 years in the fund for on-duty deaths.

(3) Monthly Pension if Decedent Was on Active Status (Off-Duty Death). Dependents are not eligible for a monthly pension for off-duty deaths. Spouses will receive a monthly pension if the member was vested in the system and at least 55 years of age. The monthly pension will be based on two-thirds of the retirement due the member based on six times the average dues paid for qualified service.

(4) Benefits if Decedent Was on Inactive Status. Spouses of terminated-vested members, who die before age 55, are eligible to receive, on the effective date of the member's 55th birthday, a monthly pension that is two-thirds of the monthly pension which would have been due the member.

(5) Monthly Pension if Decedent Was on Disability Status. TSESRA [~~The statute, under~~] §5(d), Death Benefits, [~~of the pension fund law book,~~] states that if a member dies after retirement, the surviving spouse shall receive two-thirds of the monthly pension the decedent was receiving at the time of death. This includes spouses of deceased members who were on disability at the time of their death.

(6) Lump sum death benefits are based on months served in the SB 411 system (including buyback and future service months) and the dues amount paid. They are not based on the dollar amount paid for prior service. They are payable as noted in paragraph (1) of this subsection.

(7) Lump-Sum Payment for Off-Duty Death After Service of less than 15 [~~or Fewer~~] Years. [~~If a public agency has changed the amount of its contributions after merger into the Senate Bill 411 fund,~~]. The [~~the~~] off-duty lump-sum death payment will consist of all contributions to the fund made on the decedent's behalf. If the deceased member has fewer than 15 creditable years in the Senate Bill 411 fund, enough months are added at the final rate to make 180 months of service. The minimum off-duty lump sum death benefit is $2160.00.

(8) Lump-Sum Payment for Off-Duty Death After [~~Service of More Than~~] 15 Years of service or more. For members having served more than 15 creditable years in the retirement fund, the beneficiaries will receive an off-duty lump-sum payment consisting of the total contribution amount paid during the member's service in this program (buy back rate and future service). Portions of creditable months areprorated and counted.

(9) Lump-Sum Death Benefits for On-Duty Deaths. TSESRA Section 5(b) [~~of the pension fund law~~] states that the beneficiary is guaranteed a lump-sum benefit of at least $5,000 for an on-duty death. If the sum contributed by the public agency to the fund on the decedent's behalf is more than $5,000, then the beneficiary receives this greater amount. For an on duty death occurring on or after September 1, 1999, the lump sum death benefit is $60,000.00[~~Effective September 1, 1999, the state board set on-duty lump sum death benefit at $60,000.00~~].

(10) Determination of Beneficiaries.

(A) If a member on active status in the pension system [~~should~~] dies [~~die~~] before the [~~his/her~~] 502 (Personnel Form) is filled out and notarized, the member's public agency's governing body should submit to the Fire Fighters' Pension Commission office, a notarized letter signed by its chief or department head, and local board and a death certificate. The letter should state the decedent's entrance date and that the member [~~he/she~~] was [~~a member~~] on active status at the time of death. The letter should also list the member's nearest relatives (spouse, children, parents, siblings, etc.) and if the member [~~he/she~~] had a will. After receiving the above information, the Commissioner shall determine the beneficiaries after receiving the advise of Legal Council. [~~The State Attorney General's office will determine the beneficiaries in such a case.~~]

(B) After determination, the local pension board shall[~~should~~] send the Commission the Senate Bill 411 Survivor's Form. The letter shall [~~would~~] be considered as proof of the member's participation in the pension system. The commission shall [~~would~~] bill the public agency for any contributions owed on the member's time at the next billing.

(C) If the decedent has a Personnel Form 502 on file in the pension office, the beneficiaries are paid as listed on that form or the most recent Beneficiary Change Form 503 on file.

(11) Listing of Beneficiaries on Forms.

(A) Under Senate Bill 411, a member can list anyone (including his/her estate) as a beneficiary for his/her lump-sum death benefit.

(B) A person may list as many people as he/she wants as beneficiaries of this lump-sum benefit, but the benefit will be divided equally between them unless the member designates a proportional division.

(C) The spouse and/or dependents will receive any monthly pension due them even if they are not listed as beneficiaries of the lump-sum death benefit.

(12) Guardianship and Determination of Dependents.

(A) See §301.1 of this title (relating to Definitions) for determination of dependency.

(B) The following forms must be submitted:

(i) Obligations of Guardians.

(ii) Certified copies of Letter of Guardianship of the estates of all children. If no guardian is to be named, an Application for Payments Due Minor Child (form 411-G).

(iii) A copy of the Birth Certificate; or if an adopted child, a copy of the Adoption Decree.

(C) Warrants to dependents who are minor children are written: To the order of _____ (guardian's name) Trustee, for the use and benefit of _____. [~~(guardian's name)~~] (child's name)

(D) If the dependent was placed in the system prior to September 1, 1991, the guardian of all dependents, age 19 and older, must provide us with certified documentation of dependency yearly. This may be in the form of a copy of the 1040 or a certified statement from the IRS. The certified statement can be obtained from the IRS by the guardian and is more acceptable than a copy of the income tax return. The agency will notify the guardian when a minor dependent becomes 19 as to the proper procedure to continue pension payments. The guardian must notify us as soon as the dependent is no longer eligible to receive benefits.

(E) If the dependent was placed in the system after September 1, 1991, benefits cease at age 18 unless the agency receives a certification of school attendance, in which case benefits stop at age 19.

(F) Certification of dependency forms are mailed to all guardians yearly in April.

(13) Pensioner with no beneficiaries [~~A pensioner with no beneficiaries~~], who dies prior to the 14th day of any month, is not eligible to [~~will not~~] receive a retirement check for that month.

§301.5. Billings and Annual Reports.

(a) Billings.

(1) [~~The law states that~~] Each [~~each~~] governing body shall contribute the funds for the department's participation in the system.

(2) (No change.)

(3) The governing body may choose yearly or twice yearly billings. It [~~They~~] may also choose to have billings based on the governing body's [~~their~~] fiscal year instead of a calendar year.

[~~(4) The system cannot accept new payees or pay lump-sum death benefits to departments whose governing body is not current on their bills to the pension system.~~]

[~~(5) The commissioner may elect to withhold pension payments to payees of departments which do not pay their bills in a timely manner. This measure will be used as a last resort for departments which have ignored repeated requests for payment. Payees will be notified by letter on the first day of the month in which payment of pensions is to be withheld.~~]

(4) [~~(6)~~] Billings cannot be altered by the department or governing body without prior approval by the Commissioner or State Board of Trustees. Payments are deemed late if they are not received by the Commissioner within 60 days from the mailing date as indicated on the bill. Late payments accrue interest at the most recent assumed actuarial rate of return on investments of the fund. Although the current assumed actuarial rate of the fund is 8%, that rate is subject to change at any time and without notice.[~~commission~~]

(b) Annual Reports.

(1) Annual report forms are mailed by the Commissioner [~~commission~~] in December of each year.

(2) (No change.)

(3) The reports are due in the Office of the Fire Fighters' Pension Commissioner [~~Commission office~~] by January 31.

(4) (No change.)

(5) Administrative Penalties for late departmental annual report. An annual report is deemed late if the complete report is not in the office of the Commissioner within 60 days after January 31.

(A) The initial penalty is $500 (five hundred dollars) for the first violation. A penalty of $100 (one hundred dollars) will be added to the initial penalty for every 30 days the report is late.

(B) Departments which habitually (2 times in 3 years) submit late reports will have an initial penalty of $1000.00 (one thousand dollars) the second time the report is late. A penalty of $100 (one hundred dollars) shall be added to the initial penalty for every 30 days the report is late.

(C) Every consecutive year that an annual report is submitted late, the initial penalty will be at least $500 (five hundred dollars) greater than the initial penalty assessed the previous year.

(6) The Commissioner may, with the approval of the state board, waive penalties when a local board demonstrates that the delay in submission was beyond the control of the local entities responsible for preparing and submitting the report.

(7) The Commissioner with the approval of the state board may withhold an individual's pension payments when a local board cannot verify a recipient's eligibility to receive payments due to the recipient's failure to cooperate or to provide information. The chairman of the local board must make the request to withhold payments to the Commissioner in writing. The request shall outline the attempts the board has made to obtain this information. The Commissioner shall make a decision and shall notify the recipient in writing of the decision.

(8) The Commissioner shall not begin retirement annuity, disability, or death payments based on the service of a person in departments whose service information has not been updated by the latest annual report.

[~~(5) The commission cannot accept new payees or pay lump-sum benefits to departments whose annual reports are not up to date. Also, pensioners of departments which do not have their annual reports submitted by March 31 (a two-month grace period) will, effective April 1, not receive their warrants until the report is received and accepted by this agency. All pensioners of the non-reporting departments will be notified by letter on April 1 explaining why the checks are being held.~~]

§301.6. Local Boards of Trustees.

(a) Composition and terms of the local board are contained in Section 22, Local Board of Trustees, of Article 6243e.3, Vernons Texas Civil Statutes. The term limitations set forth in Section 22 of the TSESRA, Article 6243e.3, do not apply to the representative appointed by the governing body, and the governing body has the authority to select its representative to serve on the board in a manner that the local governing body chooses.

(b) Duties of the local board are contained in Section 23, Additional Duties of the Local Board of Trustees, and throughout the pension fund law Article 6243e and Article 6243e.3. These duties are also summarized in the information booklet issued by the Commissioner. The local board members are expected to be aware of the duties imposed on them by the law and these rules, and are legally responsible for errors and omissions made at the local level resulting in non-payment of benefits.

(c) By signing and notarizing Form LPB-411 of their department's annual report, the board members are certifying that, to the best of their knowledge, the report is correct.

(d) Meetings held by the local board of trustees shall be conducted as open meetings under the Texas Open Meetings Act, Texas Government Code Annotated, Chapter 551 as amended.

[(a) Composition and terms of the local board are contained in Section 22, Local Board of Trustees, of the pension fund law. The governing entity "representative" is not a "trustee" as it relates to term limitations; and the governing body has the authority to select its representative to serve on the board in a manner that the local governing body chooses.]

[(b) Duties of the local board are contained in Section 23, Additional Duties of the Local Board of Trustees, and throughout the pension fund law. These duties are summarized in a handout available upon request from the agency. The local board members are expected to be aware of the duties imposed on them by the law and these rules and regulations, and are legally responsible for errors and omissions resulting in non-payment of benefits.]

[(c) By signing and notarizing Form LPB-411 of their department's annual report, the board members are certifying that, to the best of their knowledge, the report is correct.]

§301.9. General.

(a) TLFFRA (formerly House Bill 258) states that spouses of retirees will receive two-thirds of the retiree's monthly benefit. Senate Bill 411 fund pays spouses $200.04/year (two hundred dollars and four cents) [(]$16.67 a month[)] (sixteen dollars and sixty-seven cents).

(b) Senate Bill 411 states that any benefits being paid by the current pension system (TLFFRA) at the date of merger will be paid by the Senate Bill 411 pension system following the merger. A governing entity may decide to pay its TLFFRA retirees and spouses an amount over the minimum set by TLFFRA. The Commissioner [We] will bill the governing body this exact cost.

(c) Governing entities are not billed for administrative costs associated with the Fire Fighters Pension Commissioner [agency's] payment of TLFFRA pensions.

(d) Individual departments, with the approval of governing entities, may agree to continue paying pensions to spouses of deceased TLFFRA system retirees if the spouse remarries, and pay pensions to spouses regardless of when the spouse married the TLFFRA system retiree. This is a local decision.

(e) Death Certificates are required for TLFFRA system payees as well as Senate Bill 411 system payees before benefits can be paid to spouses.

(f) The department and/or governing entity shall [should] keep copies of all forms (502, 503, retirement, disability, survivors) on file. The originals must be on file in this office. The department or government body shall file the originals of the forms with The Commissioner.

(g) (No change.)

§301.12. Disability.

(a) A member whose disability results from performing emergency services duties is guaranteed a disability benefit of at least $300.00 (three hundred dollars) a month.

(b) The monthly benefit increases $50.00 (fifty dollars) a month for every $12.00 (twelve dollars) increase in dues paid by the governing entity.

(c) (No change.)

(d) Disability benefits are prorated for portions of months during which a person is disabled.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006841
Morris E. Sandefer
Commissioner
Office of the Fire Fighters' Pension Commission
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 936-3372

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 42. MEDICAID WAIVER PROGRAM FOR PEOPLE WHO ARE DEAF-BLIND WITH MULTIPLE DISABILITIES

40 TAC §42.12

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

The Texas Department of Human Service (DHS) proposes the repeal of §42.12, concerning cost report, in its Medicaid Waiver Program for People who are Deaf-Blind with Multiple Disabilities chapter. The purpose of this proposal is to make the cost-reporting and reimbursement methodology for this Medicaid waiver program consistent with other Medicaid programs operated by DHS.

Eric M. Bost, commissioner, has determined that for the first five-year period the proposed repeal will be in effect, there will be no

fiscal implications for state or local governments as a result of enforcing or administering the repeal.

Mr. Bost has also determined that for each year of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the proposal is that the repeal will bring the program into consistency with other Medicaid waiver programs operated by DHS. There will be no adverse economic effect on small or micro businesses, because no changes in practice are required of any business, large or small.

The Health and Human Services Commission (HHSC) proposes related policy in 1 TAC §§355.9021 and 355.9022 in this issue of the *Texas Register*.

Questions about the content of this proposal may be directed to Nancy Kimble at (512) 438-4051 in DHS's Rate Analysis Department. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-274, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules in the *Texas Register.*

The repeal is proposed under the Government Code, §531.033, which authorizes the commissioner of the Health and Human Services Commission to adopt rules necessary to carry out the commission's duties, and §531.021(b), which establishes the commission as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under Chapter 32, Human Resources Code.

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

§42.12. Cost Report.

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

Filed with the Office of the Secretary of State, on September 28, 2000.

TRD-200006793
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 438-3108

♦ ♦ ♦

CHAPTER 43. PERSONAL ATTENDANT SERVICES PROGRAM

40 TAC §§43.1-43.9

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

The Texas Department of Human Services (DHS) proposes the repeal of Chapter 43, Personal Attendant Services Program, §§43.1-43.9. The purpose of the repeals is to create the new Consumer-Managed Personal Assistance Services (CMPAS) Program that will provide long-term consumer-managed personal assistance services to persons with disabilities who require such services to maintain independence in the community. Persons in the program will direct their own care by participating in decisions about hiring, training, and supervising their personal assistants. The Client-Managed Attendant Services Program is being combined with the Personal Attendant Services Program, transferred to DHS on September 1, 1999, and language from DHS's Chapter 49, Contracting for Community Care Services.

In a related action, DHS proposes new §§48.2600-48.2619, Subchapter E, Client-managed Attendant Services, in this issue of the *Texas Register.*

Eric M. Bost, commissioner, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bost also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of adopting the proposed rules will be easier methods for consumers to access services and for the department to administer the program. The revised co-pay schedule creates more incentive for people with disabilities to obtain and retain employment. There will be no effect on large, small, or micro businesses, because the rules do not change reimbursement policies to contractors of the CMPAS services. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of this proposal may be directed to Stephen Schoen at (512) 438-2622 in DHS's Community Care for Aged and Disabled section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-200, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

The repeals are proposed under the Human Resources Code, Title 2, Chapter 22, which authorizes the department to administer public assistance programs.

The repeals implement the Human Resources Code, §§22.001-22.030.

§43.1. Purpose.

§43.2. Services Provided.

§43.3. Eligibility.

§43.4. Contractor Responsibilities.

§43.5. Client Responsibilities.

§43.6. Methods of Payment to the Attendant.

§43.7. Copayment.

§43.8. Suspension or Termination of Services.

§43.9. Client Appeals.

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

Filed with the Office of the Secretary of State, on September 27, 2000.

TRD-200006784
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 438-3108

♦ ♦ ♦

CHAPTER 48. COMMUNITY CARE FOR AGED AND DISABLED
SUBCHAPTER E. CLIENT-MANAGED ATTENDANT SERVICES

The Texas Department of Human Services (DHS) proposes the repeal of §§48.2601-48.2616, concerning Client-managed Attendant Services, and proposes new §§48.2600-48.2619, concerning Client-managed Attendant Services, in its Community Care for Aged and Disabled chapter. The purpose of the repeals and new sections is to create the new Consumer-Managed Personal Assistance Services (CMPAS) Program that will provide long-term consumer-managed personal assistance services to persons with disabilities who require such services to maintain independence in the community. Persons in the program will direct their own care by participating in decisions about hiring, training, and supervising their personal assistants. The Client-Managed Attendant Services Program is being combined with the Personal Attendant Services Program, transferred to DHS on September 1, 1999, and language from DHS's Chapter 49, Contracting for Community Care Services.

In a related action, DHS proposes the repeal of Chapter 43, Personal Attendant Services Program, in this issue of the *Texas Register.*

Eric M. Bost, commissioner, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bost also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of adopting the proposed rules will be easier methods for consumers to access services and for the department to administer the program. The revised co-pay schedule creates incentive for people with disabilities to obtain and retain employment. There will be no effect on large, small, or micro businesses, because the rules do not change reimbursement policies to contractors of the CMPAS services. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of this proposal may be directed to Stephen Schoen at (512) 438-2622 in DHS's Community Care for Aged and Disabled section. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-200, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register.*

Under §2007.003(b) of the Texas Government Code, the department has determined that Chapter 2007 of the Government Code does not apply to these rules. Accordingly, the department is not required to complete a takings impact assessment regarding these rules.

40 TAC §§48.2600-48.2619

The new sections are proposed under the Human Resources Code, Title 2, Chapter 22, which authorizes the department to administer public assistance programs.

The new sections implement the Human Resources Code, §§22.001-22.030.

§48.2600. Purpose of This Subchapter.

(a) This subchapter merges the rules from the Texas Department of Human Services (DHS) Client-Managed Attendant Services Program (CMAS) and the Texas Rehabilitation Commission (TRC) Personal Attendant Services Program (PAS), which was transferred to DHS on September 1, 1999. It also incorporates language from Chapter 49 of this title (relating to Contracting for Community Care Services). The combined program is the Consumer-Managed Personal Assistance Services (CMPAS) program.

(b) The purpose of the CMPAS program is to provide long-term consumer-managed personal assistance services to persons with disabilities who require such services to maintain independence in the community. Persons in the program direct their own care by participating in decisions about hiring, training, and supervising their personal assistants. Consumers in the CMPAS program can choose among three different payment options that provide varying degrees of responsibility in managing personal assistance services. The three payment options are the agency model, block grant model, and vendor fiscal intermediary model. Services are provided regardless of employment status.

§48.2601. Definitions.

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

(1) Agency model--The payment option in which people with disabilities control the hiring, training, management, and dismissal of their personal assistants. A contractor controls the recruitment of personal assistants and back-up personal assistants and performs employer-related administrative functions. These administrative functions include payroll functions and filing tax-related reports of personal assistants. The contractor is the employer of record.

(2) Block grant model--The payment option in which the consumer controls the recruitment, hiring, management, and dismissal of his personal assistants. The consumer handles employer-related administrative functions that include payroll functions for their personal assistants and substitute (back-up) personal assistants and filing tax-related reports of personal assistants. The consumer is the employer of record. The contractor is responsible for providing substitute attendants and reimbursing the consumer for wages and employment taxes paid to the personal assistants for authorized services.

(3) Consumer-Managed Personal Assistance Services (CMPAS)--Personal assistant services provided by agencies licensed as Home and Community Support Services Agencies (HCSSAs) under the category of Personal Assistance Services license. Consumers in this program are mentally competent, physically disabled adults who are willing to supervise their personal assistant or who delegate someone to supervise the personal assistant. This program is unique in that it offers three payment options for the delivery of personal assistance services: agency model, block grant model, and vendor fiscal intermediary (VFI) model. Payment options vary based on the way a personal assistant is paid and the employer of record. The payment option determines the amount of control the consumer has

over his services. It also impacts the flexibility of the service delivery. Consumers or contractors have different responsibilities in each option.

(4) Consumer--An eligible recipient of CMPAS services. The consumer manages his personal assistant in all three payment options. He retains control over the hiring, management, and dismissal of an individual providing personal assistance.

(5) Contractor--A Home and Community Support Services agency that has entered into a contractual agreement with the Texas Department of Human Services (DHS) to deliver CMPAS in accordance with established policies. The contractor determines the consumer's eligibility for services, authorizes the consumer's service levels within program limits, and offers the consumer a choice of the three payment options in CMPAS.

(6) Fiscal agent--A CMPAS contractor who agrees to participate in the vendor fiscal intermediary model. The fiscal agent enters into a contractual agreement with DHS to handle payroll; prepare and file tax-related forms and reports for workers' compensation, state and federal unemployment, Medicare, and Federal Insurance Contributions Act (FICA); and reimburse consumers for employer-related expenses.

(7) Personal assistant--A person who is employed by the consumer or contractor to provide personal assistance through CMPAS.

(8) Vendor fiscal intermediary model (VFI)--The payment option in which the consumer controls the recruitment, hiring, management, and firing of his personal assistants. A fiscal agent, the contractor, handles employer-related administrative functions that include payroll for the personal assistants and substitute (back-up) personal assistants and filing tax-related reports of personal assistants. The consumer is the employer of record.

§48.2602. Program Services.

(a) Eligible consumers are entitled to the following personal assistance services.

(1) Escort. Escort services include, but are not limited to, arranging for transportation or accompanying the consumer on trips such as to obtain health care services, household items, or wheelchair repairs, and to other locations in the community. The consumer is responsible for the cost of transportation.

(2) Home management. Home management services include, but are not limited to, assistance with activities related to housekeeping that are essential to the consumer's health and comfort:

(A) changing bed linens;

(B) house cleaning;

(C) laundering;

(D) shopping;

(E) storing purchased items; and

(F) washing dishes.

(3) Personal care. Personal care services include, but are not limited to, assistance with activities related to the care of the consumer's physical health:

(A) bathing;

(B) dressing and undressing;

(C) preparing meals;

(D) eating;

(E) exercising;

(F) grooming;

(G) caring for routine hair and skin needs;

(H) assistance with self-administered medications including suppositories;

(I) toileting;

(J) transfer and ambulation;

(K) changing an external catheter;

(L) using external manual manipulation to implement a bowel program;

(M) providing personal care related to menstruation;

(N) inserting and removing a tampon;

(O) providing ileostomy care (removing and disposing old bag and reapplying the new bag); and

(P) providing colostomy care (removing and disposing old bag and reapplying the new bag).

(4) Delegated health-related tasks requiring physician's orders. In the agency model only, personal assistants or back-up assistants performing delegated health-related tasks must be supervised by a registered nurse as specified in §48.2606(3)(K) of this title (relating to Additional Contractor Responsibilities Under the Agency Model). Health-related tasks requiring physician's orders authorizing the consumer's specific personal assistant(s) to perform specific tasks delegated by the physician include, but are not limited to:

(A) internal catheter care, including insertion, irrigation, and changing;

(B) administration of medications;

(C) bowel program, including cleansing enema, and internal digital stimulation;

(D) decubitus care, stages I and II; and

(E) changing sterile dressings.

(b) The following services may not be authorized for reimbursement through the Consumer-Managed Personal Assistance Services (CMPAS) program:

(1) tasks that must be provided by licensed nurses or therapists unless delegated by a licensed physician; and

(2) the purchase of additional services and/or supplemental pay that result from agreements between the personal assistant and the consumer.

§48.2603. Contractor Qualifications.

To contract with the Texas Department of Human Services (DHS) to provide Consumer-Managed Personal Assistance Services, a legal entity or one of its divisions must be:

(1) licensed by the Texas Department of Human Services as a Home and Community Support Services Agency under the category of Personal Assistance Services; and

(2) authorized to do business in the State of Texas by the Secretary of State if an out-of-state corporation.

§48.2604. Consumer Eligibility Criteria.

To be eligible for participation in the Consumer-Managed Personal Assistance Services (CMPAS) program, the applicant must:

(1) be age 18 or older;

(2) have a physician's statement that the applicant has a physical disability. The physician's statement must describe the disability and state whether the disability is permanent or is expected to last for at least six months from the date eligibility is determined. If the disability is not permanent, the physician's statement must specify the expected duration of the disability;

(3) not receive Primary Home Care, Family Care, Residential Care (supervised living services and emergency care), Adult Foster Care, Frail Elderly Program, Medicaid Waiver Program services, Special Services To Persons With Disabilities - attendant services while receiving CMPAS, or attendant services through the In-Home Family Support Program;

(4) need assistance with at least one personal care task for at least five hours per week;

(5) be able and willing to self-direct personal assistant care or have a relative or friend who is able and willing to be responsible for directing the care without compensation;

(6) reside in one of the contract areas established as part of a procurement for CMPAS;

(7) have a plan of care for authorized CMPAS of 52 hours per week or fewer. In addition, all Community Care for the Aged and Disabled services added to CMPAS must cost less than the weighted average cost for nursing home care; and

(8) have a funded service slot, based on availability of funds appropriated by the Texas Legislature to the CMPAS program.

§48.2605. Contractor Responsibilities Under Agency, Block Grant, and Vendor Fiscal Intermediary (VFI) Models.

After interviewing the applicant, the contractor must:

(1) provide personal assistance services to a specific number of eligible consumers in a specific geographic area as outlined in their contract with the Texas Department of Human Services (DHS). Contractors may provide the vendor fiscal intermediary (VFI) model, or refer consumers for that model to a VFI.

(2) employ an assessor with knowledge, understanding, and/or training in independent living concepts and at least one year of experience working with persons with physical disabilities. The assessor performs the following functions:

(A) determines service eligibility. The applicant must meet each criterion as specified in §48.2604 of this title (relating to Consumer Eligibility Criteria);

(B) enables the applicant to make an informed choice by discussing alternatives in public programs that offer personal assistance services;

(C) assesses and reassesses service needs annually, face-to-face, or by telephone, by using DHS Client Needs Assessment Questionnaire and Task/Hour Guide form; and

(D) develops a service plan that:

(i) includes the number of hours and tasks authorized and negotiated between the applicant and the contractor. Up to 10 hours per week may be authorized for tasks related to care of a dependent child under the age of 12; and

(ii) is signed by the applicant. If the applicant does not agree with the assessment of the service level and service plan, the issue is referred to the contractor's supervisory staff for resolution. If the outcome is unsatisfactory to both parties, a final determination is made by designated DHS staff within 30 days of notification. If the applicant does not agree with the determination of service level and service plan approved by the contractor's supervisory staff, the contractor must not delay initiation of services. Contractor staff, with the consumer's consent, may initiate services according to their assessment of the service level required and notify the designated DHS staff of the consumer's disagreement with the service level.

(3) place the applicant on an interest list if the eligible applicant cannot be served because the contractor is operating at full capacity. Full capacity is reached when all funds appropriated to the CMPAS program by the Texas Legislature have been allocated to the contractor by DHS and are already budgeted to be spend on existing clients. The contractor must:

(A) provide CMPAS services as space becomes available to two people from the CMPAS interest list and one person from the PAS waiting list in chronological order until all names are removed from the PAS interest list;

(B) contact the applicant annually to determine if he is still interested in receiving services and to inform him of his place on the interest list; and

(C) provide the interest list to the regional staff monthly. Regional staff places each applicant's name in the community care interest list system. As providers serve people from the interest list, regional staff update the interest list. In regions with more than one contractor, regional staff maintain the interest list, which combines the information from each contractor's interest list. As openings occur, regional staff contact consumers and give them a choice among providers.

(4) determine the consumer's copayment annually or upon change in consumer's income level. The contractor must notify the consumer of the need to follow copayment procedures to retain eligibility. Consumers are required to enter into copayment agreements based upon non-excluded monthly net income less allowable deductions. Computation of copayment amounts is outlined in §48.2614 of this title (relating to Consumer Copayment).

(5) offer the applicant a choice between the following three methods of paying the personal assistant:

(A) the contractor may pay the personal assistant's salary directly as specified in the agency model §48.2606 of this title (relating to Additional Contractor Responsibilities under the Agency Model) and §48.2610 of this title (relating to Additional Consumer Responsibilities under the Agency Model); or

(B) the consumer may pay the personal assistant's salary from a block grant option as specified in §48.2607 of this title (relating to Additional Contractor Responsibilities under the Block Grant Model) and §48.2611 of this title (relating to Additional Consumer Responsibilities under the Agency Model). Consumers receiving Medicaid or other services where eligibility may be wholly or partially based upon income are not allowed to choose this option; or

(C) the consumer may choose the VFI option as specified in §48.2608 of this title (relating to Additional Contractor Responsibilities under the VFI Model) and §48.2612 of this title (relating to Additional Consumer Responsibilities under the VFI Model).

(6) verify that there are standing physician's orders in accordance with the Texas Medical Practices Act and all related state and federal statutes and regulations if the personal assistant(s) provides the consumer any of the health-related services specified in §48.2602(a)(4) of this title (relating to Program Services). The contractor must maintain a copy of the standing physician's orders in the consumer's file.

(7) re-assess and assist consumers when there is a change in consumer status. In some instances, personal assistant care will be

insufficient. In this case, the consumer or contractor must request an evaluation of his needs. Based on the re-reassessment, services may be increased if appropriate, or terminated, if the additional tasks or hours exceed the cost ceiling for the program. Before services are terminated, the contractor must notify DHS following the procedures outlined in §48.6098(a)-(d) of this title (relating to Applicant and Consumer Rights and Responsibilities in Agency, Block Grant and Vendor Fiscal Intermediary Models). Contractor staff must be aware of the availability and eligibility criteria for other services available in the community and develop contingency plans for consumers whose physical condition or environment deteriorates significantly.

(8) train consumers in skills needed to select, instruct, and supervise personal assistants, preparation of personal assistant timesheets, and their obligations to the Internal Revenue Service in the block grant and VFI models.

(9) initiate services as quickly as possible if the contractor is not at full capacity and an applicant is determined to be at risk. If the at-risk applicant meets all other eligibility criteria, a physician's verbal statement of the consumer's physical disability is adequate for up to 30 days. For services to continue beyond 30 days, the contractor must possess a written physician's statement that verifies the consumer's disability and the date of the verbal statement. To initiate services under these circumstances, the contractor may use personal assistants of their choice. If the contractor is at full capacity when the application is received, the contractor must make a referral to other community resources. The consumer is allowed to interview permanent personal assistants after services have been initiated.

(10) send a letter to all consumers and personal assistants giving them the effective contract termination date within 10 days of contractor termination notification. The letter must also provide the name of the new contractor, procedures to transfer employment records to the new contractor, and a statement of the intent to effect a smooth transition with as little disruption in service as possible. The contractor must provide the new contractor with the names, addresses, and telephone numbers of consumers and personal assistants within ten days of notification of loss of contract. For each consumer, the contractor must also provide a copy of the current DHS Authorization for Community Care Services and Community Care Intake forms and copies of all documentation necessary for the consumer to participate in this program.

(11) comply with the rules in Chapter 49 of this title (relating to Contracting for Community Care Services).

(12) review with the consumer and provide a copy of the DHS Community Care for the Aged and Disabled Client's Rights and Responsibilities at initial assessment and reassessment.

(13) comply with §49.13(a)-(d) of this title (relating to Client Rights and Responsibilities) regarding consumer's rights and responsibilities and complaint procedures.

(14) notify the ineligible applicant in writing using DHS form Notification of Community Care Services within three calendar days of the date of the decision.

(15) notify the consumer and the department of implementing any suspension reduction, or termination of services or increase in copayment at least 12 days before the effective date of the decision in accordance with §48.2613 of this title (relating to Suspension and Termination of Services.)

(16) instruct consumers and personal assistants that personal assistants should provide only those tasks and those hours authorized on the DHS form Authorization for Community Care Services; unless the consumer privately pays for additional hours;

(17) instruct consumers to complete the timesheet as required.

(18) assure that family members or relatives employed as personal assistants and providing additional or non-covered services as informal caregivers meet all employment qualifications of the home-health agency and is not disqualified. A family member is disqualified if the applicant or participant does not want the family member as the paid contractor, there is evidence that the family member has abused or exploited the applicant/participant; or there is evidence that the family member has not delivered services in accordance with the personnel requirements of the contractor.

(19) receive and process personal assistant timesheets.

(20) prepare payroll and distribute checks to appropriate parties.

(21) complete tax form and reports.

§48.2606. Additional Contractor Responsibilities Under the Agency Model.

In addition to the responsibilities listed in §48.2605 of this title (relating to Contractor Responsibilities Under Agency, Block Grant and Vendor Fiscal Intermediary Models), contractors in the agency model:

(1) must maintain a pool of substitute personal assistants to use as substitutes and as a referral pool for consumers who do not choose the VFI option. Substitutes provide emergency back-up personal assistant capability upon request of the consumer. In the agency model the contractor is the employer of substitute personal assistants it provides. When a personal assistant's employment is terminated, replacement personal assistants are supervised by the contractor until the consumer hires another personal assistant.

(2) may hire any personal assistant who meets licensure. Prospective personal assistants are referred to consumers of the program until a satisfactory match is achieved. In the event the consumer delays hiring a personal assistant for more than seven calendar days after eligibility has been determined, the person conducting the assessment must confer with the consumer to identify the reasons for failure to hire a personal assistant and to provide training when necessary to enable the applicant or consumer to choose a personal assistant.

(3) are the employers of record for the personal assistant in the agency model. The contractor must:

(A) be responsible for the initial orientation of personal assistants for consumers who participate in the agency model. The personal assistant is notified of his rights and responsibilities as part of this training. Required subjects for orientation are basic interpersonal skills; needs of persons with disabilities; overview of the types of tasks the personal assistant will be performing; first aid, safety and emergency procedures, proper completion of required forms; explanation of the consumer's role as supervisor; and explanation of the contractor's responsibilities to personal assistants. This training is provided on or before services are provided for a consumer. The consumer provides the personal assistant all additional training needed to meet his needs. In the block grant or vendor fiscal intermediary model, the consumer provides all the training for the personal assistant.

(B) determine the consumer's preference regarding resuscitation. When there is documentation that the consumer desires resuscitation, the contractor must ensure that the personal assistant for the consumer has a current course completion card for adult cardiopulmonary resuscitation (CPR) from either the Red Cross or American Heart Association. When the consumer desires CPR, new personal assistants must complete the course paid for by the contractor within 60 days from employment.

(C) assume all responsibility for filing of employee income and unemployment taxes.

(D) assume liability for employee work-related injuries.

(E) prepare payroll and distribute payroll checks to personal assistants.

(F) conduct criminal history check prior to placement of personal assistant on the job to the consumer.

(G) resolve problems between the consumer and the personal assistant.

(H) make payroll spending decisions regarding salary of personal assistant and benefit package.

(I) not discriminate against personal assistant or applicants.

(J) accept responsibility for acts of personal assistant on the job.

(K) provide registered nurse supervision of personal assistants and back-up assistants performing health-related tasks delegated by a physician. The Home and Community Support Services Agencies (HCSSA) agency registered nurse must verify the competence of the personal assistant(s) to perform the health-related tasks delegated by a physician.

§48.2607. Additional Contractor Responsibilities Under the Block Grant Model.

In addition to the responsibilities listed in §48.2605 of this title (relating to Contract or Responsibilities Under Agency, Block Grant, and Vendor Fiscal Intermediary (VFI) Models), contractors in the block grant model must:

(1) reimburse the consumer for personal assistant wages and the employer share of Social Security. The amount of funds retained by the contractor under this model must not exceed that retained under the vendor fiscal intermediary (VFI) model.

(2) maintain a pool of personal assistants to use as substitutes and as a referral pool for consumers who do not choose the VFI option. Substitute assistants provide emergency back-up capability upon request of the consumer. The contractor is the employer of substitute personal assistants it provides. When a personal assistant's employment is terminated, the contractor supervises replacement personnel until the consumer hires another personal assistant. Prospective personal assistants are referred to consumers of the program until a satisfactory match is achieved. If the consumer delays hiring a personal assistant for more than seven calendar days after eligibility has been determined, the person conducting the assessment must confer with the consumer to identify the reasons for failure to hire a personal assistant. The person conducting the assessment must also provide training when necessary to enable the applicant or consumer to hire a personal assistant.

§48.2608. Additional Contractor Responsibilities Under the Vendor Fiscal Intermediary Model.

In addition to the responsibilities listed in §48.2605 of this title (relating to Contract or Responsibilities Under Agency, Block Grant, and Vendor Fiscal Intermediary (VFI) Models), contractors in the vendor fiscal intermediary model must perform all responsibilities listed in §41.103, of this title (relating to Generic Contractor Responsibilities Under the Vendor Fiscal Intermediary Model).

§48.2609. Applicant and Consumer Rights and Responsibilities Under the Agency, Block Grant, and Vendor Fiscal Intermediary Models.

The applicant or consumer is responsible for:

(1) obtaining the physician's statement of physical disability as specified in §48.2604 of this title (relating to Consumer Eligibility Criteria);

(2) choosing the method of payment to the personal assistant as specified in §48.2605(5) of this title (relating to Contractor Responsibilities) by completing the Texas Department of Human Services' (DHS's) Consumer Selection of Consumer-Managed Personal Assistance Services (CMPAS) Payment Option form;

(3) negotiating the number of hours and tasks with the contractor and establishing the schedule for the personal assistant to provide services;

(4) hiring and firing the personal assistant;

(5) training the personal assistant in the delivery of services, using acceptable and/or necessary procedures;

(6) supervising the personal assistant in the delivery of services or arranging for a friend or relative to provide direct supervision of the personal assistant;

(7) supervising the personal assistant's recording of hours worked and signing and dating the personal assistant's timesheet on or after the last day of the reporting period services were provided;

(8) submitting the signed and dated timesheet to the fiscal agent, according to the payroll schedule established by the fiscal agent. The consumer understands that late arrival of timesheets may result in delay in the personal assistant(s) being paid;

(9) notifying the contractor of duplicate disallowed services provided by DHS, such as primary home care or family care;

(10) submitting to the contractor any copayment amounts required;

(11) providing proof of income for the initial assessment, annual reassessment, and when income changes;

(12) obtaining standing physician's orders to delegate any of the health-related tasks specified in §48.2602(a)(4) of this title (relating to Program Services) and authorized in the service plan. Standing physician's delegation orders must specify the following:

(A) the delegated health-related tasks;

(B) the personal assistant(s) and back-up personal assistant(s) to whom the health-related tasks are delegated;

(C) the patient's name; and

(D) the date;

(13) appealing the suspension or termination of services according to applicable agency rules; and

(14) informing the contractor and DHS of any changes in the consumer's status which include, but are not limited to, changes in the consumer's address, and telephone number.

§48.2610. Additional Consumer Responsibilities Under the Agency Model.

In addition to the responsibilities listed in §48.2609 of this title (relating to Applicant and Consumer Rights and Responsibilities in Agency, Block Grant, and Vendor Fiscal Intermediary Models), consumers who choose the agency model are responsible for providing to the contractor the names of potential personal assistants or choosing the personal assistant from the contractor's personal assistant referrals.

§48.2611. Additional Consumer Responsibilities Under the Block Grant Model.

In addition to the responsibilities listed in §48.2609 of this title (relating to Applicant and Consumer Rights and Responsibilities in Agency, Block Grant, and Vendor Fiscal Intermediary Models), consumers who choose the block grant model are responsible for:

(1) resolving any employer or employee-related problems or disagreements directly with his personal assistant(s);

(2) not discriminating against personal assistants or applicants based on race, creed, color, national origin, sex, age, disability, or sexual orientation;

(3) assuming liability for work-related injuries to personal assistant. Personal assistants of consumers participating in the block grant model are considered employees of the consumer. The consumer is the employer and retains control over the selection, management, and dismissal of an individual providing long-term care, personal assistance, or respite services. Personal assistants are not employees of the contractor or the Texas Department of Human Services (DHS), and the contractor and DHS are not responsible or liable for any negligent acts or omissions by the personal assistant;

(4) spending all funds received from the contractor on wages, employer share of social security, and employee benefits;

(5) preparing and signing an agreement with the personal assistant. This agreement includes:

(A) the tasks the personal assistant is to perform for the consumer;

(B) the schedule the personal assistant will work for the consumer;

(C) the hourly rate the consumer will pay the personal assistant, which must be at least the amount the contractor normally pays personal assistants, and timeframes (at least twice a month);

(D) under what conditions the personal assistant may be dismissed; and

(E) the requirements that the personal assistant must let the consumer know at least 24 hours in advance of the personal assistant not being able to work for the consumer;

(6) supervising the personal assistant's recording of hours worked and signing and dating the personal assistant's timesheet on or after the last day of the reporting period services were provided; and

(7) submitting the signed and dated timesheet to the contractor.

§48.2612. Additional Consumer Responsibilities Under the VFI Model.

In addition to the responsibilities listed in §48.2609 of this title (relating to Applicant and Consumer Rights and Responsibilities in Agency, Block Grant, and Vendor Fiscal Intermediary Models), consumers who choose the vendor fiscal intermediary model must perform all responsibilities listed in §41.105 of this title (relating to Generic Consumer Responsibilities Under the Vendor Fiscal Intermediary Model).

§48.2613. Suspension and Termination of Services.

The Consumer-Managed Personal Assistance Services (CMPAS) contractors are responsible for implementing any suspension or termination of services in accordance with the rules in §48.6002 of this title (relating to Community Based Alternatives (CBA) Definitions) and §48.6009-§48.6108 of this title (relating to Calculation of Client Co-payment and Sanctions).

§48.2614. Consumer Copayment.

(a) The copayment amount is based on the monthly net income of both the consumer and the consumer's spouse. Monthly net income is computed according to procedures outlined in §48.2615 of this title (relating to Determination of Monthly Total Income) and §48.2616 of this title (relating to Computation of Net Income and Income and Income Eligibles). A copayment percentage is then applied according the following tables. When the consumer suffers undue hardship as a result of financial obligations, the co-pay schedule can be reduced or waived if approved by the department.

(b) The percentage in the right column is multiplied by the cost of the consumer's monthly services to determine the consumer's monthly copay amount.
Figure: 40 TAC §48.2614(b)

(c) The contractor must collect payment from the consumer by the 10th work day of the month. If payment is not made by the 10th work day of the month, the contractor must send notice to the consumer by the 11th work day of the same month. The contractor cannot charge the consumer a fee for late payment. The contractor may terminate services for failure to pay a copayment.

(d) The contractor must keep receipts for all copayments collected. The contractor must deduct the copayment amount (assessed on the authorization for community care services form) from reimbursement claims submitted to the Texas Department of Human Services.

(e) The contractor must maintain a current consumer copayment ledger system that reflects all charges and all payments made by the consumer. The ledger must reflect all copayment charges, payments, and balances, and must be maintained in accordance with generally accepted accounting principles.

§48.2615. Determination of Monthly Total Income.

The applicant's or consumer's total monthly income is the total of the following:

(1) the total earnings of the applicant or consumer and spouse. These earnings include money, wages, or salary received for work performed as an employee, including armed forces pay (including allotments from any member of the family in the armed forces specifically designated for the consumer), commissions, tips, piece-rate payments, and cash bonuses earned after deductions are made for taxes including Social Security and any other required deductions;

(2) net income from non-farm self-employment. These earnings include gross receipts minus business expenses from one's own business, professional enterprise, or partnership that results in the individual's net income. Gross receipts include the value of all goods sold and services given. Expenses include costs of purchased goods, rent, heat, light, power, depreciation charges, wages and salaries paid, business taxes (not personal income taxes or self-employment Social Security tax), and similar costs. The value of saleable merchandise used by the owners of retail stores is not included as part of net income;

(3) net income from farm self-employment. These earnings include gross receipts minus operating expenses from operation of a farm by the consumer or the consumer and his partners. Gross receipts include: the value of products sold; government crop loans; money from the rental of farm equipment to others; and incidental receipts from the sale of wood, sand, gravel, and similar items. Operating expenses include: the cost of feed, fertilizer, seed, and other farming supplies; cash wages paid to farmhands; depreciation charges; cash rent; interest on farm mortgages; farm building repairs; farm taxes (not personal income taxes or self-employment Social Security tax); and

similar expenses. The value of fuel, food, or other farm products used for family living is not included as part of net income;

(4) Social Security and railroad retirement benefits. These benefits include Social Security pensions and survivors' benefits, permanent disability insurance payments made by the Social Security Administration, and railroad retirement insurance checks from the federal government. Gross benefits from these sources are the amounts before deductions for Medicare insurance;

(5) dividends and interest. These earnings include dividends from stocks or membership in associations, interest on savings or bonds, and periodic receipts from estates or trust funds. These earnings are averaged for a 12-month period;

(6) net income from rental of a house, store, or other property; or rent from boarders or lodgers. These earnings include: net income from rental property calculated by subtracting from gross receipts prorated property taxes, insurance payments, bills for repair and upkeep of property, and interest on mortgage payment of the property. Capital expenditures for additions or improvements and depreciation are not deductible;

(7) net income from lease of mineral rights. These earnings include net income calculated by subtracting excise taxes and property taxes from gross royalties or early lease payments. Federal windfall profit taxes are not deductible. These earnings are averaged over a 12-month period;

(8) income from mortgages or contracts. These payments include income the buyer promises to pay in fixed amounts over a period of time until the principal of the note is paid;

(9) public assistance or welfare payments. These payments include Temporary Assistance to Needy Families, Supplemental Security Income, and general assistance (cash payments from a county or city);

(10) pensions, annuities, and irrevocable trust funds. These payments include pensions or retirement benefits paid to a retired person or his survivors by a former employer or by a union, either directly or through an insurance company. Periodic payments from annuities, insurance, and irrevocable trust funds also are included. Gross benefits from civil service pensions are benefits before deductions for health insurance;

(11) veterans' pensions and compensation checks. These benefits include money paid periodically by the Veterans Administration to disabled members of the armed forces or to survivors of deceased veterans, subsistence allowances paid to veterans for education and on-the-job training, and refunds paid to ex-servicemen as GI insurance premiums;

(12) educational loans and grants. These payments include money received as scholarships by students for educational purposes and used for actual current living costs;

(13) unemployment compensation. These payments include compensation received from government unemployment insurance agencies or private companies during periods of unemployment, and any strike benefits received from union funds;

(14) worker's compensation and disability payments. These payments include compensation received periodically from private or public insurance companies for injuries incurred at work;

(15) alimony. These payments are support paid to a divorced person by a former spouse;

(16) regular monthly cash support payments from friends or relatives;

(17) net income from the consumer's share of a life estate; and

(18) child support and other cash payments received in the name of a minor child.

§48.2616. Income Exclusions.

The applicant's or consumer's total monthly income excludes the following:

(1) per capita payments to or funds held in trust for any individual in satisfaction of a judgment of the Indian Claims Commission or the court of claims;

(2) any payment received under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970;

(3) loans and grants such as scholarships, obtained and used under conditions that preclude their use for current living costs;

(4) Veterans Administration aid-and-attendance benefits, VA home-bound elderly benefits, and payments to certain eligible veterans for purchase of medications. Although aid-and attendance or home-bound elderly benefits are excluded as income, the Texas Department of Human Services considers these benefits the primary source of funds for personal assistance services;

(5) in-kind income such as rent subsidies;

(6) infrequent or irregular income if the total does not exceed $20 a month from all sources:

(A) an infrequent payment is one that may not be considered a recurring factor in determining a consumer's monthly or quarterly income. Payments that do not exceed $20 a month ($60 a quarter) and occur no more than once a quarter are received too infrequently to count. Infrequent income includes interest on a savings account if the interest is not credited or received more frequently than once a quarter from a single source;

(B) an irregular payment is one made without an agreement of understanding and is made on a recurring basis;

(7) reimbursement from an insurance company for health insurance claims; and

(8) In-Home and Family Support grants.

§48.2617. Allowable Monthly Deductions.

Allowable monthly deductions from the applicant's or consumer's monthly total income include the following:

(1) the cost of tuition and books when the applicant or consumer is a student. This amount is prorated over the authorization period to determine a monthly figure;

(2) ninety-three dollars is deducted for the applicant or consumer, spouse, and each dependent supported by the applicant or consumer and spouse;

(3) FICA withholding, and any other required deductions from wages or salaries;

(4) expenditures and savings for large disability-related expenses and equipment such as vans, vehicle modifications, and power wheelchairs with a per item value over $500;

(5) actual monthly expenditures for child-care costs, up to $450 for each child 0-6 years, and up to $200 for each child 6-12 years; and

(6) actual monthly expenditures for health insurance, medical treatment and prescriptions not reimbursed by medical insurance.

§48.2618. Computation of Net Income.

The contractor must compute net income by subtracting allowable monthly deductions defined in §48.2611 of this title (relating to Allowable Monthly Deductions) from monthly total income, after income exclusions defined in §48.2610 of this title (relating to Income Exclusions) have been applied.

§48.2619. Cost Reporting Guidelines for the Consumer-Managed Personal Assistance Services (CMPAS) Program.

The Texas Department of Human Services applies the general principles of cost determination, as specified in §20.101 of this title (relating to Introduction).

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

Filed with the Office of the Secretary of State, on September 27, 2000.

TRD-200006782
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 438-3108

♦ ♦ ♦

40 TAC §§48.2601-48.2616

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

The repeals are proposed under the Human Resources Code, Title 2, Chapter 22, which authorizes the department to administer public assistance programs.

The repeals implement the Human Resources Code, §§22.001-22.030.

§48.2601. Program Services.
§48.2602. Client Eligibility Criteria.
§48.2603. Contractor Responsibilities.
§48.2604. Applicant/Client Responsibilities.
§48.2605. Suspension of Services.
§48.2606. Termination of Services.
§48.2607. Client Appeals.
§48.2608. Client Copayment.
§48.2609. Determination of Monthly Total Income.
§48.2610. Income Exclusions.
§48.2611. Allowable Monthly Deductions.
§48.2612. Computation of Net Income.
§48.2613. Cost Reporting Guidelines for Client-managed Attendant Services.
§48.2614. Cost Reporting for Client-Managed Attendant Services: 1997 and Subsequent Cost Reports.
§48.2615. Client-Managed Attendant Services Pilot Voucher Project.
§48.2616. Reassessments.

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

Filed with the Office of the Secretary of State, on September 27, 2000.

TRD-200006783
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 438-3108

♦ ♦ ♦

PART 7. TEXAS COUNCIL ON PURCHASING FROM PEOPLE WITH DISABILITIES

CHAPTER 189. PURCHASES OF PRODUCTS AND SERVICES FROM PEOPLE WITH DISABILITIES

40 TAC §§189.2, 189.5 - 189.12

The Texas Council on Purchasing from People with Disabilities (TCPPD) proposes new §189.6 and §189.12 and amendments to §§189.2, 189.5, 189.7, 189.8, 189.9, 189.10 and 189.11 pursuant to its authority as stated in Human Resources Code Section 122.013. New §189.6 establishes criteria for recognition and approval of community rehabilitation programs. New §189.12 establishes performance standards for a central nonprofit agency (CNA) which provides the daily management of the state use program under a contract with the TCPPD.

Amendments to current rules are the following: §189.2, adding definitions to clarify terms and concepts used in the state use program; §189.5, adding a phrase and sentence to (a) which clarifies the purposes of the TCCPD's meetings; §189.7, changing the word "agencies" to "agency" to comply with statutory intent in (a) and (b), adding the source of statutory authority in (a), requiring approval of the method of calculating the management fee rate by the TCCPD, adding (c) which requires approval of the CNA's management fee and fee structure and articulating the implied authority for the TCCPD to negotiate management fees, adding (d) through (g) to clarify the TCCPD's options regarding review of the CNA's performance results, clarifying the CNA's report content regarding demographic information and setting reporting dates, adding (j) which list other reports, due dates and other contractual duties of the CNA; §189.8, adding clarifying language to (c) and (e) and statutory authority for (d); §189.9, adding statutory authority to (a) and (b), adding (1) through (5) to (b) which specify criteria for determination of "fair market price" and adding (d) which clarifies the TCPPD's duty to update prices; §189.10, clarifying the circumstances in (b) for removal or suspension of products or services from the state use program in (b), clarifying the consequence to participants in the program upon failure to make prompt corrections of causes for suspension and correcting grammar in (d); and §189.11, correcting the title of the referenced statutory citation.

Margaret Pfluger, Chair of the TCCPD, has determined that for each year of the first five years these rules are in effect there will be no fiscal implication for the state, no fiscal implication for local government as a result of enforcing or administering these rules and no impact on local employment.

Chair Pfluger has also determined that for each year of the first five years these rules are in effect, the public will benefit as follows: under §189.2 the additional definitions will clarify understanding of the state use program; under §189.5 the additional language clarifies the purposes of the TCCPD meetings; under §189.6 the criteria for recognition and approval of entities eligible for participation in the state use program will ensure that the statutory purpose of the program is fulfilled (i.e. assisting persons with disabilities to achieve maximum personal independence by engaging in useful and productive employment activities and to provide state agencies with a method for achieving conformity with requirements of nondiscrimination and affirmative action in employment) pursuant to Human Resources Code §122.001; under §189.7 the new language clarifies the TCCPD's oversight of the state use program and authority to contract with a CNA, contractual reporting requirements and duties of the CNA; under §189.8 the new language clarifies and provides statutory authority for product specifications and exceptions; under §189.9 criteria for determining fair market prices will also ensure the fulfillment of the program's purpose by maintaining the demand for products and services from persons with disabilities; under §189.10 the amendments clarify the consequences for noncompliance of products or services and provide better notice to the entities affected; under §189.11 the law is correctly cited; and under §189.12 performance standards for the CNA are articulated and provide assurance that the TCCPD is fulfilling its duty to objectively oversee the management of the program.

Some new reporting or record-keeping requirements in the proposed rules may create additional costs for community rehabilitation programs and the community nonprofit agency. The actual costs, if any, can only be determined by each entity (i.e., community rehabilitation programs and the central nonprofit agency) required to comply with these provisions of the proposed rules. Any cost increases will be due to requirements for data that are not already produced for other state and/or federal programs affecting these entities. The TCCPD believes that any such costs will be outweighed by the anticipated public benefits the proposed rules will provide by enhancing fiscally responsible oversight of the state use program and fulfillment of the program's purpose of assisting persons with disabilities to achieve independence through productive employment.

The Texas Council on Purchasing from People with Disabilities invites public comments. Written comments should be mailed or delivered no later than thirty (30) days after the date of publication of this notice to Juliet U. King, Legal Counsel to the TCCPD, at 1711 San Jacinto Blvd., 2nd Floor, P.O. Box 13037, Austin, Texas, 78711-3047. Comments may also be submitted by facsimile at (512) 475-3779 or by email to Juliet.King@GSC.state.tx.us.

The new and amended sections are proposed under the authority of the Texas Human Resources Code, Chapter 122, §122.013 which provides the Texas Council on Purchasing from People with Disabilities with authority to promulgate rules consistent with the Human Resources Code.

Human Resources Code, Chapter 122, is affected by the proposed new and amended sections.

§189.2. Definitions.

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

(1) Appreciable contribution--The term used to refer to the substantial work effort contributed by persons with disabilities in the reforming of raw materials, assembly of components or packaging of bulk products in more saleable quantities, by which value is added into the final product offered for sale.

(2) [~~(1)~~] Central nonprofit agency (CNA)--An agency designated as a central nonprofit agency under contract with the Council pursuant to §122.019 of the Texas Human Resources Code.

(3) [~~(2)~~] Chapter 122--Chapter 122 of the Texas Human Resources Code.

(4) [~~(3)~~] Commission--The General Services Commission.

(5) [~~(4)~~] Community rehabilitation program (CRP)--A government entity, private nonprofit unincorporated entity which has its own nonprofit status and federal tax identification number and has as its primary purpose the employment of persons with disabilities to produce products or perform services for compensation, or a private nonprofit incorporated entity with its own federal tax identification number, articles of incorporation and bylaws that establish its existence for the primary purpose of employing persons with disabilities to produce products or perform services for compensation. [~~A government or nonprofit private program operated under criteria established by the council and under which persons with severe disabilities produce products or perform services for compensation.~~]

(6) [~~(5)~~] Council--The Texas Council on Purchasing from People with Disabilities.

(7) Direct labor--All work required for preparation, processing, and packaging of a product, or work directly relating to the performance of a service, except supervision, administration, inspection or shipping products.

(8) [~~(6)~~] Disability--A mental or physical impairment, including blindness, that impedes a person who is seeking, entering, or maintaining gainful employment.

(9) Exception-- Any product or service approved for the state use program purchased from a vendor other than a CRP because the state use product or service does not meet the applicable requirements as to quantity, quality, delivery, life cycle costs, price, and testing and inspection requirements pursuant to Texas Government Code, §2155.138 and §2155.069.

(10) State use program--The statutorily authorized mandate requiring state agencies to purchase, on a non-competitive basis, the products made and services performed by persons with disabilities, which have been approved by the council pursuant to Human Resources Code, Chapter 122 and also meet the requirements of Texas Government Code, §2155.138 and §2155.069. This program also makes approved products and services available to be purchased on a non-competitive basis by any political subdivision of the state.

(11) Value added--The labor of persons with disabilities applied to raw materials, components, goods purchased in bulk form resulting in a change in the composition or marketability of component materials, packaging operations, and/or the servicing tasks associated with a product.

§189.5. Open Meetings; Public Testimony and Access.

(a) A quorum of the full council or council subcommittee shall deliberate and make decisions in open meeting in accordance with Chapter 551 of the Texas Government Code and the open meeting shall be conducted pursuant to Robert's Rules of Order. The full council may meet in executive session for authorized purposes during a public meeting as allowed under Chapter 551 of the Texas Government Code.

(b) The public will be provided a reasonable opportunity to appear before the council or council subcommittee in an open meeting and present testimony pertinent to an agenda item duly posted for said open meeting or any issue under the jurisdiction of the council.

(c) The council shall comply with federal and state laws related to program and facility accessibility. Each CNA shall develop, for council's approval, a written plan that describes how a person who does not speak English can be provided reasonable access to the council's programs and services under its management.

(d) The council may deliberate and take action on public testimony regarding an agenda item at the meeting for which the agenda item was duly posted.

(e) If a member of the public inquires about a subject for which notice has not been given as required by Chapter 155 of the Texas Government Code, the notice provisions do not apply to:

(1) a statement of specific factual information given in response to the inquiry; or

(2) a recitation of existing policy in response to the inquiry.

(f) Any deliberation of or decision about a subject of the inquiry shall be limited to a proposal to place the subject on the agenda for a subsequent meeting.

§189.6. Criteria for Recognition and Approval of Community Rehabilitation Programs.

(a) Any CRP currently participating in the state use program on the date these rules are adopted will be allowed to continue so long as they comply with the criteria given in this chapter.

(b) A CRP must be a government entity, private nonprofit unincorporated entity which has its own nonprofit status and federal tax identification number and has as its primary purpose the employment of persons with disabilities to produce products or perform services for compensation, or a private nonprofit incorporated entity with its own federal tax identification number, articles of incorporation and bylaws that establish its existence for the primary purpose of employing persons with disabilities to produce products or perform services for compensation.

(c) A CRP must maintain payroll, personnel, accounting and documentation of disability for people employed to produce goods or services under the state use program.

(d) A CRP must maintain billing and payment records if it contracts with other entities for support services.

(e) A CRP must purchase raw materials through a competitive process or provide acceptable relevant documentation for its inability to do so.

(f) A CRP desiring to provide services under the state use program must comply with the following requirements to obtain approval from the council:

(1) A minimum of thirty-five percent (35%) of the contract price of the service must be paid to persons with disabilities who perform the service.

(2) Supply costs for the service must not exceed twenty percent (20%) of the contract price of the service.

(3) Administrative costs allocated to the service must not exceed ten percent (10%) of the contract price for the service. At least seventy-five percent (75%) of the hours of direct labor necessary to perform a service must be done by persons with disabilities; however, the council may accept a lower percentage when it is satisfied that this percentage is not feasible for a particular service.

(g) A CRP must comply with the following requirements to obtain approval from the council for state use products:

(1) At least seventy-five percent (75%) of the hours of direct labor necessary to reform raw materials, assemble components, manufacture, prepare, process and/or package a product must be done by persons with disabilities; however, the council may accept a lower percentage when it is satisfied that this percentage is not feasible for a particular product.

(2) Appreciable contribution to the product by persons with disabilities must be determined on a product-by-product basis to be substantial based on acceptable documentation provided to the council upon application for a product to be approved for the state use program.

(h) Failure to meet any of the above criteria shall result in suspension or disqualification of a CRP or a product or service to be included or remain in the state use program.

(i) The rules governing the approval of products to be offered by community rehabilitation programs apply to all items that a community rehabilitation program proposes to offer to state agencies, regardless of the method of acquisition by the agency, whether by sale or lease. A community rehabilitation program must in fact own any product or products it leases. A proposal by a community rehabilitation program to rent or lease a product to a state agency is a proposal to offer a product, not a service, and the item offered must meet the requirements of these rules governing products. If the product is offered for lease by the community rehabilitation program, the unit cost of the product, for purposes of applying the standards set forth in these rules, is the total cost to the state agency of leasing the product over its expected useful life.

(j) Community rehabilitation programs shall seek broad competition in the purchase of raw materials and components used to manufacture products and perform services for state agencies. Subcontracting, when necessary, shall be performed to the maximum extent possible by other community rehabilitation programs, and in a manner that maximizes the employment of persons with disabilities. Raw materials or components may be obtained from companies operated for profit, but a community rehabilitation program must own any product that it offers for sale to state agencies through the state use program and an appreciable contribution to the product which accounts for a substantial amount of the value added to the product shall be achieved.

(k) The organization must not serve, in whole or in part, as an outlet or front for any entity whose primary purpose is not the employment of persons with disabilities.

(l) The council may:

(1) recognize a CRP that maintains accreditation by a nationally accepted vocational rehabilitation accrediting organization, and

(2) approve CRP services that have been approved for purchase by a state habilitation or rehabilitation agency.

(m) The council, at its sole discretion, may review, or have reviewed, any CRP approved to participate in this program to verify that the CRP meets the applicable qualifications contained in this chapter.

(n) Violation of any of the criteria given in this chapter may result in suspension of approval or in disapproval of a CRP's eligibility to participate in this program.

(o) Neither the council, the State of Texas, nor any other Texas state agency will be responsible for any loss or losses, financial or otherwise, incurred by any CRP should its product not be approved for the state use program as provided by law.

§189.7. Contracting with a Central Nonprofit Agency [~~Agency(ies)~~].

(a) The council shall contract with a central nonprofit agency [~~agency(ies)~~] to perform, at a minimum, the duties set forth in §122.019(a)(b) of Chapter 122 of the Human Resources Code.

(b) The management fee rate charged by a central nonprofit agency [~~agency(ies)~~] for its services to the CRP(s) and its method of calculation must be approved by the council. The maximum management fee rate must be:

(1) computed as a percentage of the selling price of the product; or

(2) the contract price of a service; and

(3) must be included in the selling price or contract price; and

(4) must be paid at the time of sale.

(c) The council, at its sole discretion, may negotiate and approve varying management fees for a CNA to provide a fee structure that corresponds to the level of service being given by a CNA to each of the CRPs.

(d) [~~(c)~~] A percentage of the management fee described in subsection (b) of this section shall be set by the council and paid to the council in an amount necessary to reimburse the general revenue fund for direct and reasonable costs incurred by the commission in administering its duties under Chapter 122.

(e) In accordance with the Texas Human Resources Code, §122.019(d), the council shall, at least once during the two year contract period, but more often if the council deems necessary, review services by and the performance of a CNA, and the revenue required to accomplish the program. The purpose of the review shall be to determine whether a CNA has complied with statutory requirements, contract requirements, and performance standards set forth in §189.12 of this title (relating to performance standards for a central nonprofit agency). Following the review of a CNA as required by §122.019(d) of the Human Resources Code, the council at its sole discretion, may:

(1) approve the performance of the central nonprofit agency and the continuation of the contract through its termination date; or

(2) if the contract expires within twelve months after the completion of the review and the council has approved the performance of the central nonprofit agency, the council may negotiate a new contract with the same CNA to begin upon expiration of the current contract or enter into a new contract in accordance with Subtitle D, Title 10, Government Code, using competitive bidding or competitive sealed proposals, as recommended by the commission.

(f) The council may use competitive bidding, competitive sealed proposals pursuant to Subtitle D, Title 10, Texas Government Code, or negotiate an emergency contract not to exceed one year, when a contract with a CNA is terminated by the council because:

(1) the central nonprofit agency ceases operations;

(2) the central nonprofit agency gives notice that it can not complete the contract;

(3) the central nonprofit agency's performance contract has been terminated due to its failure to perform its contractual obligations; or

(4) review of the central nonprofit agency results in disapproval of its performance.

(g) In the event the council terminates the contract, the terminated CNA shall cooperate fully and assist the new CNA to take over CNA duties and responsibilities as soon as possible with the least disruption in operations possible. Such cooperation and assistance will include turning over to the new CNA the terminated CNA's records described in the Texas Human Resources Code §122.009(a), which includes but not limited to a marketing plan, a listing of CRPs participating in the state use program, copies of all contracts with CRPs participating in the state use program, a listing of state agencies that purchase state use products and services, financial statements, and job descriptions for staffing a CNA to perform its duties under its contract with the council.

[~~(d) In accordance with §122.019(c)(d) of Chapter 122, the council shall, at least annually, review services by a central nonprofit agency(ies) and the revenue required to accomplish the program to determine whether performance complies with contractual specifications and accomplishes the council's objectives.~~]

[~~(e) The council shall contract with the CNA(s) for periods of 12 months. Contracts may be extended with or without amendments for one additional 12 month period. At any time during the 24 month period, but not later than the end of the 24 months, the council must enter into a new contract with the CNA(s).~~]

(h) [~~(f)~~] Not later than the 60th day before the date the council adopts or renews a contract, the council shall publish notice of the proposed contract in the Texas Register.

(i) [~~(g)~~] No later than October 1st of each year the CNA [~~The CNA(s)~~] will provide to the council, regarding CRP(s) which have contracted with the [~~a~~] CNA, the following information for the period of July 1st through June 30th of each year: [~~.~~]

(1) from each CRP: [~~Sheltered Workshops.~~]

(A) summary data from CRP annual business reports; [~~the number of disabled persons employed by type of disability at sheltered workshops managed by the CRP(s);~~]

(B) the number of disabled persons employed by type of disability in programs managed by the CRP(s); [~~the amount of annual wages paid to disabled employees in sheltered workshops;~~]

(C) the amount of annual wages paid to disabled employees in CRPs; [~~a summary of the sale of products offered by the CRP(s);~~]

(D) a summary of the sale of products offered by the CRP(s); [~~a list of products and/or services offered by a CRP; and~~]

(E) a list of products and/or services offered by a CRP; [~~the geographic distribution of CRP(s).~~]

(F) the geographic distribution of CRP(s); and

(G) a report of all CRPs that have not met the criteria for participation in the state use program in a format approved by the council.

(2) from each CRP data on individual outplacement or supported employment to include:[~~Individual Outplacement or Supported Employment.~~]

(A) the number of individuals in outplacement employed;

(B) the hourly wage range;

(C) the range of hours worked; and

(D) the number of disabled persons employed by primary type of disability.

(j) In accordance with the Texas Human Resource Code, §122.019(c) and (d), a CNA will provide or make available to the council:

(1) quarterly reports for each calendar quarter of its contract of sales of products or services, wages paid and hours worked by persons with disabilities for each CRP participating in the state use program;

(2) quarterly reports for each calendar quarter listing CRPs that do not meet criteria for participation in the state use program and the reasons that each CRP listed does not meet the criteria;

(3) at least once a year by October 31st, and prior to any review and/or renegotiation of the contract:

(A) an updated marketing plan;

(B) a proposed annual budget with estimated sales, commissions, and expenses;

(C) a program budget with details on how the expected revenue and expenses will be allocated to directly support and expand the state use program and other programs that expand direct services and/or the enhancement of employment opportunities for persons with disabilities; and

(D) an audited annual financial statement which should include information on FDIC coverage of all cash balances, earnings attributed to the management fee for the state use program, accounts receivable, cash reserves, line of credit borrowings, interest payments, bad debt, administrative overhead and any detailed supporting documentation requested by the council;

(4) quarterly reports of categories of expenditures in reporting format approved by the council;

(5) records in accordance with the Texas Human Resources Code §122.009(a) and §122.0019(d) for audit purposes, provided however, that any records provided by a CNA which may be subject to any exception to Chapter 522 of the Texas Government Code, would not be disclosed to any third party except with the permission of the CNA or in accordance with the provisions of Chapter 552, Government Code (the "Public Information Act"); and

(6) any other information the council requests as set forth in Chapter 189 of this title (relating to Purchase of Products and Services from Persons with Disabilities).

(k) Duties of a CNA include, but not be limited to:

(1) recruit and assist community rehabilitation programs in developing and submitting applications for the selection of suitable products and services;

(2) facilitate the distribution of orders among community rehabilitation programs;

(3) manage and coordinate the day-to-day operations of the program, including the general administration of contracts with community rehabilitation programs;

(4) promote increased supported employment opportunities for persons with disabilities;

(5) investigate products and services before they are proposed by CRPs for the state use program and after their approval for compliance with Texas Government Code §2155.138 and §2155.069; and

(6) monitor CRPs to ensure that all criteria for participation in the state use program are met.

(l) The services of a central nonprofit agency may include marketing and marketing support services, such as:

(1) assistance to CRPs regarding solicitation and negotiation of contracts;

(2) direct marketing of products and services to consumers;

(3) research and development of products and services;

(4) public relations activities to promote the program;

(5) customer relations;

(6) education and training;

(7) accounting services related to purchase orders, invoices, and payments to CRPs; and

(8) other duties as designated by the council that may include:

(A) establishing a payment system to pay CRPs within thirty days of completion of work and proper invoicing;

(B) resolving contract issues and/or problems as they arise between the CRPs and customers of the program, referring those that cannot be resolved to the council;

(C) maintaining a system that tracks and monitors product and service sales; and

(D) tracking and reporting quality and delivery times of products and services.

(m) Each year by October 31st, a central nonprofit agency will establish performance goals for the next fiscal year in support of objectives set by the council. Those performance goals will include, but not be limited to:

(1) sales of products or services;

(2) wages paid to persons with disabilities;

(3) hours worked by persons with disabilities;

(4) response time to customers' inquiries and/or complaints; and

(5) quality standards and delivery goals for CRP programs operations.

(n) The CNA shall have an authorized representative present at all council meetings who can bind the CNA to any representations, agreements or decisions regarding agenda items subject to the council's authority.

§189.8. Product Specifications and Exceptions.

(a) A product manufactured for sale through the commission to any office, department, institution or agency of the state shall be manufactured or produced according to specifications developed by the commission. If the commission has not developed specifications for a particular product, the production shall be based on commercial or federal specifications in current use by the industry.

(b) Requisitions for products and/or services required by state agencies are processed by the commission according to commission rules.

(c) An exception [~~Exception~~] from subsection (a) of this section may be made in any case as follows:

(1) under the rules of the commission, the product and/or service so produced or provided does not meet the reasonable requirements of the office, department, institution, or agency; or

(2) the requisitions made cannot be reasonably complied with through provision of products and/or services produced by persons with disabilities.

(d) An office, department, institution, or agency may not evade purchasing products and/or services produced or provided by persons with disabilities by requesting variations from standards adopted by the commission when the products and/or services produced or provided by persons with disabilities, per established standards, are reasonably adapted to the actual needs of the office, department, institution, or agency and comply with Government Code §2155.138 and §2155.069.

(e) The commission shall provide the council with a list of items known to have been purchased under the exceptions provided in subsection (c) [~~(b)~~] of this section monthly, in the format adopted by the council.

§189.9. Determination of Fair Market Value.

(a) Pursuant to §122.008 of Chapter 122 of the Texas Human Resources Code and §2155.138 [~~§2155.441~~] of the Texas Government Code, a suitable product and/or service that meets applicable specifications and that is available within the time specified must be procured from a CRP at the price determined by the council to be the fair market price.

(b) The pricing subcommittee shall review products, services and price revisions submitted by the CNA(s) on behalf of participating or prospective CRP(s). Due consideration shall be given to the following factors set forth in the Human Resources Code §122.015 and other criteria which is necessary to determine the fair market price of the products and/or services:

(1) to the extent applicable, the amounts being paid for similar articles in similar quantities by state agencies purchasing the products or services not in the state use program;

(2) the amounts which private business would pay for similar products or services in similar quantities if purchasing from a reputable corporation engaged in the business of selling similar products or services;

(3) to the extent applicable, the amount paid by the state in any recent purchases of similar products or services in similar quantities, making due allowance for general inflationary or deflationary trends;

(4) the actual cost of manufacturing the product or performing a service at a community rehabilitation program offering employment services on or off premises to persons with disabilities, with adequate weight to be given to legal and moral imperatives to pay workers with disabilities equitable wages; and

(5) the usual, customary, and reasonable costs of manufacturing, marketing, and distribution.

(c) The pricing subcommittee shall recommend its decisions regarding products, services and price revisions to the full council for formal action.

(d) The council shall revise the prices periodically to reflect changing market conditions.

§189.10. Consumer Information; Complaints and Resolution.

(a) Complaints regarding matters under the jurisdiction of the council shall be made in writing and addressed to the council's presiding officer who shall refer the complaint to the appropriate subcommittee for review and determination. The subcommittee shall then recommend action on the complaint to the full council. The council shall maintain information regarding each complaint.

(b) Any product or service [~~A CRP~~] may be removed or temporarily suspended from the state use program as a result of a CRP: [~~receiving purchase orders from state agencies, to include but not be limited to one or more of the following reasons:~~]

(1) continuing to provide products that fail to meet specifications; [~~failing to make a delivery as promised~~]

(2) continuing to fail to make a delivery as promised;

(3) [~~(2)~~] making unauthorized substitutions;

(4) [~~(3)~~] misrepresenting merchandise;

(5) [~~(4)~~] failing to make satisfactory adjustments when required; or [~~and~~]

(6) [~~(5)~~] unethical actions.

(c) A product or service [~~CRP~~] which has been temporarily suspended may be reinstated by promptly correcting the reason(s) for suspension. A failure to make the necessary correction promptly may result in the [~~CRP's~~] termination of the CRP's [~~its~~] contract with the CNA.

(d) Complaints regarding a CNA shall be resolved by [~~the~~] a quorum of the council and representatives of the CNA in an open meeting.

§189.11. Records.

The commission is the depository for all records of the council's operations and disclosure of records are subject to requirements of Chapter 552 of the Texas Government Code (the "Public Information Act [~~Law~~]").

§189.12. Performance Standards for a Central Nonprofit Agency (CNA).

(a) A CNA shall meet performance standards in carrying out the terms and conditions of the contract.

(b) A CNA must manage and coordinate the day-to-day operation of the state use program including, but not limited to the following activities:

(1) strive to increase employment for persons with disabilities by ten percent (10%) per year by researching new products, services and markets, improving existing products and services, and reporting to the council on a quarterly basis the status of these activities;

(2) provide superior customer relations by monitoring customer satisfaction with products and services, responding to customer complaints within one business day or less, and reporting to the council on a quarterly basis the level of consumer satisfaction for each CRP based on complaints as to products or services provided by each CRP;

(3) provide quarterly regional information workshops to promote the state use program;

(4) provide quarterly regional training programs to the CRPs on the requirements to participate in the state use program, governmental contracting, and procurement procedures and laws;

(5) resolve contract issues and/or problems as they arise between the CRPs, the CNA, and/or customers, referring those that cannot be resolved to the council and submit quarterly status reports on issues and referrals;

(6) provide an annual report that includes audited financial statements of the CNA, an updated strategic plan, and an updated projected schedule of expenses that details how the management fee is being allocated to directly support the state use program and what amount of funds are being devoted to expanding direct services to programs that

enhance the disabled and what percentage of funds will be used for administrative overhead, such as salaries;

(7) demonstrate compliance with state and federal tax laws and payroll laws by submitting quarterly reports of sales and taxes paid to the Texas Comptroller of Public Accounts and the Internal Revenue Service;

(8) provide accounting services related to purchase orders, invoices and payments to CRPs and submit annual reports detailing accounting services and invoice amounts for each CRP;

(9) create a database of governmental and private sector purchasers to promote sales of state use program products and services;

(10) conduct business ethically and submit detailed reports on a quarterly basis of any conflicts between the CRPs, the CNA and/or customers, with a goal of maintaining less than (5) complaints annually and responding to all complaints within (5) business days;

(11) follow the directives of the council, and submit quarterly reports to the council regarding any non-compliance or variances with the goal of achieving 100% compliance;

(12) create and maintain automated tracking and monitoring of product/service sales and submit quarterly reports to the council regarding delivery turnaround times and contract performance for each CRP;

(13) respond to inquiries about individual sales and/or total sales within five (5) business days or sooner and submit quarterly reports regarding the number of inquiries and average response time in conjunction with the above described report;

(14) maintain knowledge of governmental contracting and procurement processes and laws;

(15) provide general administration of the state use program with performance criteria and timely submission of reports required by these above rules; and

(16) maintain all necessary records for audit purposes that are in accordance with the law and directives set forth by the council and submit any or all records requested by the council within (3) weeks of the request. Disclosure to the public of any and all records of a CNA shall be subject to the Public Information Act.

(c) Problems will be tracked, corrected and reported to the council on a quarterly basis by the CNA.

(d) A CNA will provide the council with a detailed report that contains information about new products and service contracts and renewed service contracts at least three (3) weeks prior to each quarterly council meeting.

(e) A CNA will provide the council with all quarterly reports required by these rules at least (3) weeks prior to each quarterly council meeting.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006861

Juliet U. King
Legal Counsel
Texas Council on Purchasing from People with Disabilities
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-3244

♦ ♦ ♦

40 TAC §189.6, §189.12

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

The Texas Council on Purchasing from People with Disabilities (TCPPD) proposes the repeal of Title 40, Texas Administrative Code, §189.6 (Criteria for Recognition and Approval of Community Rehabilitation Programs) and §189.12 (Reports; Strategic Plan; Final Operation Plan). The repeal of §189.6 and §189.12 are being proposed in order to reorganize Title 40, Texas Administrative Code, Chapter 189 and to allow for the adoption of amended and new rules that will contain language in accordance with the Texas Human Resources Code, Chapter 122.

Margaret Pfluger, Chair, Texas Council on Purchasing from People with Disabilities, has determined for the first five-year period the rules are in effect, there will be no fiscal implication for state or local governments as a result of enforcing or administering the repeal.

Margaret Pfluger, Chair, Texas Council on Purchasing from People with Disabilities, further determines that for each year of the first five-year period the repeals are in effect, the public benefit anticipated as a result of enforcing these rules will be the deletion of obsolete language that will allow for the amended and new rules. There is no anticipated economic cost to persons who are required to comply with the repealed rules and no impact on local employment.

The Texas Council on Purchasing from People with Disabilities invites public comments. Written comments should be mailed or delivered no later than thirty (30) days after the date of publication of this notice to Juliet U. King, Legal Counsel to the TCCPD, at 1711 San Jacinto Blvd., 2nd Floor, P.O. Box 13037, Austin, Texas, 78711-3047. Comments may also be submitted by facsimile at (512) 475-3779 or by email to Juliet.King@GSC.state.tx.us.

The repeal to Title 40, Texas Administrative Code, Chapter 189, §189.6 and §189.12 are proposed under the authority of the Texas Human Resources Code, Chapter 122, §122.013 which provides the Texas Council on Purchasing from People with Disabilities with authority to promulgate rules consistent with the Human Resources Code.

Human Resources Code, Chapter 122, is affected by the proposed repeal.

§189.6. Criteria for Recognition and Approval of Community Rehabilitation Programs.

§189.12. Reports; Strategic Plan; Final Operation Plan.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006862
Juliet U. King
Legal Counsel
Texas Council on Purchasing from People with Disabilities
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-3244

♦ ♦ ♦

TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 1. MANAGEMENT

SUBCHAPTER B. PUBLIC MEETINGS AND HEARINGS

43 TAC §1.5

The Texas Department of Transportation proposes amendments to §1.5, concerning public hearings.

EXPLANATION OF PROPOSED AMENDMENT

Transportation Code, §21.111 requires the Texas Transportation Commission (commission) or the commission's authorized representative to hold a public hearing before approving financial assistance for airport development grants and loans.

Subsection (b) is amended to allow the executive director to designate an employee of the department to conduct public hearings in regards to receiving comments from interested parties prior to the approval of financial assistance under Transportation Code, §21.111. Delegation of authority allows for the hearings to be conducted at times necessary and convenient to the public.

Subsection (a)(4) is amended to update statutory references.

Subsection (a)(5) is deleted to remove reference to Transportation Code, §545.362, which expired due to the repeal of the national maximum speed limits.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments. There are no anticipated economic costs for persons required to comply with the section as proposed.

David Fulton, Director, Aviation Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT

David Fulton has also determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing or administering the amendments will be to better serve the public by allowing for hearings to be conducted at times necessary and convenient to the public. There will be no effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to David Fulton, Director, Aviation Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 13, 2000.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation and more specifically, Transportation Code, §21.111, which authorizes the commission to delegate responsibility for conducting public hearings regarding financial assistance for airport development grants.

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

§1.5. Public Hearings.

(a) Subject of hearings. The commission may hold public hearings to:

(1) consider the adoption of rules, in accordance with the Administrative Procedure Act, Government Code, Chapter 2001;

(2) receive evidence and testimony concerning the desirability of acquiring dredge material disposal sites and of any widening, relocation, or alteration of the main channel of the Gulf Intracoastal Waterway, in accordance with Transportation Code, Chapter 51;

(3) provide for public input regarding the design, schematic layout, and environmental impact of transportation projects, in accordance with Transportation Code, §203.021, and §2.42 and §2.43 of this title (relating to Highway Improvement Projects - Federal-aid and Highway Improvement Projects - State Funds);

(4) consider maximum prima facie speed limits on highways in the state highway system that are near public or private [~~institutions of~~] elementary or secondary schools or institutions of higher education, in accordance with Transportation Code, §545.357 [~~§545.351~~];

[~~(5) receive testimony regarding a proposed order establishing maximum prima facie speed limits, in accordance with Transportation Code, §545.362;~~]

(5) [~~(6)~~] annually receive public input on the commission's highway project selection process and the relative importance of the various criteria on which the commission bases its project selection decisions, in accordance with Transportation Code, §201.602;

(6) [~~(7)~~] receive comments from interested persons prior to transferring a segment of the state highway system to the Texas Turnpike Authority under Transportation Code, §362.0041;

(7) [~~(8)~~] receive comments from interested parties prior to approving any financial assistance under Transportation Code, §21.111; and

(8) [~~(9)~~] provide, when deemed appropriate by the commission or when otherwise required by law, for public input regarding any other issue under the jurisdiction of the commission.

(b) Authorized representative. The executive director or an employee of the department designated by the executive director may conduct public hearings held under subsection (a)(1), (3), (7), and (8) [~~(9)~~] of this section.

(c) Conduct and decorum. Public hearings will be conducted in a manner that maximizes public access and input while maintaining

proper decorum and orderliness, and will be governed by the following guidelines.

(1) Questioning of those making presentations will be reserved to commission members, the executive director, or, if applicable, the presiding officer.

(2) Organizations, associations, or groups are encouraged to present their commonly held views and same or similar comments through a representative member where possible.

(3) Presentations shall remain pertinent to the issue being discussed.

(4) A person who disrupts a public hearing must leave the hearing room if ordered to do so by the chair or the presiding officer.

(5) A person may not assign a portion of his or her time to another speaker.

(d) Disability accommodation. Persons with disabilities who have special communication or accommodation needs and who plan to attend a hearing to be held by the commission may contact the office of the secretary to the commission in Austin. In the case of a hearing to be conducted by the department, those persons may contact the public affairs officer whose address and telephone number appear in the public notice for that hearing. Requests should be made at least two days before the hearing. The department will make every reasonable effort to accommodate these needs.

(e) Language accommodation. For a hearing held in an area with a substantial -Spanish speaking population, the department will provide:

(1) notice of the hearing in both English and Spanish; and

(2) upon request, Spanish translation.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006828
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

CHAPTER 2. ENVIRONMENTAL POLICY
SUBCHAPTER B. MEMORANDA OF UNDERSTANDING WITH NATURAL RESOURCE AGENCIES

The Texas Department of Transportation proposes the repeal of §2.23, Memorandum of Understanding with the Texas Water Commission, the repeal of §2.25, Memorandum of Understanding with the Texas Natural Resource Conservation Commission, and simultaneously proposes new §2.23, Memorandum of Understanding with the Texas Natural Resource Conservation Commission.

EXPLANATION OF PROPOSED REPEALS AND NEW SECTION

Transportation Code §201.607, requires the Texas Department of Transportation (TxDOT) to adopt a Memorandum of Understanding (MOU) with each state agency that has responsibilities for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources. Section 201.607 also requires TxDOT to adopt the memoranda and all revisions by rule and to periodically evaluate and revise the memoranda. In order to meet the legislative intent and to ensure that natural environmental resources are given full consideration in accomplishing TxDOT's activities, TxDOT has evaluated the memoranda of understanding adopted in 1992 and 1994. After this evaluation, TxDOT finds it necessary to propose the repeal of §2.23 (MOU with the Texas Water Commission) and §2.25 (MOU with the Texas Natural Resource Conservation Commission), and to simultaneously propose the adoption of new §2.23 in a revised form. New §2.23 describes procedures providing for Texas Natural Resource Conservation Commission (TNRCC) review of TxDOT projects that have the potential to affect natural resources within the jurisdiction of TNRCC.

New §2.23 describes the purpose of the section, including implementing provisions of Texas Transportation Code, §201.607, and the rules for coordination of state-assisted transportation projects, codified under Title 43, Texas Administrative Code, §§2.40-2.51 (and any subsequent amendments), which underline the need for and importance of comprehensive environmental coordination for all transportation projects. Section 2.23 also provides definitions for words and terms used in the MOU.

Subsection (a) explains the purpose of the MOU, including a statement of TxDOT policy regarding the identification of environmental impacts of TxDOT projects; the basis for project decisions; public input; and the use of a systematic interdisciplinary approach in project development. The MOU provides a formal mechanism by which TNRCC may review TxDOT projects. This review will promote the mutually beneficial sharing of information between TxDOT and TNRCC, which will assist TxDOT in making environmentally sound decisions.

Subsection (b) sets out the authority by which each agency may adopt memoranda of understanding.

Subsection (c) provides definitions for this section.

Subsection (d) outlines the responsibilities of the department and TNRCC. The department's responsibilities include planning and designing safe, efficient, effective and environmentally sound transportation facilities, while avoiding, minimizing, or compensating, where practicable, for anticipated environmental impacts; the timely and efficient construction of transportation facilities; and the ongoing maintenance of transportation facilities. As a state natural resource protection agency, TNRCC's responsibilities include protecting the state's air quality; the protection of water, water quality, and water rights; and the administration of other state environmental programs.

Subsection (e) contains a new provision for early project development that provides a process for early contact with TNRCC to identify potential impacts to air and water resources caused by proposed transportation projects. Subsection (e) also contains a set of criteria under which transportation projects will be coordinated on air quality and/or water quality with TNRCC, with a TNRCC review time of environmental documentation of 30 days.

The subsection also provides TxDOT with the authority to determine final disposition of transportation projects; provides for continuing coordination between TxDOT and TNRCC through the construction period of a transportation project if needed; and provides recommendations for the protection of natural resources under the jurisdiction of TNRCC.

Subsection (f) contains provisions concerning additional provisions regarding the exchange of information on air quality between TxDOT and TNRCC.

Subsection (g) contains provisions concerning additional provisions regarding the exchange of information on water quality between TxDOT and TNRCC.

Subsection (h) includes a mechanism for the resolution of disputes between TxDOT and TNRCC.

Subsection (i) provides for the review and revision of the MOU, at a minimum, every fifth year beginning January 1, 2002, and provides that TxDOT and TNRCC will adopt by rule the MOU and all revisions to the MOU.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section. There are no anticipated economic costs for persons required to comply with the section as proposed.

Dianna F. Noble, P.E., Director, Environmental Affairs Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new section.

PUBLIC BENEFIT

Ms. Noble has also determined that for each year of the first five years the new section is in effect the MOU will provide for timely and effective reviews, as a result of increased coordination and communication between the department and TNRCC. The MOU will assist TxDOT in meeting the mission of providing needed transportation projects and will assist TNRCC in meeting their mission of ensuring that the state's natural resources are preserved. The MOU will ensure comprehensive environmental coordination for all transportation projects in a manner consistent with federal and state laws, regulations, and guidelines. There will be no effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, TxDOT and TNRCC will conduct a joint public hearing to receive comments concerning the proposed new chapter. The public hearing will be held at 10:00 a.m., October 24, 2000, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 9:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc., for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Eloise Lundgren, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal and new section may be submitted to Dianna F. Noble, P.E., Director of Environmental Affairs, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 13, 2000.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW

This rulemaking action has been determined to be subject to the Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et. seq.) and the rules of the Coastal Coordination Council (31 TAC Chapters 501-506). As required by 31 TAC §505.22(a), this rulemaking action must be consistent with all applicable CMP policies.

This action has been reviewed for consistency, and it has been determined that this rulemaking is consistent with the applicable CMP goals and policies. The primary CMP policy applicable to this rulemaking action is the policy that transportation projects be located at sites that, to the greatest extent practicable, avoid and otherwise minimize the potential for adverse effects to coastal natural resource areas from construction and maintenance of roads, bridges, causeways, and other development associated with the project. This rulemaking action provides a means for identifying the environmental impacts of department transportation projects on natural resources, including air and water resources, for coordination of these projects with the relevant state resource agency, and for inclusion of these investigations and coordination in the environmental documentation for each project. All of these purposes will provide a mechanism for avoiding, minimizing, or compensating, where practicable, for the adverse effects of department projects on coastal natural resource areas that serve as habitat, on coastal preserves, and on threatened and endangered species. For these same reasons, the rulemaking action is consistent with the CMP goal of protecting, preserving, restoring, and enhancing the diversity, quality, quantity, functions, and values of coastal natural resource areas. Interested persons are requested to submit comments on the consistency of the proposed rules with the CMP.

43 TAC §2.23, §2.25

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of

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

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §201.607, which requires that the department adopt memoranda of understanding with each agency that has responsibility for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources, and that these memoranda and all revisions be adopted as rules.

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

§2.23. Memorandum of Understanding with the Texas Water Commission.

§2.25. Memorandum of Understanding with the Texas Natural Resource Conservation 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 October 2, 2000.

TRD-200006829
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

43 TAC §2.23

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §201.607, which requires that the department adopt memoranda of understanding with each agency that has responsibility for the protection of the natural environment, the preservation of the natural environment, or for the preservation of historic or archeological resources, and that these memoranda and all revisions be adopted as rules.

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

§2.23. Memorandum of Understanding with the Texas Natural Resource Conservation Commission.

(a) Purpose. This section contains the Memorandum of Understanding (MOU) between the Texas Department of Transportation (TxDOT) and the Texas Natural Resource Conservation Commission (TNRCC) concerning the coordination of environmental reviews associated with transportation projects. The MOU addresses only those reviews required by Transportation Code, §201.607, and does not affect coordination or permits required by other state or federal regulations.

(1) It is the policy of TxDOT to:

(A) investigate fully the environmental impacts of departmental transportation projects, coordinate these projects with applicable state and federal agencies, and reflect these investigations and coordination in the environmental documentation for each project;

(B) base project decisions on a balanced consideration of the need for a safe, efficient, economical, and environmentally sound transportation system;

(C) receive input from the public through the public involvement process;

(D) utilize a systematic interdisciplinary approach as essential parts of the development process for transportation projects; and

(E) strive for environmental soundness of transportation activities through appropriate mitigation, where feasible and prudent, in coordination with appropriate resource agencies.

(2) It is the policy of TNRCC to:

(A) promote and foster voluntary compliance with environmental laws;

(B) ensure that regulations promote flexibility in achieving environmental goals;

(C) ensure that regulations and decisions are rational and based on common sense, good science, and current risk factors;

(D) ensure that regulations are applied clearly and consistently;

(E) ensure meaningful public participation in the decision making process;

(F) ensure that TNRCC decisions follow the law;

(G) ensure strict, sure, and just enforcement when environmental laws are violated; and

(H) ensure that unnecessary, ineffective, or redundant regulations and processes are eliminated whenever possible.

(3) The rules for coordination of state-assisted transportation projects developed by TxDOT, codified as 43 TAC §§2.40-2.51, underline the need for and importance of comprehensive environmental coordination for all transportation projects.

(4) The intent of this MOU is to provide a formal mechanism by which TNRCC may review TxDOT projects that have the potential to affect resources within TNRCC's jurisdiction. This review will promote the mutually beneficial sharing of information between TxDOT and TNRCC, which will assist TxDOT in making environmentally sound decisions.

(b) Authority.

(1) Transportation Code, Section 201.607, directs TxDOT to adopt memoranda of understanding with each agency that has responsibilities for protection of the natural environment.

(2) By statute, TNRCC may enter into a memorandum of understanding with any other state agency and shall adopt by rule any memorandum of understanding between TNRCC and any other state agency (Water Code, Section 5.104, and Health and Safety Code, Section 382.035).

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

(1) Construction - Activities that involve the building of transportation projects on new location, the expansion, rehabilitation, or reconstruction, of an existing facility, or other transportation-related activities under TxDOT jurisdiction.

(2) Districts - One of the 25 geographical districts into which TxDOT is divided.

(3) Environmental documents - Decision-making documents prepared pursuant to 23 CFR 771 (or any subsequent amendments or regulations) for federal-aid projects or §§2.40 et seq. of this chapter for non federal-aid projects that incorporate the results of environmental studies, coordination and consultation efforts, and engineering elements. These documents include categorical exclusions, environmental assessments, and environmental impact statements.

(4) Environmental Protection Agency (EPA) - The federal agency that is charged with monitoring and protecting air and water resources.

(5) Federal Clean Air Act (FCAA) - The federal act, including all amendments, that establishes national ambient air quality standards and mandates procedures for reaching and maintaining these standards.

(6) Inspection and Maintenance Program - A vehicle emissions inspection program as defined by the EPA that includes, but is not limited to, the use of computerized analyzers, on-road testing, and/or inspection of vehicle emission devises.

(7) Maintenance - Activities which involve the repair or preservation of an existing facility to prevent that facility's degradation to an unsafe or irreparable state, or which involve the treatment of an existing facility or its environs to meet acceptable standards of operation or aesthetic quality. The activities generally do not require the acquisition of additional right of way or result in increased roadway capacity.

(8) Memorandum of Understanding - A formal document that outlines the relationship between agencies or parties, including the responsibilities and jurisdiction of each party, and which sets forth within its provisions agreements between the parties and a means of dispute resolution.

(9) Metropolitan Planning Organization (MPO) - An organization designated in certain urbanized areas to carry out the transportation planning process as required by 23 United States Code (U.S.C.) §134.

(10) Mitigation - A means of addressing impacts to the natural environment including in general order of preference, avoidance, minimization, and compensation.

(11) National Environmental Policy Act of 1969 (NEPA) - The basic national charter for protection of the environment. It establishes policy, sets goals, and provides means for carrying out the policy. NEPA is binding upon federal agencies, including the Federal Highway Administration (FHWA), and is usually followed as an environmental guideline by state and local agencies. For the purpose of this MOU, NEPA includes the Act itself, its subsequent amendments, and implementing regulations.

(12) Non-attainment counties - Counties in an air quality control region which have been designated pursuant to 42 U.S.C. 7407 (Section 107 of the FCAA) as not meeting the NAAQS established for any pollutant.

(13) Project development - The planning process of a transportation project that includes environmental studies and drafting the appropriate environmental documentation, the public involvement process, engineering design, and right of way acquisition.

(14) Right of way - The land provided for a transportation facility. Right of way includes the roadway itself (including shoulders) and the areas between the roadway and adjacent properties.

(15) Single occupancy vehicle - A motor vehicle operated by a driver and typically carrying no passengers.

(16) State Implementation Plan (SIP) - The plan prepared by TNRCC as required by 42 U.S.C. §7410 (Section 110 of the FCAA) to attain and maintain air quality standards. An approved SIP is the implementation plan, or most recent revision of this plan, which has been approved or promulgated by EPA under Section 110.

(17) Statewide Transportation Improvement Plan (STIP) - The statewide multi-year transportation improvement program made up of Transportation Improvement Plans (TIPs) from all metropolitan planning areas, as well as the rural TIPs for areas outside the metropolitan planning areas, and some statewide programs.

(18) TNRCC - For the purposes of this MOU, TNRCC refers to the commission, executive director, and their respective staffs, of the Texas Natural Resource Conservation Commission.

(19) Transportation Improvement Program (TIP) - A staged, multi-year (normally three years), intermodal program of transportation projects which are consistent with the metropolitan transportation plan (MTP) as defined in 23 CFR 450.322 and covers a metropolitan planning area.

(20) Transportation projects - All surface transportation projects designed, constructed, and maintained by TxDOT, excluding projects of the Texas Turnpike Authority.

(21) TxDOT - For the purposes of this MOU, TxDOT refers to the commission, executive director, and staff of the Texas Department of Transportation.

(22) TxDOT environmental rules - The rules relating to the environmental review and public involvement process for transportation projects (§§2.40-2.51 of this chapter).

(d) Responsibilities.

(1) The responsibilities of TxDOT pertain primarily to its functions as a transportation agency and include:

(A) planning and designing safe, efficient, cost effective and environmentally sound transportation projects, while avoiding, minimizing, or compensating for anticipated environmental impacts to the fullest extent practicable;

(B) timely and efficient construction of transportation projects consistent with transportation control measures in the SIP and with approved plans and agreements which have been executed by TxDOT regarding the protection of the environment;

(C) ongoing maintenance to protect transportation investments and to provide safe and efficient transportation facilities for the traveling public;

(D) preservation of the environment when possible and enhancement of the environment when practicable;

(E) maintaining vehicle registration data which will facilitate mobile source air quality planning and implementation as directed by the SIP and as agreed to by TxDOT.

(F) developing a STIP, which includes each MPO's TIP and specific projects in the TIP;

(G) implementing an enforceable and verifiable registration denial mechanism which requires emissions testing as a prerequisite to vehicle registration in appropriate areas.

(2) The responsibilities of TNRCC pertain to air and water quality as described in this paragraph.

(A) Air quality.

(i) TNRCC is the state air pollution control agency and is the principal authority in Texas on matters relating to the quality of the state's air resources.

(ii) TNRCC's primary responsibility, as designated by Health and Safety Code, Section 382.002, includes, but is not limited to, setting standards, criteria, levels, and emission limits for air quality and air pollution control.

(iii) General powers and duties of TNRCC regarding air quality are:

(I) regulation of air quality through the development, implementation, and enforcement of strategies, and control programs as necessary to satisfy all federal and state requirements, including SIP requirements mandated by the FCAA;

(II) participation in the preparation and review of SIP conformity evaluations and other SIP documents for determination purposes of transportation programs, plans, and projects as required by the FCAA;

(III) participation, through coordination with TxDOT, in the development and implementation of transportation control measures, which may require action by TxDOT; and

(IV) implementation of an effective vehicle inspection and maintenance program incorporating an enforceable and verifiable registration denial mechanism.

(iv) TNRCC has the power to develop the following items.

(I) State Air Control Plan. TNRCC shall prepare and develop a general, comprehensive plan for the proper control of the state's air quality.

(II) Air quality control regions. TNRCC may designate air quality control regions based on jurisdictional boundaries, urban/industrial concentrations, and other factors, including atmospheric conditions, necessary to provide adequate implementation of air quality standards.

(III) Emission inventory. TNRCC may require any entity whose activities cause emissions of air contaminants to submit information to enable TNRCC to develop an inventory of air contaminants.

(B) Water quality

(i) TNRCC is charged with the protection of the quality of water and water rights in the state.

(ii) TNRCC's jurisdiction, as outlined in Water Code, §5.013, include:

(I) water and water rights, including the issuance of water rights permits, water rights adjudication, cancellation of water rights, and enforcement of water rights;

(II) the state's water quality program, including issuance of permits, enforcement of water quality rules, standards, orders, and permits, and water quality planning;

(III) the determination of the feasibility of certain federal projects which affect water quality;

(IV) the administration of the state's programs relating to inactive hazardous substance, pollutant, and contaminant disposal facilities as they affect ground or surface water quality;

(V) the administration of the state's programs involving underground water; and

(VI) any other areas assigned to TNRCC by the Water Code and other state law.

(e) Provisions regarding coordination and document review.

(1) Coordination.

(A) TxDOT is committed to performing early identification efforts to assess potential environmental concerns in or adjacent to proposed transportation projects, and initiating coordination with TNRCC during the early planning stages of these projects. Early identification of environmental concerns and coordination with TNRCC is essential to TxDOT's efforts to:

(i) consider environmental issues early in the project development process;

(ii) design and develop transportation projects in a timely manner; and

(iii) avoid and minimize impacts to environmental resources to the maximum extent practicable.

(B) TxDOT's districts are encouraged to coordinate projects early in development by working with TNRCC's regional offices. Any information received, and the results of coordination will be summarized in the environmental document prepared for the project.

(C) Through notices, public meetings, and public hearings, TxDOT and TNRCC are committed to encouraging public input when appropriate concerning plans and actions that may affect environmental quality.

(2) Environmental document review.

(A) TxDOT will furnish environmental documentation to TNRCC for types of projects listed below, pertaining to air quality and water quality.

(i) Air quality. TxDOT shall furnish to TNRCC environmental documentation for all projects that:

(I) involve the construction of highway projects on new location in non-attainment areas;

(II) involve additional single occupancy vehicle capacity in non-attainment areas; or

(III) are in non-attainment areas and which may affect air quality.

(ii) Air quality - special requests by TNRCC. TxDOT shall furnish to TNRCC environmental documentation on the construction of single occupancy vehicle projects on new location and increased single occupancy vehicle highway capacity in major metropolitan areas on the special request by TNRCC.

(iii) Water quality. TxDOT project types to be coordinated with TNRCC include:

(I) projects which may encroach upon threatened or impaired stream segments designated under §303(d) of the Clean

Water Act and/or are 5 miles upstream from the designated stream segment; and

(II) projects in the recharge or contributing zone of the Edwards Aquifer, pursuant to 30 TAC §213.3, §213.10 and §§213.20-213.28.

(B) The level of environmental documentation prepared and provided to TNRCC by TxDOT will be in compliance with NEPA, USDOT regulations (23 CFR 771), TxDOT environmental rules, and other applicable laws, rules, and regulations.

(C) The environmental document shall be forwarded to the designated points of contact at TNRCC following TxDOT review. TNRCC shall have a period of 30 days, from date of receipt, to review the environmental document and provide written comments within the established time frame. TNRCC may, if necessary, submit a written request to extend the review period for a maximum of 30 days. The reason for requesting a review extension must be included in any such request.

(D) For projects requiring the preparation of an environmental impact statement, TxDOT shall furnish the preliminary environmental/scoping document to TNRCC upon approval of the document by the FHWA for federal projects or TxDOT for state projects. TxDOT will also provide the draft and final environmental impact statements to TNRCC.

(f) Additional provisions regarding air quality.

(1) TNRCC shall furnish TxDOT information detailing the location and severity of non-attainment counties and information affecting transportation-related activity and mobile sources to be included in the SIP. The information is helpful in the planning and location of future TxDOT projects, and in the coordination of the projects with TNRCC.

(2) TxDOT and TNRCC shall exchange, on a statewide basis, accurate and timely information to facilitate the coordination of environmental reviews. In addition, data for developing mobile source budgets and data on transportation conformity determinations will also be provided.

(g) Additional provisions regarding water quality. TxDOT will coordinate with TNRCC in complying with 30 TAC Chapter 213 (Edwards Aquifer Protection Program) in accordance with the Interagency Cooperation Contract relating to such coordination.

(h) Dispute resolution. When TxDOT and TNRCC are unable to reach a mutually agreeable plan of action regarding impacts of transportation projects to natural resources within the jurisdiction of TNRCC, each agency shall make a good faith effort to address the major concerns of the other party. TxDOT will evaluate comments received from TNRCC in conjunction with all other applicable factors (i.e., other agency comments, project alternatives, cost, mitigation requirements, and safety considerations) in an attempt to arrive at a plan of action acceptable to the affected parties. A period of 45 days shall be provided for the resolution of such disputes, after which the department is charged with determining the disposition of transportation projects within its jurisdiction. If TxDOT proceeds with a proposed transportation project in conflict with TNRCC comments, TxDOT will submit to TNRCC a complete and detailed justification demonstrating full compliance with all federal and state rules, regulations, and laws. TNRCC reserves the right to bring enforcement action against TxDOT for violation of any related laws or rules that TNRCC is charged with enforcing and that may be applicable to TxDOT operations. Both parties agree that this MOU does not preclude either party from making any legal argument.

(i) Review of MOU. This MOU shall be reviewed and updated no later than January 1, 2002 and at a minimum every fifth year after January 1, 2002. TxDOT and TNRCC by rule shall adopt the MOU and all revisions to the MOU. If a change in state or federal law or a change in the Texas SIP necessitates a change in this MOU, then representatives from both TxDOT and TNRCC will meet to work out a mutually agreeable amendment to the MOU. If such an amendment is not possible, either party may require dispute resolution under subsection (h) of this section.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006830
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

CHAPTER 9. CONTRACT MANAGEMENT
SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

43 TAC §§9.11, 9.12, 9.14 - 9.16, 9.18

The Texas Department of Transportation proposes amendments to §9.11 and §9.12, §§9.14-9.16, and §9.18, concerning highway improvement contracts.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, Chapter 223, Subchapter A, prescribes the method by which the Texas Department of Transportation receives competitive bids for the improvement of highways that are a part of the state highway system. Pursuant to this authority, the commission has previously adopted §§9.10-9.20 to specify the process by which the department will award highway improvement contracts.

Section 9.11

Definitions have been added, revised, and numbered to provide clarification regarding proposal bid items. Definitions for an alternate bid item and a regular bid item have been added to provide clarification and uniformity for these frequently used terms.

Section 9.12

Subsection (a)(2)(C)(i) is revised to provide that a bidder with a negative working capital position as reflected in the financial statements submitted for bidder qualification will receive a bidding capacity of $300,000. This revision is necessary to ensure that only those bidders with adequate financial resources are eligible to bid on highway improvement contracts in excess of $300,000.

Subsection (a)(2)(C)(ii)(II) is amended to allow for the consideration of additional work experience of bidders submitting compiled financial information in order to become eligible to bid on waived projects. Bidders possessing more than two years work experience in construction and/or maintenance will receive

an additional $250,000 in bidding capacity for each additional year of experience obtained, with a maximum bidding capacity of $3,000,000 applicable.

The experience and project completion requirements for bidders submitting reviewed financial information as contained in subsection (a)(2)(C)(ii)(III) are revised to parallel the experience and project completion requirements for bidders submitting compiled financial information contained in subsection (a)(2)(C)(ii)(II). Subsection (a)(2)(C)(ii)(III) has also been revised to clarify the exact bidding capacity available for a bidder when the calculation of the bidding capacity does not result in an amount greater than $1,000,000.

The revisions to this section are made to provide additional opportunity for increased competition related to highway improvement contracts.

Section 9.14

Revisions have been made to this section to ensure that the terms "alternate bid item" and "regular bid item" are listed properly as previously defined. Subsection (a) is amended to properly reference the title of the department letting official. The required certification for computer printouts listed in subsection (c)(1) has been replaced with the requirement that an authorized signature accompany a computer printout sheet with the bid proposal. The department has determined that the submission of an original computer printout sheet with an authorized signature is sufficient for the purposes of bid proposal submission.

Subsection (d)(2) has been revised to provide additional information regarding requirements for the submission of a bid bond acceptable to the department. These revisions are necessary in order to protect the integrity of the competitive bidding process.

Section 9.15

Subsection (b) is revised to remove the requirement that a proposal will not be read if the unit prices are written in the proposal in numerals. An additional reason for not reading a proposal due to the bidder modifying the proposal has been added. The department has determined that the requirement that a proposal not be read due to the unit prices being written in numerals is obsolete. The additional reason for not reading a proposal is necessary to preserve the uniformity of the bidding process by ensuring that all bids submitted for a specific contract are based on the same criteria.

Subsection (b)(1)(I) is revised to remove the certification requirement associated with a computer printout sheet in accordance with the proposed revision made to §9.14(c)(1).

Subsection (d) is revised to provide that a bidder may not withdraw a bid subsequent to the time for the receipt of bids with exceptions provided for the withdrawal of a bid as outlined in §9.16(c) relating to tie bids and §9.17(d) relating to award to second bidder. The addition regarding the time for bid withdrawal and the exceptions provided are necessary to provide additional clarification regarding the requirements associated with the withdrawal of bids.

Section 9.16

Clarification is provided with revisions to subsection (b) regarding department interpretations for regular and alternate bid items. Additional clarification is also provided regarding department interpretation and procedure for bid item unit price entries extended to more than three decimal places.

New paragraph (1) has been added to subsection (b) to provide that a proposal where unit bid prices have been left blank for regular bid items with no corresponding alternate bid items, will be considered to be incomplete and nonresponsive. This paragraph further clarifies that regular or alternate bid item groups must have a unit bid price listed for each bid item contained within the group in order for the bid to be considered responsive. These revisions provide additional clarification concerning the proposal unit bid item entries needed thereby enabling the department to uniformly tabulate the bids received.

Paragraph (2) of subsection (b) is revised to reflect the department procedure for rounding when a unit bid price contains an amount extended to more than three decimal places. As with the revisions made to subsection (b)(1), these revisions provide additional clarification regarding procedures for department interpretations necessary in order to enable the department to tabulate the bids received in a uniform and consistent manner.

Subsection (b)(6) is revised for additional clarification regarding department interpretations related to alternate and regular bid items, or groups of items. As stated previously, regular or alternate bid item groups must have a unit bid price listed for each bid item contained within the group in order for the bid to be considered responsive. When both the regular and alternate bid items, or groups of items, have unit bid price entries such as no dollars and no cents, zero dollars and zero cents or numerical entries of $0.00, the department will make two calculations using one-tenth of a cent ($.001) for each item. The department will then determine the option that results in the lowest cost to the state and tabulate as such. In those instances where a unit bid price greater than zero has been entered for either a regular or alternate bid item, or group of items, and the corresponding regular or alternate bid item has a unit bid price of no dollars and no cents, zero dollars and zero cents or numerical entries of $0.00, the department will interpret the intent of the bidder and use the unit bid price that is greater than zero for bid tabulation. These revisions are necessary to provide uniform criteria for bid tabulation.

New subsection (c) has been added to provide a procedure in the event of tie bids. Should tie bids occur, the low bidder will be determined by coin toss governed by the letting official or designee. This revision is necessary to provide a fair and impartial procedure in the event of tie bids.

Section 9.18

Subsection (a)(1)(A) has been revised to provide clarification regarding the determination of the contract amount for providing a payment and performance bond, if required. This subsection is clarified by referencing the contract amount determined as provided in §9.16(b)(2) relating to department interpretation.

New subparagraph (D) is added to subsection (a)(1) stating that the successful bidder must provide a list of all quoting subcontractors and suppliers within 15 days after written notification of contract award. This addition is necessary to comply with new federal regulations contained in Title 49, Code of Federal Regulations, §26.11.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the amended sections are in effect, there will be no fiscal implications to the state.

The proposed addition of §9.18(a)(1)(D) regarding the required list of all quoting subcontractors and suppliers may create a fiscal

impact to bidders, however, sufficient data is not available at this time to estimate the amount of impact, if any, that may occur. The remaining proposed amendments to §§9.11-9.12, §§9.14-9.16 and §9.18 are not expected to have a fiscal impact. There will be no fiscal implications to local governments as a result of implementing the proposed amendments.

Thomas R. Bohuslav, Director, Construction Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amended sections.

PUBLIC BENEFIT

Mr. Bohuslav has also determined that for each year of the first five years the amended sections are in effect, the public benefit anticipated as a result of enforcing and administering the amended sections will be to increase the competition associated with highway improvement contracts. There will be no effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Thomas R. Bohuslav, Director, Construction Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 13, 2000.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §§223.001-223.013, which requires the Texas Department of Transportation to competitively bid highway improvement contracts.

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

§9.11. Definitions.

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

(1) Alternate bid item - A bid item identified by the department as an acceptable substitute for a regular bid item.

(2) [~~(1)~~] Available bidding capacity - Bidding capacity less uncompleted work under contract.

(3) [~~(2)~~] Bidder - An individual, partnership, limited liability company, corporation or any combination submitting a proposal.

(4) [~~(3)~~] Bidding capacity - The maximum dollar value a contractor may have under contract at any given time.

(5) [~~(4)~~] Building contract - A contract entered under Transportation Code, Chapter 223, Subchapter A for the construction or maintenance of a department building or appurtenant facilities.

(6) [~~(5)~~] Certification of Eligibility Status form - A notarized form describing any suspension, voluntary exclusion, ineligibility determination actions by an agency of the federal government, indictment, conviction, or civil judgment involving fraud, official misconduct, each with respect to the bidder or any person associated with the bidder in the capacity of owner, partner, director, officer, principal investor, project director/supervisor, manager, auditor, or a position involving the administration of federal funds, covering the three-year period immediately preceding the date of the qualification statement.

(7) [~~(6)~~] Commission - The Texas Transportation Commission.

(8) [~~(7)~~] Confidential Questionnaire - A prequalification form reflecting detailed financial and experience data.

(9) [~~(8)~~] Construction contract - A contract entered under Transportation Code, Chapter 223, Subchapter A, for the construction or reconstruction of a segment of the state highway system.

(10) [~~(9)~~] Department - The Texas Department of Transportation.

(11) [~~(10)~~] Deputy executive director - Any second tier manager appointed by the executive director.

(12) [~~(11)~~] Disadvantaged business enterprise (DBE) - As defined in Title 49 Code of Federal Regulations (CFR) §26.5, a for-profit small business concern, certified by the department, that is at least 51% owned by one or more individuals who are both socially and economically disadvantaged, or in the case of a corporation, in which 51% of the stock is owned by one or more such individuals, and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(13) [~~(12)~~] District engineer - The chief executive officer in each of the designated district offices of the department.

(14) [~~(13)~~] Emergency - Any situation or condition of a designated state highway, resulting from a natural or man-made cause, that poses an imminent threat to life or property of the traveling public or which substantially disrupts or may disrupt the orderly flow of traffic and commerce.

(15) [~~(14)~~] Executive director - The executive director of the Texas Department of Transportation.

(16) [~~(15)~~] Highway improvement contract - A construction, maintenance, or building contract.

(17) [~~(16)~~] Historically underutilized business (HUB) - A corporation, sole proprietorship, partnership, or joint venture formed for the purpose of making a profit, certified by the General Services Commission in accordance with Government Code, Chapter 2161.

(18) [~~(17)~~] Maintenance contract - A contract entered under Transportation Code, Chapter 223, Subchapter A, for the maintenance of a segment of the state highway system.

(19) [~~(18)~~] Materially unbalanced bid - A bid which generates a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the state.

(20) [~~(19)~~] Mathematically unbalanced bid - A bid containing lump sum or unit bid items that do not reflect reasonable actual costs plus a reasonable proportionate share of the bidder's anticipated profit, overhead costs, and other indirect costs.

(21) [~~(20)~~] Preventive maintenance contract - Contracts let through the construction contracting procedure to preserve and prevent further deterioration of the roadways and rights of way, with all its components.

(22) [~~(21)~~] Proposal - The offer of the bidder, made out on the prescribed form, giving bid prices for performing the work described in the plans and specifications.

(23) [~~(22)~~] Proposal guaranty - The security designated in the proposal and furnished by the bidder as a guaranty that the bidder will enter into a contract if awarded the work.

(24) Regular bid item - A bid item contained in a proposal and not designated as an alternate bid item.

(25) [~~(23)~~] Routine maintenance contract - Contracts let through the routine maintenance contracting procedure to preserve and repair roadways and rights of way, with all its components, to its designed or accepted configuration.

§9.12. Qualification of Bidders.

(a) Audited financial qualification of construction and maintenance bidders. Unless waived under paragraph (2) of this subsection, to be eligible to bid on a construction or maintenance contract a potential bidder must be prequalified in accordance with paragraph (1) of this subsection.

(1) Requirements.

(A) To be qualified to bid on a construction or maintenance contract, a potential bidder must:

(i) submit a confidential questionnaire to the department's Construction Division in Austin 10 days prior to the last day of bid opening, in a form prescribed by the department, which shall include certain information concerning the bidder's equipment and experience as well as financial condition;

(ii) have its certified public accountant submit the audited and other financial information required by the current edition of the department's Bulletin Number 2, titled "Contractor's Financial Resources";

(iii) satisfactorily comply with any technical qualification requirements determined by the department to be necessary for a specific project; and

(iv) for the purpose of bidding on federal-aid projects, properly complete the Certification of Eligibility Status form contained in the Confidential Questionnaire.

(B) The department will make its examination and determination based on the information submitted, and advise the bidder of its approved bidding capacity. Information adverse to the potential bidder contained in the Certification of Eligibility Status form will be reviewed by the department and the Federal Highway Administration, and may result in the bidder being declared ineligible to submit bids on federal-aid projects.

(C) Satisfactory audited financial information will grant a 12-month period of qualification from the date of the financial statement.

(D) A three month grace period of qualification, for the purpose of preparing and submitting current audited information, will be granted prior to the expiration date of the financial statement.

(E) The department may require current audited information at any time if circumstances develop which are factors that could alter the firm's financial condition, ownership structure, affiliation status, or ability to operate as an on-going concern.

(2) Waiver.

(A) The department will waive the audited financial qualification requirements of paragraph (1) of this subsection if the engineer's estimate is $300,000 or less, the project is a maintenance project, or the project pertains to specialty items not normal to the department's roadway projects program unless the executive director or the director's designee determines that audited financial qualification should be required due to:

(i) safety considerations;

(ii) the complexity of the work; or

(iii) the potential impact of the work on adjacent property owners.

(B) To be eligible to bid on a contract for which the audited financial qualification requirements have been waived under subparagraph (A) of this paragraph, or on a contract to be awarded under §9.19 of this title (relating to Emergency Contract Procedures), a bidder must:

(i) submit a bidder's questionnaire, in a form prescribed by the department, which includes certain information concerning a bidder's equipment and experience;

(ii) submit unaudited and other data as required in the instructions to the bidder's questionnaire;

(iii) satisfactorily comply with any technical qualification requirements determined by the department to be necessary on a specific project; and

(iv) for a federal-aid project, properly complete the Certification of Eligibility Status form contained in the bidder's questionnaire (Information adverse to the potential bidder contained in the certification will be reviewed by the department and by the Federal Highway Administration, and may result in the bidder being declared ineligible to submit bids on a federal-aid project).

(C) The department will make its examination and determination based on the information submitted, and advise the bidder of its approved bidding capacity.

(i) A bidder with no prior experience in construction or maintenance, or a negative working capital position (i.e., financial statements indicate that current liabilities exceed current assets), will receive a bidding capacity of $300,000.

(ii) An experienced bidder with sufficient working capital and financial capability, as determined by the department, will receive a bidding capacity of:

(I) $500,000 for a bidder submitting compiled financial information if the principals of the bidder have at least one year experience in construction and/or maintenance and have satisfactorily completed at least two projects in these fields;

(II) $1,000,000 for a bidder submitting compiled financial information if the principals of the bidder have at least two years experience in construction and/or maintenance and have satisfactorily completed at least four projects in these fields (Those contractors possessing more than two years experience will be granted an additional $250,000 in bidding capacity for each additional year of experience in construction and/or maintenance, with a maximum bidding capacity of $3,000,000.); and

(III) over $1,000,000 for a bidder submitting reviewed financial information if the principals of the bidder have at least two [~~three~~] years of experience in construction and/or maintenance and have satisfactorily completed at least four [~~six~~] projects in these fields (The amount of the bidding capacity will be determined by multiplying the net working capital by a factor determined by the department based upon the expected dollar volume of projects to be awarded and the number of bidders prequalified by the department. In the event that this calculation does not result in an amount greater than $1,000,000, the bidder will receive a bidding capacity of $1,000,000) [~~equal to the amount listed in subclause (II) of this clause~~)].

(b) Building contracts. To be eligible to bid on a building contract, a potential bidder must satisfactorily comply with any financial,

experience, technical, or other requirement contained in the governing specifications applicable to the project.

(c) Financial statements. For purposes of this section, an audited financial statement involves an examination of the accounting system, records, and financial statements by an independent certified public accountant in accordance with generally accepted auditing standards. Based on the examination, the auditor expresses an opinion concerning the fairness of the financial statements in conformity with generally accepted accounting principles. A reviewed financial statement is substantially less in scope than an audited financial statement, and consists primarily of inquiries of company personnel and analytical procedures applied to financial data by an independent certified public accountant. Only negative assurance is expressed by the auditor, meaning the auditor is not aware of any material modifications that should be made in order for the financial statements to conform to generally accepted accounting principles. A compiled financial statement is limited to presenting in the form of financial statements information that is the representation of management. No opinion or any other form of assurance is expressed on the statements by the auditor.

§9.14. Submittal of Proposal.

(a) Delivery. The bidder shall place each completed proposal form in a sealed envelope marked to show its contents. When submitted by mail, this envelope shall be placed in another envelope which shall be sealed and addressed as indicated in the notice. Bids must be received on or before the hour and date set for the receipt and opening of bids and must be in the hands of the department letting [~~bid receipt~~] official by that time.

(b) Proposal content. The bidder shall submit the proposal on the form furnished by the department and in compliance with the following requirements.

(1) Except as provided in paragraph (2) of this subsection and subsection (c) of this section, the blank spaces for each item as required in the proposal form shall be filled in by writing in words in ink.

(2) The bidder shall submit a unit price for each item for which a bid is requested (including a zero if appropriate), except in the case of a regular bid item that has an alternate bid item. In such case, prices must be submitted for the base bid or with the set of items of one or more of the alternates.

(3) The proposal shall be executed with ink in the complete and correct name of the bidder making the proposal and be signed by the person or persons authorized to bind the bidder.

(4) Except in the case of regular bid item that has an alternate bid item, unit prices shall be stated in dollars and/or cents for each bid item listed in the proposal.

(c) Computer printouts.

(1) In lieu of writing in words in ink, a bidder may submit an original computer printout sheet bearing the authorized [~~required certification by and~~] signature for the bidder. The unit prices shown on acceptable printouts will be the official unit prices used to tabulate the official total bid amount and used in the contract if awarded by the commission.

(2) Computer printouts are not acceptable on building contracts.

(d) Proposal guaranty. A bidder must submit a proposal guaranty with the proposal form.

(1) Except as provided in paragraph (2) of this subsection, the proposal guaranty must be in the amount specified by the proposal form, made payable to the order of the commission, and in the form of a cashier's check, money order, or teller's check drawn by or on a state or national bank, savings and loan association, or a state or federally chartered credit union (collectively referred to as a "bank"). The check must be payable at or through the institution issuing the instrument, or must be drawn by a bank on a bank, or by a bank and payable at or through a bank. The form of the instrument must be identified on the instrument's face.

(2) When the department estimates a project to involve less than $300,000, a bidder may submit a bid bond, in lieu of providing the guaranty required in paragraph (1) of this subsection. The bid bond shall be on the form and in the amount specified by the department. A bid bond will only be accepted from a surety company authorized to execute a bond under and in accordance with state law. The bond must bear the impressed seal of the surety company and be signed by the bidder and an authorized representative of the surety company. Powers of attorney must be attached to the bid bond. The bid bond amount required by the department must be within the surety company's authorized bonding limit.

(3) The department will not accept as a proposal guaranty:

(A) personal checks or certified checks;

(B) other types of money orders; or

(C) checks or money orders more than 90 days old.

(4) The commission will establish by order proposal guaranty and bid bond amounts. The commission may require a greater amount for a bid bond in order to compensate for increased administrative costs associated with bid bonds.

§9.15. Acceptance, Rejection, and Reading of Proposals.

(a) Public reading. Bids will be opened and read in accordance with Transportation Code, §223.004 and §223.005. Bids for contracts with an engineer's estimate of less than $300,000 may be filed with the district engineer at the headquarters for the district, and opened and read at a public meeting conducted by the district engineer, or his or her designee on behalf of the commission.

(b) Proposals not read.

(1) The department will not accept and will not read a proposal if:

(A) the proposal is submitted by an unqualified bidder;

(B) the proposal is in a form other than the official proposal form issued to the bidder;

(C) the certification and affirmation are not signed;

(D) the proposal was received after the time or at some location other than that specified in the advertisement;

(E) the bidder modifies the proposal in a manner that alters the conditions or requirements for work as stated in the proposal [~~the unit prices are written in the proposal in numerals~~];

(F) the proposal guaranty, when required, does not comply with §9.14(d) of this title (relating to Submittal of Proposal);

(G) the bidder did not attend a specified mandatory pre-bid conference;

(H) the bid does not include a historically underutilized business subcontracting plan when required;

(I) a computer printout proposal, when used, does not have the unit bid prices entered in designated spaces, [~~does not include the proper certification,~~] is not signed in the name of the firm or firms to

whom the proposal was issued, or omits required bid items or includes items not shown in the proposal;

(J) the bidder was not authorized to be issued a proposal under §9.13(e) of this title (relating to Notice of Letting and Issuance of Proposals);

(K) the proposal did not otherwise conform with the requirements of §9.14 of this title; or

(L) the bidder fails to properly acknowledge receipt of all addenda.

(2) If more than one proposal involving a bidder under the same or different names is submitted on the same project, the department will not accept and will not read any of the proposals submitted by that bidder for that project.

(c) Revision bid by bidder.

(1) A bidder may change a bid price before it is submitted to the department by changing the price and initialing the revision in ink.

(2) A bidder may change a bid price after it is submitted to the department by requesting return of the bid in writing prior to the expiration of the time for receipt of bids, as stated in the advertisement. The request must be made by a person authorized to bind the bidder. The department will not accept a request by telephone or telegraph, but will accept a properly signed telefacsimile request. The revised bid must be resubmitted prior to the time specified for the close of the receipt of bids.

(d) Withdrawal of bid. A bidder may withdraw a bid by submitting a request in writing before the time and date of the bid opening. The request must be made by a person authorized to bind the bidder. The department will not accept telephone or telegraph requests, but will accept a properly signed telefacsimile request. Except as provided in §9.16(c) of this chapter (relating to Tabulation of Bids) and §9.17(d) of this chapter (relating to Award of Contract), a bidder may not withdraw a bid subsequent to the time for the receipt of bids.

(e) Unbalanced bids. The department will examine the unit bid prices of the apparent low bid for reasonable conformance with the department's estimated prices. The department will evaluate a bid with extreme variations from the department's estimate, or where obvious unbalancing of unit prices has occurred. For the purposes of the evaluation, the department will presume the same retainage percentage for all bidders. In the event that the evaluation of the unit bid prices reveals that the apparent low bid is mathematically and materially unbalanced, the bidder will not be considered in future bids for the same project.

§9.16. Tabulation of Bids.

(a) Official bid amount. Except for lump sum building contract bid items, the official total bid amount for each bidder will be determined by multiplying the unit bid price written in for each item by the respective quantity and totaling those amounts.

(b) Department interpretations.

(1) Proposals where unit bid prices have been left blank will be considered by the department to be incomplete and nonresponsive. If a proposal has a regular and a corresponding alternate bid item or group of items, the proposal will not be considered to be incomplete if either the regular bid item, or group of items, or the alternate bid item, or group of items, has a unit bid price entered. If both a regular bid item, or group of items, and a corresponding alternate bid item, or group of items, are left blank, the bid will be considered to be incomplete and nonresponsive (A bidder who elects to bid on a bid item group corresponding to a regular or alternate bid item, or group of items, must include unit bid prices for each bid item contained in the bid item group).

(2) [~~(1)~~] Proposal entries such as no dollars and no cents, [~~or~~] zero dollars and zero cents, or numerical entries of $0.00 will be interpreted to be one-tenth of a cent ($.001) and will be entered in the bid tabulation as $.001, except as provided in paragraph (6) of this subsection. Any entry extended to more than three decimal places will be rounded to the nearest tenth of a cent and entered as such. (For rounding purposes contained in this subsection, entries of five-hundredths of a cent or more will be rounded up to the next highest tenth of a cent, while entries of four-hundredths of a cent or less will be rounded down to the next lowest tenth of a cent) [~~Any entry less than $.001 will be interpreted and entered as $.001~~].

(3) [~~(2)~~] If a bidder submits both a completed proposal form and a properly completed computer printout, the department will use the computer printout to determine the total bid amount of the proposal. If the computer printout is incomplete, the department will use the completed proposal form to determine the total bid amount of the proposal.

(4) [~~(3)~~] If a bidder submits two computer printouts reflecting different totals, both printouts will be tabulated, and the department will use the lowest tabulation.

(5) [~~(4)~~] If a unit bid price is illegible, the department will make a documented determination of the unit bid price for tabulation purposes.

(6) [~~(5)~~] If a unit bid price has been entered for both the regular bid item, or group of items, and a corresponding alternate bid item, or group of items, the department will determine the option that results in the lowest total cost to the state and tabulate as such, except as provided in subparagraphs (A) and (B) of this paragraph. If both the regular and alternate bids result in the same cost to the state the department will select the regular bid item or items.

(A) If both a regular bid item or a group of items, and a corresponding alternate bid item or group of items, have an entry such as no dollars and no cents, zero dollars and zero cents, or numerical entries of $0.00, the department will make two calculations using one-tenth of a cent ($.001) for each item as described in subparagraph (2) of this subsection. The department will determine the option that results in the lowest total cost to the state and tabulate as such. If both the regular and alternate bids result in the same cost to the state the department will select the regular bid item or items.

(B) If a unit bid price greater than zero has been entered for either a regular bid or corresponding alternate bid item, or a group of items, and an entry of no dollars and no cents, zero dollars and zero cents, or a numerical entry of $0.00 has been entered for the other corresponding item, or group of items, the department will use the unit bid price that is greater than zero for bid tabulation.

(c) Tie bids. In the event the official bid amount for two or more bidders is equal and those bids are the lowest submitted, each tie bidder will be given an opportunity to withdraw its bid. If two or more tie bidders decline to withdraw their bids, the low bidder will be determined by a coin toss. If all tie bidders request to withdraw their bids, no withdrawals will be allowed and the low bidder will be determined by a coin toss.

§9.18. After Contract Award.

(a) Contract execution.

(1) Except as provided in paragraphs (2) and (3) of this subsection, within 15 days after written notification of award of a contract,

the successful bidder must execute and furnish to the department the contract with:

(A) a performance bond and a payment bond, if required and as required by the Government Code, Chapter 2253, with powers of attorneys attached, each in the full amount of the contract price, executed by a surety company or surety companies authorized to execute surety bonds under and in accordance with state law (Department interpretations made in accordance with §9.16(b)(2) of this chapter (relating to Tabulation of Bids) will be used to determine the contract amount for providing a performance bond and payment bond, if required, and as required by the Government Code, Chapter 2253.);

(B) a certificate of insurance showing coverages in accordance with contract requirements; [and]

(C) when required, written evidence of current good standing from the Comptroller of Public Accounts; and

(D) a list of all quoting subcontractors and suppliers.

(2) A successful bidder on a routine maintenance contract will be required to provide the certificate of insurance prior to the date the contractor begins work as specified in the department's order to begin work.

(3) Within the time specified in the contract, the successful bidder on a construction contract containing a DBE or SEB [HUB] goal, who is not a DBE or SBE [HUB], must submit all the information required by the department in accordance with §9.53(e) of this title (relating to Disadvantaged Business Enterprise (DBE) Program) and §9.55(c) of this title (relating to Small Business Enterprise (SBE) Program) [§9.58(d) of this title (relating to Contract Compliance)]. The successful bidder must comply with paragraph (1) of this subsection within 15 days after written notification of acceptance by the department of the successful bidder's documentation to achieve the DBE or SBE [HUB] goal.

(b) Proposal guaranty.

(1) Apparent low bidder. The department will retain the proposal guaranty of the successful bidder until after the contract has been awarded, executed, and bonded. If the successful bidder does not comply with subsection (a) of this section, the proposal guaranty will become the property of the state, not as a penalty but as liquidated damages; provided, however, the department may, based on documentation submitted by the contractor, grant a 15-day extension to comply with the requirements under subsection (a)(3) of this section. A bidder who forfeits a proposal guaranty will not be considered in future proposals for the same work unless there has been a substantial change in the design of the project subsequent to the forfeiture of the proposal guaranty.

(2) Other bidders. Not later than 72 hours after bids are opened, the department will mail the proposal guaranty of all bidders except the apparent low bidder to the address specified on each bidder's return bidder's check form included in the proposal.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006831

Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

SUBCHAPTER F. CONTRACTS FOR SCIENTIFIC, REAL ESTATE APPRAISAL, RIGHT OF WAY ACQUISITION, AND LANDSCAPE ARCHITECTURAL SERVICES

43 TAC §§9.80 - 9.83, 9.85 - 9.87, 9.89

The Texas Department of Transportation proposes amendments to §§9.80-9.83 and §§9.85-9.87, and new §9.89 concerning contracts for scientific, real estate appraisal, right of way acquisition, and landscape architectural services.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTIONS

Transportation Code, Chapter 223, Subchapter D, provides that the department may follow a procedure using competitive sealed proposals to procure the services of technical experts including archeologists, biologists, geologists, historians, or other technical experts to conduct environmental and cultural assessments for transportation projects within the authority or jurisdiction of the department.

Government Code, Chapter 2254, Subchapter A, the Professional Services Procurement Act, includes real estate appraisers (appraisers) and landscape architects as professional services.

The amendments and new sections set forth procedures for the selection of appraisers, and extend the time period for tasks within scientific services work authorizations. Appraisers were already included in these sections if their services were required for the selection of a right of way provider.

The amendments to §9.80 add appraisers to the types of services that can be procured by the department with the use of a precertification procedure and competitive sealed proposals. The selection by competitive sealed proposals complies with a revision to Government Code, §2254.003 in 1997 which requires selection and award to be made on the basis of demonstrated competence and qualifications to perform the services, and for a fair and reasonable price.

The amendments to §9.81 provide a definition for the term appraiser.

The amendments to §9.82 provide that the department may use competitive sealed proposals for appraisal services.

The amendments to §9.83 provide that the department will give notice of appraisal procurements and the process for a potential provider to obtain a Request for Proposal packet. As another method to inform an appraiser of the precertification application requirement, the notice will contain a statement that an appraiser must be precertified.

The amendments to §9.85 provide that the appraiser must be precertified in order to be evaluated. A precertified appraiser will be evaluated on the experience of the individual; demonstrated understanding of the scope of services to be provided; references including the ability to meet deadlines over the past

three years; ability to meet department scheduling requirements; and reasonableness of fee.

The amendments to §9.86 provide that the department may discuss best and final offers for appraisal services in order to obtain a contract that is in the best interest of the state.

The amendments to §9.87 provide that all work authorizations under an indefinite delivery contract shall be issued within two years of the effective date of the contract, except for scientific services. For scientific services, the initial work authorization for any specific project must be issued within two years. The work authorization for tasks or subtasks, within the specific project, may be issued after the initial two years provided that the task or subtask does not initiate a new project. The additional time is needed to begin tasks or subtasks because often the complete scope of a scientific services project cannot be determined until the initial scope of the project is complete.

New §9.89 lists the qualification requirements for appraisers. The qualifications establish a minimum education and experience threshold that an appraiser must meet in order to provide work for the department. An appraiser may be precertified if the individual has demonstrated experience after licensure in the performance of appraisals associated with residences, apartments, commercial property, industrial property, farms, or other special purpose property; and is licensed to practice in Texas by the Texas Appraiser Licensing and Certification. To be precertified, an appraiser must submit an application, including, but not limited to, information regarding education, training, experience, and copies of licenses and certifications. The precertification of an appraiser does not guarantee that work will be awarded to such appraiser. The new section also sets a time period for review of the application by the department and a process for renewing precertification every five years. An appraiser may appeal denial of precertification by submitting additional information to the Director of the Right of Way Division in Austin who will review the information and make a determination. An appraiser may appeal that determination by filing a written complaint with the executive director or his or her designee.

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the amendments and new section are in effect, there will be increased fiscal costs for state government as a result of enforcing or administering the sections because the department will be evaluating proposals. There will be no fiscal implications for local governments. Appraisers' costs will increase because they must submit precertification applications and proposals. The fiscal implications to the providers and department cannot be determined because they depend upon the number of RFPs and proposals generated.

Jennifer Soldano, Director, Contract Services Office has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new section.

PUBLIC BENEFIT

Ms. Soldano have also determined that for each year of the first five years that the amendments and new section are in effect, the public benefit anticipated as a result of the proposed sections will be to further the department's mission to provide an efficient, effective process to select appraisers and to allow for flexibility in the issuing tasks for scientific services. There will be no effect on small or micro businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new section may be submitted to Jennifer Soldano, Director, Contract Services Office, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 13, 2000.

STATUTORY AUTHORITY

The amendments and new section are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Texas Transportation Code, Chapter 223, Subchapter D, which provides for the selection of technical experts, and Government Code, Chapter 2254, Subchapter A, which provides for the selection of appraisers and landscape architects.

No statutes, articles, or codes are affected by these proposed amendments and new section.

§9.80. Purpose.

(a) Transportation Code, Chapter 223, Subchapter D, provides that the department may follow a procedure using competitive sealed proposals to procure the services of technical experts including archeologists, biologists, geologists, historians, or other technical experts to conduct environmental and cultural assessments for transportation projects within the authority or jurisdiction of the department. This subchapter, which implements Chapter 223, Subchapter D of the Transportation Code, establishes standard procedures for selection of technical experts to provide scientific services including environmental and cultural studies, analyses, and document preparation.

(b) This subchapter also establishes standard procedures for selection of appraisers, right of way acquisition providers, and landscape architects in accordance with Government Code, Chapter 2254, Subchapter A, the Professional Services Procurement Act.

§9.81. Definitions.

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

(1) Appraiser - An individual licensed to provide real estate appraisal services in Texas.

(2) [~~(1)~~] Competitive sealed proposals - A procurement method in which offers are solicited from a number of sources, and selection is made using criteria other than cost, although reasonableness of cost is a selection criterion.

(3) [~~(2)~~] Department - The Texas Department of Transportation.

(4) [~~(3)~~] Indefinite delivery contract - A contract that contains a general scope of services, maximum contract amount, and contract termination date in which contract rates are negotiated prior to contract execution, and work is authorized as needed.

(5) [~~(4)~~] Landscape architect - An individual licensed to practice landscape architecture in the state or states that he or she performs professional services.

(6) [~~(5)~~] Mandatory/minimum qualifications - Those qualifications listed in the request for proposals that the provider must demonstrate it meets in order for the proposal to be considered responsive.

(7) [~~(6)~~] Provider - An individual or entity that provides scientific, appraisal, right of way acquisition, or landscape architectural services.

(8) [~~(7)~~] Request for proposals (RFP) - A request for submittal of a proposal that demonstrates competence and qualifications of the provider to perform the requested services and shows an understanding of the specific project.

(9) [~~(8)~~] Right of way acquisition provider (ROW provider) - A firm performing right of way acquisition, including appraisal services, but excluding surveying, engineering, or architectural services.

(10) [~~(9)~~] Subprovider - A provider proposing to perform work through a contractual agreement with the provider.

(11) [~~(10)~~] Scientific services - Environmental or cultural studies, analyses, and document preparation services required by state or federal law, for a transportation project within the authority or jurisdiction of the department, and performed by an archeologist, biologist, geologist, historian, architectural historian, or other technical expert.

(12) [~~(11)~~] Technical expert - An archeologist, biologist, geologist, historian, architectural historian, or other non-engineering expert in a natural, social, historical, or environmental science qualified to conduct an environmental or cultural study required by state or federal law for a transportation project. This definition includes a firm or institution employing one or more technical experts.

§9.82. Use of Providers.

The department may use competitive sealed proposals to procure scientific, appraisal, right of way acquisition, and landscape architectural services.

§9.83. Notice and Letter of Interest.

(a) Notice. When the department elects to use competitive sealed proposals to procure appraisal, right of way acquisition, landscape architectural, and scientific services, notice will be given as follows.

(1) Electronic and newspaper notice. Not less than 21 days before the proposal due date, the department will post a notice on an electronic bulletin board and publish a notice in a selected newspaper. The notice will contain the:

(A) proposed contract or RFP number;

(B) type of selection in accordance with §9.87 of this title (relating to Selection Types);

(C) general description of the project and work to be done;

(D) due date for providers to send letters of interest to the department;

(E) contact person;

(F) date and location of the proposal meeting, if applicable; and

(G) location of the electronic bulletin board that contains more information; and

(H) if the notice is for an appraiser, a statement that the appraiser must be precertified in accordance with §9.89 of this section (relating to Qualification Requirements for Appraiser).

(2) Organizations. The department will publish a quarterly statewide list of projected contracts to be issued under this subchapter and will provide upon request, or make available on the department's Web site, a copy of the list to community, business, and professional organizations for dissemination to their membership.

(b) Letter of interest.

(1) The provider may obtain an RFP packet by:

(A) sending a letter of interest to the department notifying the department of the provider's interest in the contract;

(B) downloading it from the department's Web site; or

(C) obtaining it at the proposal meeting, if applicable.

(2) The department will accept a letter of interest by electronic facsimile.

(c) Requests for proposals. The RFP packet will include:

(1) the requirements for a responsive proposal including:

(A) date, time, and location for submittal of the proposal;

(B) an outline of the required proposal format and content; and

(C) mandatory/minimum provider qualifications;

(2) scope of services to be provided by the department;

(3) scope of services to be provided by the provider;

(4) proposed contract duration;

(5) proposed method of payment;

(6) any constraints directly relating to the performance of the contract, if applicable;

(7) description of the evaluation criteria including numerical weighting values;

(8) a copy of the evaluation matrices;

(9) type of contract selection;

(10) a copy of the proposed contract, with all attachments;

(11) criteria for breaking ties, if criteria are different from that outlined in §9.85(e) of this title (relating to Evaluation);

(12) any special contract requirements.

(d) Proposal meeting. The meeting may be either mandatory or optional at the discretion of the department. If the meeting is mandatory, the department will only accept proposals from providers represented at the meeting. The proposal meeting provides an opportunity for the provider to seek clarification or ask questions concerning the contract.

§9.85. Evaluation.

(a) Technical expert and ROW provider evaluation criteria. The department will evaluate a technical expert's or ROW provider's responsive proposal based on the following criteria, if applicable:

(1) professional qualifications;

(2) experience of the firm and the team or individuals;

(3) merits of the proposal, including unique or innovative methods for performing the work[~~,~~];

(4) ability to commit personnel, time, and other resources to the project (technical experts cannot be removed from association with the contract without prior consent by the department);

(5) demonstrated understanding of the scope of services to be provided, including identifying which type of work will be performed by a subprovider, if any;

(6) demonstrated understanding of applicable rules, regulations, policies, and other requirements associated with the environmental or cultural studies, analyses, or document preparation to be performed;

(7) ability to meet department scheduling requirements;

(8) past performance of the provider, specific provider staff, or subproviders on similar contracts; and

(9) reasonableness of fee.

(b) Landscape architect evaluation. The department will evaluate a landscape architect's responsive proposal based on the following criteria:

(1) experience of the project manager and project team;

(2) demonstrated understanding of the scope of services to be provided, including identifying which type of work will be performed by a subprovider, if any;

(3) references including the ability [~~of the landscape architect~~] to meet deadlines over the past three years;

(4) ability to meet department scheduling requirements; and

(5) reasonableness of fee.

(c) Appraiser evaluation. An appraiser must be precertified in accordance with §9.89 of this section (relating to Qualification Requirements for Appraisers). The department will evaluate a precertified appraiser's responsive proposal based on the following criteria:

(1) experience of the individual;

(2) demonstrated understanding of the scope of services to be provided;

(3) references including the ability to meet deadlines over the past three years;

(4) ability to meet department scheduling requirements; and

(5) reasonableness of fee.

(d) [~~(c)~~] Evaluation scale. The department will assign a numerical weighting value to each evaluation criterion and then score each criterion based upon a numerical scale.

(e) [~~(d)~~] Evaluation matrix. The department will evaluate each responsive proposal using an individual proposal evaluation matrix.

(f) [~~(e)~~] Tie scores. In the event of a tie, the managing officer will break the tie using the following method unless different criteria have been listed in the RFP.

(1) The first tie breaker, if needed, will be references/past performances.

(2) The second tie breaker, if needed, will be ability to meet department scheduling requirements.

(3) If there is still a tie, the provider will be chosen by random selection.

§9.86. Discussions for Best and Final Offer for Scientific, Appraisal, Right of Way Acquisition, and Landscape Architectural Services.

(a) When it is determined to be in the best interests of the state for scientific, appraisal, right of way acquisition, and landscape architectural service contracts, the department may elect to include discussions with the top three responsive providers [~~providers'~~] to clarify their best and final offer prior to selection. In the case of selecting multiple providers, discussions will be held with a number of providers equal to the number of contracts to be awarded plus three. Discussions for best and final offer will occur following completion of the steps in §9.82 through §9.85 of this subchapter, relating to contracts for scientific, appraisal, right of way acquisition, and landscape architectural services.

(b) If the department elects to conduct discussions as provided for in subsection (a) of this section, the top providers, as determined by subsection (a) of this section, shall be given an equal opportunity to discuss and revise their proposals. The department will not disclose any information derived from proposals submitted by competing providers during these discussions. Discussions will include any portion of the responsive proposal in order to assess a provider's ability to meet the RFP requirements, and an opportunity for the provider to demonstrate an understanding of the project and remedy the proposal's deficiencies. Discussions may include reasonableness of fee.

(c) After completing discussions with providers, the department will send written notification to each provider to submit a best and final offer. The proposals will be reevaluated using the criteria in §9.85 of this title (relating to Evaluation). The evaluation shall be made in writing and shall include the individual proposal evaluation matrix as specified in §9.85(d) of this title.

§9.87. Selection.

The department will perform three types of contract selections.

(1) Individual contract selection. One contract will result from the contract notice.

(2) Multiple contract selection. More than one contract, of similar work types and estimated amounts will result from the contract notice. The notice will indicate the number and type of contracts to result from the advertisement, and specify a range of scores for providers that will be considered qualified to perform the work.

(3) Indefinite delivery contract selection.

(A) This contract selection may be for award of contracts to single or multiple providers to perform work under a general scope of services.

(B) The typical type of work will be described in the contract notice. Specific services shall be authorized by individual work authorizations on an as-needed basis. The maximum contract amount shall be specified and shall not exceed $1,000,000 per contract. The contract period shall be specified.

(C) All work authorizations under an indefinite delivery contract shall be issued within two years of the effective date of the contract, except for scientific services. For scientific services, the initial work authorization for any specific project must be issued within two years. The work authorization for tasks or subtasks, within the specific project, may be issued after the initial two years provided that the task or subtask does not initiate a new project.

§9.89. Qualification Requirements for Appraisers.

(a) Eligible individuals. To be precertified an appraiser must:

(1) have demonstrated experience after licensure in the performance of appraisals associated with one or more of the following types of properties: residences, apartments, commercial, industrial, farms, or other special purpose;

(2) be currently licensed to practice in the state of Texas by the Texas Appraiser Licensing and Certification Board; and

(3) submit to the Right of Way Division of the Texas Department of Transportation in Austin a complete and correct application for precertification on a form prescribed by the department, including, but not limited to, information regarding education, training, experience, and copies of licenses and certifications.

(b) The precertification of an appraiser does not guarantee that work will be awarded to the appraiser.

(c) An appraiser will be precertified within 60 days of receipt of a complete and correct application form or notified in writing within the same time period that they did not meet the requirements for precertification or that additional information or documentation will be required for review.

(d) If the application is incomplete, the appraiser applying for precertification will be requested to submit additional information or documentation for review. The appraiser shall submit such information or documentation within 30 days of receipt of the department's request for such information or documentation. If the information is not provided within 30 days after receipt of the request, the application for precertification will be processed with the information available. The department will make a determination on precertification status within 60 days of receipt of the additional information.

(e) Renewal of precertification will be required every five years. Precertified appraisers will be assigned a renewal date by the department and must apply for renewal of precertification on an application form prescribed by the department between 90 and 30 days prior to their renewal date. The precertification of a appraiser who fails to submit an application for renewal at least 30 days prior to its renewal date will expire, and the appraiser would then be ineligible to submit a letter of interest for new contracts until having first been precertified.

(f) Appeal. An appraiser may appeal denial of precertification by submitting additional information within 30 days of receipt of written notification of denial to the Director of the Right of Way Division in Austin. This information shall justify why the appraiser meets the requirements for precertification. The Director of the Right of Way Division will review the information and make a determination regarding precertification. An appraiser may appeal that determination by filing a written complaint regarding selection for precertification with the executive director or his or her designee.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006832
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

CHAPTER 31. PUBLIC TRANSPORTATION

The Texas Department of Transportation proposes new §31.22 and amendments to §§31.1-31.3, §31.11, §31.13, §31.16, §31.21, §31.26, §31.31, §31.36, §31.37, §§31.42-31.44, §31.48, §31.53, §31.57, §31.61, and §31.65, concerning public transportation.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

In 1996 the department underwent a federal triennial review, which resulted in several changes in the department's administration of the various federal programs. The amendments incorporate these changes in rules. House Bill 1980, 76th Legislature, 1999, amended Transportation Code, §456.008, to remove statutory performance measures and to direct the commission to develop new performance measures. The amendments respond to this directive by establishing new performance measures. The department has also decided to revamp the administration of the Section 5310 grant program serving elderly persons and persons with disabilities to encourage more public input in the selection of projects.

Changes in language have been made to enhance readability and clarity, to improve grammar, and to correct cross-references. The amendments also update citations to federal law to reflect its codification and modify terminology to reflect the latest federal guidance. These changes are both non-substantive and pervasive, and therefore they have not been separately addressed in each instance in which they occur.

Section 31.2 is amended to add rail safety oversight to the duties of the department in accordance with Transportation Code, §455.005.

Section 31.3 is amended to add new definitions, to clarify and expand existing definitions, and to conform definitions more closely to existing practice, federal standards, and state law.

The definition of "accident" is amended to create a general definition applicable to all non-rail accidents. The previous definition, applicable only to rail fixed guideways, has been renamed "rail accident."

Existing subsections (5) and (6) are eliminated to reflect changes in the department's organizational structure.

A definition is added for "average revenue vehicle capacity," a component in the definition of "vehicle utilization."

The term "Deputy executive director" is defined to reflect changes in the department's organizational structure.

New paragraph (19) is added to define "fatality," a component in the definition of "accident."

New paragraph (24) is added to define "incident," a component in the definitions of "accident," "fatality," and "injury."

New paragraph (26) is added to define "injury," a component in the definitions of "accident," "incident," and "rail accident."

New paragraph (33) is added to define "MPO," a shorthand form for Metropolitan Planning Organization, to facilitate references throughout the chapter.

Paragraph (38) is amended to clarify and expand the scope of the term "operating expenses."

New paragraph (42) is added to define "rail accident." The definition is the same as the existing definition of "accident."

New paragraph (46) is added to define "revenue vehicle," a component in the definitions of "average revenue vehicle capacity," "incident," and "vehicle utilization."

New paragraph (47) is added to define "revenue service," a component in the definitions of "rail accident," "vehicle miles," and "vehicle revenue hours or miles."

New paragraph (55) is added to define "stakeholders," a concept used to encourage more public input into the selection of projects for the Section 5310 program serving elderly persons and persons with disabilities.

New paragraph (56) is added to define "subrecipient." This term is now used in federal regulations to refer to a person previously known as a "contractor."

New paragraph (60) is added to define "unlinked passenger trips," a concept used in new reporting requirements for cost effectiveness and service effectiveness.

Paragraph (61) is amended to clarify and expand "urban transit district" to match the definition in Transportation Code, §458.001.

New paragraph (63) is added to define "vehicle miles," a concept used in new reporting requirements for cost efficiency, service efficiency, and service effectiveness.

New paragraph (64) is added to define "vehicle revenue hours or miles," a concept used in new reporting requirements for service efficiency and service effectiveness.

New paragraph (65) is added to define "vehicle utilization," a concept used in new reporting requirements for service efficiency.

Section 31.11 is amended to eliminate existing reporting requirements. House Bill 1980, 76th Legislature, 1999, amended Transportation Code §456.008, by removing statutory performance measures. Figure: 43 TAC §31.11(b)(1)(B)(ii) has been added to enhance readability and clarity. Section 31.11(f) has therefore been deleted. Reporting requirements will now be set forth in §31.48(b).

Section 31.16 is amended to conform to the pattern of the rule sections dealing with other grant programs. These amendments conform to current practice.

Subsections (c) and (d) are added to clarify the department's role in administering the Section 5309 grant program and the federal requirements for local match.

Section 31.21 is amended to conform to the pattern of the rule sections dealing with other grant programs. These amendments conform to current practice.

Subsections (a) and (b) are amended to conform more closely to federal requirements concerning administration of the Section 5303 grant program. Subsections (c) and (d) are added to clarify the department's role in administering the Section 5309 grant program and the federal requirements for local match.

New §31.22 is added to provide guidance concerning the Section 5313 grant program, which currently is not addressed in the rules. The new rule conforms to the pattern of the rule sections dealing with other grant programs and identifies the purpose, eligible recipients, and local share requirements mandated by federal regulations. The new section follows the department's current practice.

Section 31.31 is amended to provide for greater local participation in the selection of projects for the Section 5310 grant program for elderly persons and persons with disabilities.

Subsection (b)(2) is added to state the department's objective of promoting and encouraging greater local participation in decisions regarding the Section 5310 grant program.

Subsection (c)(2) is added to establish the department's role in ensuring input from local entities and individuals.

Subsection 31.31(d) is amended to provide that the primary recipient of funds will be local metropolitan transit authorities and rural and urban transit districts for their respective service areas and to provide for an alternative recipient in areas not served by those entities. Secondary recipients of funds will continue to be local public bodies, and subsection d) is also amended to provide examples of local public bodies that would be eligible as ultimate recipients of Section 5310 funds and to ensure that these local public bodies must be approved by the department. These changes are intended to foster decentralized decision-making and broaden local participation in the selection process.

Subsection (i), paragraph (1) is amended and paragraph (2) is deleted to provide that in all cases, the department's districts will select projects in priority order from the list of projects developed by the districts with substantial local participation.

Subsection (j) is amended to create a new local planning and development process. This new process is carefully crafted to maximize local participation in the selection process for projects and is designed to be implemented through a three-year plan, which will be updated annually. This process will identify local transportation needs and available local transportation resources and generate a plan for meeting those needs. Each department district will submit an annual report setting forth that district's plan and the process used in establishing it.

Subsection (m) is amended to clarify that vehicles purchased under the Section 5310 grant program cannot be altered to accommodate meal deliveries. This clarification is consistent with federal law and current practice.

Section 31.36 is amended to correct an oversight in the existing rule, to clarify eligible capital costs under the Section 5311 grant program, and to update various references to percentages.

Subsection (d) is amended to provide that for-profit transit operators may receive Section 5311 funds under the intercity bus program. This amendment brings the language of this section into conformity with federal law and current practice.

Subsection (e)(2) is amended to bring these allowable costs into conformity with federal law and current practice.

Subsection (g) is amended to eliminate obsolete references to percentages that have expired.

Section 31.37 is amended to eliminate references to an advisory committee that no longer exists.

Subsection (d) is amended to delete references to the Transit Operators' Advisory Committee, a departmental advisory committee that was abolished in recent amendments to 43 TAC §1.85. Also deleted are references to ad hoc advisory committees, also abolished in the recent amendments to 43 TAC §1.85.

Section 31.42 is amended to identify the specific federal programs administered by the department and the specific federal laws applicable to grant recipients.

Section 31.43 is amended to require that subrecipients notify the department in advance of pending large purchases and to prevent purchases from being split to evade this requirement. This will allow the department to fulfill its federal and state oversight responsibilities and to take preventive action before a potential violation becomes actual. The $10,000 limit corresponds to the state requirement for formal competitive bidding.

Section 31.44 is amended to conform bidding requirements to current practice and to enhance the department's role in overseeing subrecipients of grant funds.

Existing subsection (b)(1) is eliminated so that subrecipients may purchase vehicles below the $10,000 threshold without using formal competitive bidding.

Subsection (b) is amended to set a $10,000 limit, which corresponds to the state requirement for formal competitive bidding.

Subsection (c) is amended to require that subrecipients notify the department in advance of pending large purchases and to prevent purchases from being split to evade this requirement. This will allow the department to fulfill its federal and state oversight responsibilities and to take preventive action before a potential violation becomes actual.

Section 31.48 is amended to establish reporting requirements and performance standards for subrecipients. These reporting requirements are proposed in response to the directive of House Bill 1980, 76th Legislature, 1999, amending Transportation Code, §456.008, which requires the commission to develop new performance measures for transit operators.

Subsection (b) is amended to provide for nine categories of reports that must be filed by subrecipients of grant funds. These categories include accident reports, asset inventory reports, charter service reports, reports on Disadvantaged Business Enterprises and Historically Underutilized Businesses, operations reports, reports on performance goals and management objectives, reports on significant events, rail transit agency reports, and miscellaneous reports. Of these, the only new requirement is the accident report. This report will comply with the department's responsibility to oversee federal assets and with expected federal requirements for bus safety. Under existing federal and state regulations, the department is already requiring all the other reports listed in this subsection.

Subsection (b) is also amended to renumber and rearrange the various reports that are already required. Asset inventory reports were formerly listed as Biennial inventory. The provision for operations reports now includes revised language formerly found in subsection 31.11(f) and incorporates requirements of the former quarterly report. The report on significant events is relocated to item number 7, and miscellaneous reports are reworded and relocated to item number 9. Survey forms are unnecessary because the information previously gathered under this report is now collected under other required reports.

Subsection (b)(5)(A) and (B) set out the performance standards for recipients of Section 5307 and Section 5311 funds. The performance standards measure service efficiency, cost effectiveness, service effectiveness, and safety, but apply different measures of these qualities to recipients of the two programs. These performance measures were chosen because they contain elements that are readily available, that are already collected by the department, or that are already being reported to the National Transit Database. Different measures are used for urban and rural operators because urban operators already collect more-detailed information.

Subsection (c) is amended to reflect current practice and federal requirements that were implemented following the department's federal triennial review in 1996.

Section 31.53 is amended to establish a consistent maintenance program for subrecipients receiving federal funds through the department for the procurement of equipment. The department's federal triennial review of 1996 included the absence of a maintenance program, and these changes are made in response to that federal mandate.

Section 31.57 is amended to eliminate an invalid reference and to add language reflecting the department's role in providing instructions concerning the disposition of property.

Subsection (d) is amended to delete the section's restriction to real property and equipment in which the department has an interest as 50% of a nonfederally-assisted capital improvement. This restriction is invalid because all property and equipment acquired with federal or state funds is subject to the department's regulations on disposition. In addition, language has been added to clarify the department's role in providing disposition instructions.

Subsection (d)(2)(C) has been added to require record-keeping when proceeds from a sale of property will later be devoted to federal public transportation purposes. The new language conforms to the latest edition of federal program guidance.

Section 31.61 is amended to clarify the reporting requirements of rail transit agencies. Initial reports of accidents and unacceptable hazardous conditions can now be filed by facsimile, and a summary report is now due monthly. These changes are expected to facilitate reporting by rail transit agencies.

Section 31.65 is amended to conform to current practice, to eliminate obsolete time references, to clarify the reporting requirements of newly started rail transit agencies, and to clarify the due date for the safety report described in §31.61(c).

FISCAL NOTE

James Bass, Director, Finance Division, has determined that for the first five-year period the new and amended sections are in effect, there will be no fiscal implications for state government as a result of enforcing or administering the new and amended sections. There are anticipated economic costs for local governments equal to $62,976 in the first year and $53,136 in each succeeding year. There are no other anticipated economic costs for persons required to comply with the sections as proposed.

Margot D. Massey, Director, Public Transportation Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new and amended sections.

PUBLIC BENEFIT

Ms. Massey has also determined that for each of the first five years the proposed amendments and additions are in effect, the public benefit anticipated as a result of enforcing and administering the amendments and compliance with the sections will be to provide a safer and more efficient public transportation network in the State of Texas through the department's oversight role and the transit industry's reports and greater local participation in the selection of projects in the Section 5310 program resulting in increased and efficient coordinated transportation for the Section 5310 program, which serves elderly persons and persons with disabilities.

There will be no effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, TxDOT will conduct a public hearing to receive comments concerning the proposed new and amended sections. The public hearing will be held at 9:00 a.m., October

30, 2000, in the Dewitt C. Greer State Highway Building, 125 E. 11th Street, Austin, Texas, and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc., for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or Braille, are requested to contact Eloise Lundgren, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new section may be submitted to Margot D. Massey, Director, Public Transportation Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on November 13, 2000.

SUBCHAPTER A. GENERAL

43 TAC §§31.1 - 31.3

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules concerning rail fixed guideway mass transportation system safety oversight, and Transportation Code, §456.008, which requires the commission to by rule prepare and issue a report on the performance of certain public transportation providers in this state.

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

§31.1. Scope and Purpose.

This chapter sets out policies and procedures to be followed by the Texas Department of Transportation in accomplishing the duties prescribed by Transportation Code, Chapters 455 and 456, concerning public transportation. This chapter also describes the administration of federal public transportation grant monies by the department pursuant to 49 United States Code (U.S.C.) §5301, et seq. [~~the Federal Transit Act (49 United States Code §5301 et seq).~~]

§31.2. Organization.

The Public Transportation Division is [~~shall be~~] responsible for:

(1) preparing and updating a statewide comprehensive master plan for public transportation;

(2) providing financial assistance through appropriate communication and the establishment of procedures for the development and processing of applications;

(3) assisting local entities in securing financial aid offered by the federal government for the purpose of establishing, [~~or~~] maintaining, or expanding public transportation systems;

(4) carrying out the Federal Transit Administration (FTA) rail safety oversight program;

(5) [~~(4)~~] administering the state public transportation funds [~~fund,~~] and other monies appropriated by the Texas Legislature for public transportation purposes and established within the department budget, in accordance with all federal, state, and local laws, statutes, ordinances, rules, and regulations;

(6) [~~(5)~~] providing technical assistance [~~through a core of technical expertise~~] to district personnel and local jurisdictions;

(7) [~~(6)~~] representing the state in public transportation matters with federal officials, other state agencies, transit organizations, and local communities;

(8) [~~(7)~~] monitoring and sponsoring research and development activities to enhance public transportation development; and

(9) [~~(8)~~] assisting in the development of policies by the commission, the governor, and the legislature.

§31.3. Definitions.

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

(1) Accident - An incident that involves a transit vehicle or occurs on transit property, and:

(A) results in a fatality, an injury, or transit property damage greater than $1,000; or

(B) involves a non-arson fire. [~~Any event involving the revenue service operation of a rail fixed guideway system as a result of which an individual dies or suffers bodily injury and immediately receives medical treatment away from the scene of the event; or a collision, derailment, or fire that results in property damage in excess of $100,000. Injuries, deaths, or property damage that occur when a rail fixed guideway system is not in revenue service are excluded.~~]

(2) Administrative expenses - Include, but are not limited to, general administrative expenses such as salaries of the project director, secretary, and bookkeeper; [~~,~~] marketing expenses; [~~,~~] insurance premiums or payments to a self-insurance reserve; [~~,~~] office supplies; [~~,~~] facilities and equipment rental; and [~~, or~~] standard overhead rates.

(3) Allocation - A preliminary distribution of grant funds representing [~~which represents~~] the maximum amount to be made available to a subrecipient [~~contractor~~] during the fiscal year, subject to the subrecipient's [~~contractor's~~] completion of and compliance with all application requirements, rules, and regulations applicable to the specific funding program.

(4) APTA guidelines - The "Manual for the Development of Rail Transit System Safety Program Plans" published by the American Public Transportation [~~Transit~~] Association on May 1, 1999 [~~August 20, 1991~~], and subsequent revisions.

[~~(5) Assistant executive director - The assistant executive director for multimodal transportation for the department.~~]

[(6) Associate executive director - The associate deputy director of planning and policy for the department.]

(5) [(7)] Authority - A metropolitan or regional authority [as] created under Transportation Code, Chapter 451 or 452 [Texas Civil Statutes, Article 1118x or Article 1118y], or a city transit department created under Transportation Code, Chapter 453 [Texas Civil Statutes, Article 1118z], by a municipality having a population of not less than 200,000 according to the most recent federal census.

(6) Average revenue vehicle capacity - The number of seats in all revenue vehicles divided by the number of revenue vehicles.

(7) [(8)] Capital expenses - Include the acquisition, construction, and improvement of public transit facilities and equipment needed for a safe, efficient, and coordinated public transportation system.

(8) [(9)] Commission - The Texas Transportation Commission.

(9) [(10)] Common rule - 49 Code of Federal Regulations [Title 49, Code of Federal Regulations,] Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to [with] State and Local Governments.

(10) [(11)] Contractor - A recipient of public transportation funds through a contract with the department. This definition is synonymous with subrecipient.

(11) [(12)] Department - The Texas Department of Transportation.

(12) Deputy executive director - The deputy executive director of the department.

(13) Designated recipient - The state, an [An] authority, a municipality that is not included in an authority, a local governmental body, or a nonprofit entity providing rural public transportation services, that receives federal or state public transportation money through the department or the Federal Transit Administration, or its successor.

(14) Director - The director of public transportation for the department.

(15) District - One of the 25 districts of the department having responsibility for administration of public transportation programs in a designated geographic [their] area.

(16) District engineer - The chief executive officer in charge of a district of the department.

(17) Equipment - Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(18) Executive director - The chief executive officer of the department.

(19) Fatality - A death resulting from an incident and occurring within 30 days following the incident.

(20) [(19)] Federally funded project - A public transportation project that [which] is being funded in part under the provisions of the Federal Transit Act, as amended, 49 U.S.C. §5301 et seq., [amended (49 United States Code §5301, et seq.)] the Federal-Aid Highway Act of 1973, as amended, 23 U.S.C. §101 et seq., [amended (23 United States Code §101, et seq.),] or other federal program for funding public transportation.

(21) [(20)] Fiscal year - The state accounting period of 12 months that [which] begins on September 1 of each calendar year and ends on August 31 of the following calendar year.

(22) [(21)] FTA - The Federal Transit Administration, an agency of the United States Department of Transportation.

(23) [(22)] Hazardous condition - A condition that may endanger human life or property, including an unacceptable hazardous condition.

(24) Incident - A collision; a loss of vehicle control that results in a vehicle's leaving the roadway or in an injury; a non-arson fire; or transit property damage that is greater than $1,000 and that is associated with a transit agency revenue vehicle, that is associated with any other facility on the transit property, or that is associated with a service vehicle, a maintenance area, or transit agency right of way.

(25) [(23)] Individual - A natural person, including a passenger, trespasser, employee, or [other] bystander.

(26) Injury - Any harm to an individual if the harm necessitates medical treatment, or any harm to an individual if the harm is reported to a law enforcement authority at approximately the time and place of the harm's occurrence. For an employee of a transit agency, this definition includes an incident resulting in time lost from duty and also includes any other definition followed by the transit agency with regard to its current employee injury reporting practice.

(27) [(24)] Investigation - A process to determine the probable cause of an accident or an unacceptable hazardous condition, including a review by the department, or its agent, of a rail transit agency's determination of the probable cause of an accident or an unacceptable hazardous condition.

(28) [(25)] Like-kind exchange - The trade-in or sale of a transit vehicle [vehicles] before the end of its [their] useful life to acquire a replacement vehicle of like kind.

(29) [(26)] Local funds - Money from the purchase of service agreements, contract income, advertising revenue, local tax receipts, and private donations, in-kind contributions, and passenger revenue, notwithstanding any statutory requirement to apply that money to offset operating deficits.

(30) [(27)] Local governmental entity - Any local unit of government including a city, town, village, municipality, county, city transit department, metropolitan transit authority, or regional transit authority.

(31) [(28)] Local public body [bodies] - Includes [Include] cities, counties, and other political subdivisions of states; public agencies; and instrumentalities of one or more states, municipalities, or [and] political subdivisions of states.

(32) [(29)] Local share requirement - The amount of funds that [which] is required and is eligible to match federally funded projects for the improvement of public transportation.

(33) MPO - Metropolitan Planning Organization, the organization designated by the governor as the responsible entity for transportation planning in urbanized areas over 50,000 in population.

(34) [(30)] Net operating expenses - Those expenses that remain after operating revenues are subtracted from eligible operating expenses.

(35) [(31)] Nonprofit organization - A corporation or association determined by the Secretary of the Treasury of the United States to be an organization described by 26 U.S.C §501(c), one that [Title 26 United States Code §501(c), which] is exempt from taxation under 26 U.S.C. §504(a) or §101, [26 United States Code §501(a) or §101,] or one that [which] has been determined under state law to be nonprofit and for which the state has received documentation certifying the status of the nonprofit organization.

(36) [~~(32)~~] Nonurbanized area - An [~~areas - Used synonymously with rural and small urban areas and defined as any~~] area outside an urbanized area, as designated by the United States Census Bureau. This definition is synonymous with a rural or small urban area.

(37) [~~(33)~~] Obligated funds - Monies made available under a valid, unexpired contract between the department and a public transportation subrecipient [~~contractor~~].

(38) [~~(34)~~] Operating expenses - Costs directly related to system operations of a transit agency. At a minimum, this definition includes fuel, oil, replacement tires, replacement parts that [~~which~~] do not meet the criteria for capital items, [~~maintenance and repairs,~~] drivers' and mechanics' salaries and fringe benefits, dispatchers' [~~dispatcher~~] salaries, and licenses[~~must be considered operating expenses~~]. This definition also includes the maintenance, repair, servicing, and inspection of transit agency property, including both vehicles and other property, whether routine or to remedy the effects of collision damage or vandalism.

(39) [~~(35)~~] Private - Pertaining to nonpublic entities. This definition does not include [~~Nonpublic bodies which are~~] municipalities or other political subdivisions of the state; [~~are not~~] public agencies or instrumentalities of one or more states; [~~are not~~] Indian tribes (except private nonprofit corporations formed by Indian tribes); [~~are not~~] public corporations, boards, or commissions established under the law of any state; or entities [~~are not~~] subject to control by public authority, whether state or municipal.

(40) [~~(36)~~] Project - The public transportation activities to be carried out by a subrecipient, [~~contractor~~] as described in its [~~their~~] application for funding.

(41) [~~(37)~~] Public transportation - Transportation of passengers and their hand-carried packages or baggage on a regular or continuing basis by means of surface or water conveyance. This definition includes [~~, including~~] fixed guideway transportation and [~~or~~] underground transportation, but excludes [~~or transit vehicle, but excluding~~] services provided by aircraft, taxicabs, ambulances, and [~~or~~] emergency vehicles.

(42) Rail accident - An event that occurs when a rail fixed guideway system is in operation and as a result of which an individual dies or suffers bodily injury for which immediate medical treatment is given at a location other than the scene of the event or in which a collision, derailment, or fire results in property damage in excess of $100,000. This definition does not include injuries, deaths, and property damage that occur when a rail fixed guideway system is not in revenue service operation.

(43) [~~(38)~~] Rail fixed guideway system - Any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that:

(A) is included in FTA's computation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas, found in 49 U.S.C. §5336 [~~(49 U.S.C. §5336)~~]; and

(B) is not regulated by the Federal Railroad Administration.

(44) [~~(39)~~] Rail transit agency - An [~~The~~] entity operating a [~~the~~] rail fixed guideway system.

(45) [~~(40)~~] Real property - Land, including [~~land~~] improvements, structures, and appurtenances, but [~~appurtenances thereto,~~] excluding movable machinery and equipment.

(46) Revenue vehicle - The rolling stock used in providing transit service for passengers. This definition does not include a vehicle used in connection with keeping revenue vehicles in operation, such as a tow truck or a staff car.

(47) Revenue service - Passenger transportation occurring when a vehicle is available to the general public and there is a reasonable expectation of carrying passengers that directly pay fares, are subsidized by public policy, or provide payment through some contractual agreement. This does not imply that a cash fare must be paid. Vehicles operated in free fare services are considered in revenue service.

(48) [~~(41)~~] Revenues - Fares paid by riders, including those who are later reimbursed by a human service agency or other user-side subsidy arrangement. This definition includes [~~Fares include~~] subscription service fees, whether or not [~~which may or may not be~~] collected on-board a transit vehicle. Payments made directly to the transportation system by a human service agency are not considered to be revenues.

(49) [~~(42)~~] Ridesharing activities - Transportation provided by rubber-tired vehicles that carry no fewer than 10 nor more than 15 passengers and that are operated on a nonprofit basis.

(50) [~~(43)~~] RPT (rural public transportation) - A generic term used to identify subrecipients [~~contractors~~] who provide service in nonurbanized areas.

(51) [~~(44)~~] Rural transit district - A political subdivision of the state that [~~which~~] provides and coordinates rural public transportation within its boundaries in accordance with the provisions of Transportation Code, Chapter 458 [~~the House Bill 2588, 74th Legislature, 1995~~].

(52) [~~(45)~~] Safety - Freedom from danger, including freedom from unintentional as well as intentional acts.

(53) [~~(46)~~] Security - Freedom from intentional danger, including criminal acts such as muggings, rapes, robberies, and [~~or~~] terrorist acts, such as bombings, releases of poisonous gases, and [~~or~~] kidnappings.

(54) [~~(47)~~] Service expansion - The implementation or enhancement of public transportation services in a geographic area. Examples include, but are not limited to, initiating service in an area previously unserved by any public transportation subrecipient [~~contractor~~], offering more frequent service within a subrecipient's [~~contractor's~~] service area, and implementing a new mode of public transportation services (such as rail service in what was previously a bus-only [~~bus only~~] system or fixed-route services in what was previously a demand-response system).

(55) Stakeholders - All individuals or groups that are potentially affected by transportation decisions. Examples include, but are not limited to, public agencies, representatives of transportation agency employees or other affected employees, private providers of transportation, non-governmental agencies, local businesses, persons in diverse and traditionally underserved communities, and other interested parties.

(56) Subrecipient - An entity that receives FTA assistance from the department, rather than directly from FTA. This definition is synonymous with contractor.

(57) [~~(48)~~] State data center - A program operated by Texas A&M University to compile and issue demographic and other data.

(58) [~~(49)~~] Unacceptable hazardous condition - A particular kind of hazardous condition determined by using the hazard resolution matrix contained in the American Public Transportation [~~Transit~~] Association's guidelines [~~hazard resolution matrix~~].

(59) [~~(50)~~] Uniform grant and contract management standards - The standards contained in the Texas Administrative Code, Title 1, Chapter 5, Subchapter A, concerning uniform grant and contract management standards for state agencies.

(60) Unlinked passenger trips - The number of passengers who board public transportation vehicles. A passenger is counted each time the passenger boards a vehicle even though the passenger might be on the same journey from origin to destination.

(61) [~~(51)~~] Urban transit district - In accordance with Transportation Code, Chapter 458, [~~the provisions of House Bill 2588, 74th Legislature, 1995,~~] a local governmental body or a political subdivision of the state that [~~which~~] operates a public transportation system in an urbanized area with a population between 50,000 and 200,000, according to the most recent federal census. This definition includes small urban transportation providers under Transportation Code, Chapter 456, that received state money through the department on September 1, 1994.

(62) [~~(52)~~] Urbanized area - A core area and the surrounding densely populated area with a population of 50,000 or more, with boundaries fixed by the United States Census Bureau.

(63) Vehicle miles - The miles a vehicle travels while in revenue service, plus deadhead miles. This definition excludes miles a vehicle travels for charter service, school bus service, operator training, or maintenance testing.

(64) Vehicle revenue hours or miles - The hours or miles a vehicle travels while in revenue service. This definition includes layover and recovery, but excludes travel to and from storage facilities, the training of operators prior to revenue service, road tests, deadhead travel, and school bus and charter service.

(65) Vehicle utilization - Average daily passenger trips per revenue vehicle, divided by average revenue vehicle capacity. This definition provides a measure of an individual system's ability to use existing seating capacity.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006833
Richard Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

SUBCHAPTER B. STATE PROGRAMS

43 TAC §31.11, §31.13

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules concerning rail fixed guideway mass transportation system safety oversight, and Transportation Code, §456.008, which requires the commission to by rule prepare and issue a report on the performance of certain public transportation providers in this state.

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

§31.11. Formula Program.

(a) Purpose. Transportation Code, Chapter 456 requires the commission to allocate, at the beginning of each fiscal biennium, certain appropriated amounts from the public transportation fund on the basis of a prescribed formula. This section sets out the policies, procedures, and requirements for that formula allocation.

(b) Formula allocation. At the beginning of each state fiscal biennium, an amount equal to the amount appropriated from all sources to the commission by the legislature for that biennium for public transportation, other than federal funds and amounts specifically appropriated for coordination, technical support, or other costs of administration, will be allocated to designated recipients.

(1) The commission will allocate those funds as follows.

(A) Fifty percent of the funds available under this section will be allocated to municipalities that are designated recipients or transit providers in urbanized areas [~~that have a population of not less than 50,000 according to the most recent federal census and~~] that are not served by an authority [~~, as that term is defined in §31.3 of this title (relating to Definitions)~~] and to designated recipients that received state transit funding during the fiscal biennium ending August 31, 1997, that are not served by an authority but are located in urbanized areas [~~that have a population of not less than 50,000 according to the most recent federal census and~~] that include one or more authorities. Any local governmental entity having the power to operate or maintain a public transportation system, except for an authority, [~~as that term is defined in §31.3 of this title (relating to Definitions),~~] may receive formula program funds described in paragraph (2) of this subsection. The commission will distribute the money allocated under this paragraph as follows.

(i) Ten percent of the total amount will be distributed to designated recipients for state or federally assisted public transportation projects in urbanized areas [~~, each with a population of not less than 50,000, according to the most recent federal census,~~] selected by the commission.

(ii) Ninety percent of the total amount will be distributed to designated recipients operating public transportation services in urbanized areas [~~, each with a population of not less than 50,000, according to the most recent federal census~~] and receiving funds in accordance with 49 United States Code (U.S.C.) §5307 [~~§5307 of the Federal Transit Act (49 United States Code §5307)~~]. The monies will be distributed in a ratio of the amount received by that entity during the preceding fiscal biennium, less any amount returned by the entity at the end of the first year of the preceding fiscal biennium, to the total amount received by all entities during the preceding fiscal biennium. However, designated recipients located in an urbanized area including [~~that includes~~] one or more transit authorities that received state transit funding during the fiscal biennium ending August 31, 1997, cannot receive funding under this section or §31.13 of this subchapter that [~~title (relating to Discretionary Program) which~~] exceeds the amount the designated recipient received during the fiscal biennium ending August 31, 1997.

(B) Fifty percent of the funds available under this section will be allocated in nonurbanized areas [~~urban areas, each with a population of less than 50,000, according to the most recent federal census, or in rural areas~~]. Any eligible recipient may receive formula

program funds described in paragraph (2) of this subsection. Of the money allocated under this paragraph, the commission will distribute:

(i) 10% of the total amount to designated recipients for state or federally assisted rural public transportation projects [~~,~~] selected by the commission; and

(ii) 90% of the total amount to designated recipients operating public transportation services in nonurbanized areas. These monies will be distributed in accordance with the following formula. [~~:~~ ~~D = T x F/A where: "D" = the amount distributed to a designated recipient; "T" = the total amount apportioned under this subparagraph for a fiscal year of the state; "F" = the amount of federal public transportation money available to the state through the federal formula grant program for areas other than urbanized areas in accordance with §5311 of the Federal Transit Act (49 United States Code §5311), including money transferred for that purpose in accordance with §5307 of that Act (49 United States Code §5307), that was approved during the state's preceding fiscal year for the designated recipient; and "A" = the amount of federal public transportation money available to the state through the federal formula grant program for areas other than urbanized areas in accordance with §5311 of the Federal Transit Act (49 United States Code §5311), including money transferred for that purpose in accordance with §5307 of that Act (49 United States Code §5307), that was approved during the state's preceding fiscal year for all designated recipients eligible to receive money under this subparagraph.~~]
Figure: 43 TAC §31.11(b)(1)(B)(ii)

(2) Funds allocated under this section and any local funds may be used for any transit-related activity except that a designated recipient not included in a transit authority but located in an urbanized area that includes one or more transit authorities may only use funds to provide:

(A) 65% of the local share requirement for federally financed projects for capital improvements;

(B) 50% of the local share requirement for projects for operating expenses and administrative costs;

(C) 50% of the total cost of a public transportation capital improvement, if the designated recipient certifies that federal money is unavailable for the proposed project and the commission finds that the proposed project is vitally important to the development of public transportation in the state; and

(D) 65% of the local share requirement for federally financed planning activities.

(c) Unobligated funds. Any money under this section that the designated recipient has not applied for before the November commission meeting in the second year of a state fiscal biennium will [~~shall~~] be administered by the commission under the discretionary program described in §31.13 of this subchapter [~~title (relating to Discretionary Program)~~].

(d) Application. To receive funds allocated under this section, a designated recipient must first submit an application, in the form prescribed by the department, to the director. The application must [~~which shall~~] include certification that the proposed public transportation project is consistent with continuing, cooperating, and comprehensive regional transportation planning implemented in accordance with 49 U.S.C. §5301 and §1602a [~~the Federal Transit Act of 1964 (49 United States Code §5301 et seq.) and the Federal-Aid Highway Act of 1973 (49 United States Code §1602a)~~]. [~~(~~]Federal approval of a proposed public transportation project will [~~shall~~] be accepted as a determination that all federal planning requirements have been met[~~)~~].

(e) Project evaluation. In evaluating a project under this section, the department will [~~shall~~] consider the need for fast, safe, efficient, and economical public transportation and the approval of the [~~federal~~] FTA, or its successor.

[~~(f) Reporting requirements. A designated recipient that receives funds allocated under this section shall submit to the department, on the format prescribed by the department, quarterly reports which include the following information: operating cost per passenger; operating cost per revenue mile; fare recovery rate; average vehicle occupancy; on-time performance; the number of accidents per 100,000 vehicle miles; and the number of total miles between mechanical road calls. The reports shall be submitted based on calendar quarters and shall be provided to the department within 45 days of the end of the calendar quarter.~~]

§31.13. Discretionary Program.

(a) Purpose. Transportation Code, Chapter 456 allows the commission to allocate any funds not obligated in accordance with the terms of §31.11 of this subchapter [~~title (relating to Formula Program)~~] on a discretionary basis. This section sets out the policies, procedures, and requirements for that discretionary allocation.

(b) Discretionary allocation. The commission will allocate funds to a local governmental entity, except an authority [~~as that term is defined in §31.3 of this title (relating to Definitions),~~] or a private nonprofit organization that [~~which~~] has the power to operate or maintain a public transportation system. Funds may be used for:

(1) the same purposes as described in §31.11(b)(2) of this subchapter [~~title (relating to Formula Program)~~]; and

(2) [~~for~~] 80% of the cost of capital expenditures associated with ridesharing activities.

(c) Application. To receive funds under this section, an applicant [~~applicants~~] must first submit an application, in the form prescribed by the department, to the director. The application must include:

(1) a description of the project, including estimates of the population that would benefit from the project and the anticipated date of project completion;

(2) a statement of the estimated cost of the project, including estimates of the federally financed portions of the project costs; and

(3) certifications that:

(A) local funds are available for local share requirements if required under §31.11(b)(2) of this subchapter [~~title (relating to Formula Program)~~] and subsection (b)(2) of this section [~~title~~] and that the proposed project is consistent with comprehensive regional transportation plans (federal approval of a proposed public transportation project will [~~shall~~] be accepted as a determination that all federal planning requirements have been met);

(B) federal funds are not available as described under §31.11(b)(2)(C) of this subchapter [~~title~~];

(C) equipment furnished by the applicant in connection with ridesharing activities will be used primarily for commuting purposes;

(D) ridesharing activities will be operated on a nonprofit basis without state subsidies and with accountability in operating the van pool equipment; and

(E) any funding available through the United States Department of Transportation to participate in the capitalized portion of state and locally supported ridesharing activities will [~~may~~] be applied

for and utilized to supplement the availability of local resources for the recapitalization of van pool equipment.

(d) Project evaluation. In evaluating a project under this section, the department will [~~shall~~] consider the need for fast, safe, efficient, and economical public transportation and the approval of the [~~federal~~] FTA, or its successor.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006834
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

SUBCHAPTER C. FEDERAL PROGRAMS

43 TAC §§31.16, 31.21, 31.22, 31.26, 31.31, 31.36, 31.37

STATUTORY AUTHORITY

The amendments and new section are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules concerning rail fixed guideway mass transportation system safety oversight, and Transportation Code, §456.008, which requires the commission to by rule prepare and issue a report on the performance of certain public transportation providers in this state.

No statutes, articles, or codes are affected by the proposed amendments and new section.

§31.16. Section 5309 [~~3~~] Grant Program.

(a) Purpose. The Federal Transit Act, codified at 49 United States Code (U.S.C.) §5309, [~~, §3, as amended (49 United States Code §1602),~~] authorizes the secretary of the United States Department of Transportation to make capital investment grants and loans [~~discretionary grants or loans for capital projects that meet the criteria prescribed by the Federal Transit Administration~~].

(b) Eligible recipients. Section 5309 [~~3~~] funds are available to states and local public bodies.

(c) Department role. The department acts as the designated recipient for Section 5309 statewide grants. As the administering agency the department will:

(1) develop application materials and disseminate information to prospective applicants and other interested parties;

(2) allocate the available program funds in a fair and equitable manner;

(3) develop evaluation criteria and select projects for funding;

(4) prepare the state's funding application and submit that material to the FTA for approval;

(5) negotiate and execute contracts with subrecipients;

(6) prepare requests for federal reimbursement and process payment requests from subrecipients;

(7) monitor and evaluate the progress of local projects, including compliance with federal regulations; and

(8) provide technical assistance to subrecipients as necessary.

(d) Local share requirements. Section 5309 grants require a 20% match as the local share. FTA program funds cannot be used as the local share. Eligible match sources include local or state programs or unrestricted federal funds. Donations are eligible as local share if the value is documented.

§31.21. Section 5303 Grant Program [~~8 Planning and Technical Studies~~].

(a) Purpose. The Federal Transit Act, codified at 49 U.S.C. §5303, [~~§8, as amended (49 United States Code §1607),~~] authorizes the secretary of the United States Department of Transportation to make grants to MPOs to support the development of transportation plans and programs. The secretary is required to allocate planning funds to the states, who must further suballocate them to MPOs [~~contract for and make grants for the planning, engineering, designing, and evaluation of public transportation projects, and for other technical studies~~].

(b) Eligible recipients. Section 5303 funds are available only to MPOs. Other entities may participate in the program through contracts with MPOs [~~8 funds are available to states and local public bodies~~].

(c) Department role. The department acts as the designated recipient for Section 5303 metropolitan planning grants. As the administering agency the department will:

(1) develop application materials and disseminate information to MPOs;

(2) allocate the available program funds using the latest census data for population for the urbanized area served by the MPO, so that:

(A) all MPOs will receive funds based on the ratio of each MPO's population to the total population of all MPOs;

(B) any MPO that would otherwise receive less than $20,000 will have its share adjusted upward to $20,000, except that the minimum funding amount for Texarkana will be $12,999; and

(C) the balance of FTA Section 5303 funds will be redistributed to the remaining MPOs based on the ratio of each MPO's population to the total population of all MPOs;

(3) prepare the state's funding application and submit that material to the FTA for approval;

(4) execute contracts with MPOs;

(5) prepare requests for federal reimbursement and process payment requests from MPOs;

(6) monitor and evaluate the progress of annual work programs, including compliance with federal regulations; and

(7) provide technical assistance as necessary.

(d) Local share requirements. Section 5303 grants require a 20% match as the local share. FTA program funds cannot be used as the local share. Eligible match sources include local or state programs or unrestricted federal funds. In-kind services, volunteer services, and donations are eligible as local share if the value is documented.

§31.22. Section 5313 Grant Program.

(a) Purpose. The Federal Transit Act, codified at 49 U.S.C. §5313, authorizes the Secretary of the United States Department of Transportation to make grants to states for planning and research activities.

(b) Eligible recipients. Section 5313 funds are available only to the state. Other entities may participate in the program through contracts with the state.

(c) Local share requirements. Section 5313 grants require a 20% cash match as the local share.

§31.26. Section 5307 [~~9~~] Grant Program.

(a) Purpose. The Federal Transit Act, codified at 49 U.S.C. §5307, [~~§9, as amended (49 United States Code §1607),~~] authorizes the Secretary [~~secretary~~] of the United States Department of Transportation to make capital and operating grants for public transportation projects in urbanized areas.

(b) Eligible recipients. Section 5307 [~~9~~] funds for urbanized areas with populations of 200,000 or more [~~population~~] are dispensed by the FTA [~~Federal Transit Administration (FTA)~~] directly to eligible recipients designated by the governor. Section 5307 [~~9~~] funds for urbanized areas with populations of less than 200,000 may be dispensed by the governor or may be dispensed by FTA directly to eligible recipients designated by the governor.

§31.31. Section 5310 [~~16~~] Grant Program.

(a) Purpose. The Federal Transit Act, codified at 49 U.S.C. §5310 (a)(2) [~~§16, as amended (49 United States Code §1612)~~], authorizes the Secretary of the United States Department of Transportation to make capital grants or loans for the provision of transportation services meeting the special needs of elderly and disabled persons. The department has been designated by the governor to administer the Section 5310 [~~§16~~] program.

(b) Goal and objectives. The department's goal in administering the Section 5310 [~~§16~~] program is to promote the availability of professional, cost-effective, efficient, and coordinated passenger transportation services to elderly and disabled persons using the most efficient combination of financial and other resources. To achieve this goal, the objectives of the department are to:

(1) promote the development and maintenance of a network of transportation services for elderly and disabled persons throughout the state, in partnership with local stakeholders [~~officials~~];

(2) promote and encourage local participation in decision-making;

(3) [~~(2)~~] fully integrate the Section 5310 [~~§16~~] program with other federal, state, and local resources and programs that are designed to serve similar populations;

(4) [~~(3)~~] improve the efficiency, effectiveness, and safety of Section 5310 [~~§16~~] transit systems through the provision of technical assistance and the establishment of performance goals and management objectives; and

(5) [~~(4)~~] include private sector operators in the overall plan to provide transportation services for elderly and disabled persons.

(c) Department role. The department acts as the designated recipient for all Section 5310 [~~§16~~] funds appropriated to the state. As the administering agency, the department will:

(1) develop application materials and disseminate information to prospective applicants and other interested parties;

(2) develop evaluation criteria and select projects for funding, with input from local entities and local individuals in accordance with the standards set forth in subsection (j) of this section [~~in concert with other entities that have prescribed roles in this process as outlined in subsection (i) of this section~~];

(3) prepare the state's annual program of projects and funding application and submit that material to the FTA [~~Federal Transit Administration~~] for approval;

(4) negotiate and execute contracts with local Section 5310 [~~§16~~] recipients that include performance goals and management objectives for those recipients;

(5) prepare requests for federal reimbursement[~~,~~] and process payment requests from Section 5310 [~~§16~~] recipients;

(6) monitor and evaluate the progress of ongoing transportation operations, including compliance with federal regulations and coordination of services; and

(7) provide technical assistance to Section 5310 [~~§16~~] recipients to aid them in improving and coordinating transit services.

(d) Eligible recipients. Existing rural and urban transit districts and metropolitan transit authorities will be the primary recipients of funds from this program for their respective service areas. For those areas not covered by transit providers, or in cases where the existing provider is not willing and able to provide the transportation, the department may choose an alternative primary recipient. Private, nonprofit organizations and [~~or~~] associations are eligible to receive Section 5310 [~~§16~~] funds as secondary recipients [~~through the department~~]. Local public [~~Public~~] bodies[~~,~~] approved by the state to coordinate transportation services, as selected in subsection (i) of this section, and [~~or~~] any public body that certifies to the selecting entity that nonprofit organizations in the area are not readily available to carry out the services, may also receive Section 5310 [~~§16~~] funds as secondary recipients. Examples of local public bodies approved by the state to coordinate transportation services are a county agency on aging and a public transit provider that the state has identified as the lead agency to coordinate transportation services funded by multiple federal or state human service programs [~~through the department~~].

(e) Eligible assistance categories. The following categories of expenses are eligible for federal reimbursement under the Section 5310 [~~§16~~] program.

(1) State administrative expenses. The department will use up to 10% of the annual federal program apportionment to defray its expenses incurred for the administration of the Section 5310 [~~§16~~] program. The department must provide a 20% match for any federal administrative monies.

(2) Capital expenses.

(A) Eligible recipients, as defined in subsection (d) of this section, may use program funds for the purchase of capital items. Eligible items include, but are not limited to:

(i) buses;

(ii) vans or other paratransit vehicles;

(iii) radios and communication equipment;

(iv) vehicle shelters;

(v) wheelchair lifts and restraints;

(vi) vehicle rehabilitation, remanufacture, or overhaul, if done with the concurrence of the department;

(vii) microcomputer hardware and software;

[(viii) other durable goods such as spare parts with a unit cost over $300 and a useful life of more than one year;]

(viii) [(ix)] initial component [equipment] installation costs;

(ix) [(x)] vehicle procurement, testing, inspection, and acceptance costs;

(x) vehicle extended warranties that do not exceed industry standards;

(xi) the lease of equipment, provided that the local recipient, with the concurrence of the department, determines a lease is more cost effective than the purchase of equipment after considering management efficiency, availability of equipment, staffing capabilities and guidelines on capital leases as contained in 49 Code of Federal Regulations (C.F.R.) [CFR] Part 639; [and]

(xii) the acquisition of transportation services under a contract, lease, or other arrangement;

(xiii) the acquisition of preventive maintenance services and vehicle parts associated with preventive maintenance services, with the concurrence of the department;

(xiv) transit-related intelligent transportation systems; and

(xv) the introduction of new technology, through innovative and improved products, into mass transportation.

(B) When a subrecipient chooses to include the acquisition of transportation services under a contract, lease or other arrangement, both capital and operating costs associated with the contracted services are eligible expenses. User-side subsidies are considered one form of eligible arrangement. The department, as the recipient, has the option to decide whether to provide funding for these acquired services. Funds may be requested for contracted services covering a period of more than one year.

(C) [(B)] Based on funding availability, federal funds may be used to defray up to 80% of the cost of eligible capital expenditures. The federal share may increase to up to 90% for incremental costs related to compliance with the Clean Air Act in areas of air quality non-attainment or with the Americans with Disabilities Act of 1990, with concurrence from the department. Eligibility standards for the higher federal share are defined in FTA Circular 9070.1E, or its latest version [9070.1C]. The local subrecipient [recipient] must provide a 20% or 10% cash match at the time the equipment is delivered or the services are received.

(f) Local share requirements. The local share required under subsection (e)(2) of this section must be provided from sources other than federal funds except when authorized by federal law.

(g) Funding distribution.

(1) Formula basis. The balance of the annual Section 5310 [§16] federal apportionment, after the state administrative expenses described in paragraph (e)(1) of this section are set aside, will be allocated to [department] districts on a formula basis as follows. [For urbanized areas of 200,000 population or greater, suballocations will be made from the appropriate district allocations provided under subparagraph (B) to the designated metropolitan planning organization.]

(A) 25% of the total available funds will be distributed equally among the [department] districts.

(B) 75% of the total available funds will be allocated as follows.

(i) The elderly and disabled population of each [department] district will be calculated by using the latest census figures for counties available from the state data center.

(ii) Each [department] district's subtotal of elderly and disabled population will then be divided by the state total of that [such] population to determine the district's formula allocation.

(2) Allocation.

(A) Preliminary formula allocations for the next fiscal year will be announced by the department no later than January 1.

(B) Final allocations will be announced within 30 [thirty] days of the federal apportionment to the state.

(C) Upon completion of the project selection procedures described in subsection (i) of this section, if a [department] district [or designated metropolitan planning organization] does not need the entire allocation, the commission or the executive director will distribute the balance to the remaining districts in accordance with paragraph (1)(B) of this subsection or to individual projects identified in subsection (i)(1) of this section [the balance will be redistributed among the other department districts using the formula outlined in subparagraph (1)(B) of this subsection].

(h) Application requirements. A prospective applicant must submit an application for Section 5310 [§16] grant funds to the appropriate [department] district office[,] on the forms and at the time specified by the department. The application must [shall] document the need and demand for passenger transportation services for elderly and disabled persons.

(i) Project selection. [In urbanized areas of 200,000 population or greater, applications from individual local agencies, as described in subsection (h) of this section, will be provided by the department to the designated metropolitan planning organization for project selection as described in paragraph (2) of this subsection.] The [In all other areas, the department] district office will [review the applications and] consult with all local parties, including any existing MPOs. [metropolitan planning organizations.] Up to 10% of a district's [district] annual allocation or suballocation may be reserved for contingencies or unidentified projects in keeping with the Category C allowances in the program of projects that [which] is described in subsection (k) [(j)] of this section. Project selection will be as follows.

(1) The [In nonurbanized areas and in urbanized areas under 200,000 population, the department] district office will select projects in priority order as described in subsection (j) of this section, including up to five reserve projects should additional funding be made available, based on the following criteria:

(A) the demonstrated need for capital equipment, examples of which include, but are not limited to, a needs assessment that [which] documents the demand for new services, a vehicle inventory that [which] establishes the need for replacement of older equipment, dispatcher logs that [which] document requests for service that cannot be met with existing equipment, and purchase of service contracts that [which] substantiate the need for additional vehicles;

(B) the applicant's financial and managerial capability to maintain and operate the equipment, examples of which include, but are not limited to, audited financial statements and review letters from grantor agencies;

(C) the applicant's efforts to coordinate services and related activities with other local entities, examples of which include, but are not limited to, contracts that outline purchase of service agreements, shared maintenance or dispatching functions, and joint training initiatives; and

(D) evidence of local support for the proposal, examples of which include, but are not limited to, resolutions by local governing bodies and endorsement letters from other organizations or individuals.

[(2) In urbanized areas of 200,000 population or greater, the designated metropolitan planning organization will make the final project selection, including up to five reserve projects should additional funding be made available, based on criteria adopted by that metropolitan planning organization. The metropolitan planning organization will then notify the department of the projects selected for funding in priority order and return the applications to the appropriate department district office. The metropolitan planning organization may choose to adopt local procedures. In those instances, it shall be the responsibility of the metropolitan planning organization to advise prospective applicants of the procedures necessary to be considered for project funding in that urbanized area.]

(2) [(3)] Upon receipt of the applications selected for funding from the [department] district offices, the [division] director, or the director's [his or her] designee, will review all funding requests for completeness and compliance with all statutory and program administrative requirements. The department will negotiate a contract with the selected local entities and organizations to implement the projects selected for funding.

(j) Elderly and disabled transportation planning and development.

(1) Planning and development process. In urbanized and non-urbanized areas each district will establish, after consultation with local stakeholders, a local planning and development process. The local planning and development process will result in a three-year Public Transportation Development Plan, updated annually, that will demonstrate and include, but will not be limited to:

(A) local public input identifying public transportation needs and services;

(B) evaluation criteria for project selection that will include researching and establishing the best possible service and the best possible provider to carry out service;

(C) efforts to encourage local coordinated services in all areas and to create a coordinated transportation network; and

(D) procedures for evaluating the efficiency and effectiveness of the transportation network.

(2) Annual report. Each district will submit an annual report to the Public Transportation Division no later than October 1st. The October 1st report will include an annual program of projects prioritizing projects selected for funding that will include, but not be limited to:

(A) the decision-making process;

(B) the local area's continuous plan for coordinating transportation services in the area;

(C) an annual evaluation of projects and areas previously funded;

(D) the providers in the local area participating in the program;

(E) the resources available in the area (i.e., purchase of services or wheelchair lift vehicles);

(F) a local assessment of the program;

(G) a needs assessment; and

(H) a three-year service plan.

(k) [(j)] Program of projects. Upon completion of the evaluation and selection of projects, the department will prepare a program of projects as described in FTA Circular 9070.1E, or its latest version [9070.1C]. Projects listed in category A of the program of projects are those that [which] have met all statutory and administrative requirements for project approval and for which contracts will be issued upon receipt of federal grant approval. A selected project that is not yet complete will be listed in category B and a contract will not be issued until all requirements are met. Up to 10% of the annual federal apportionment may be listed as a program reserve in category C. Projects advance to the next category in the program until all listings are in category A.

(l) [(k)] Vehicle leasing. Vehicles acquired under the Section 5310 [§16] program may be leased to other entities such as local public bodies or agencies, other private non-profit agencies, or private for-profit operators. The lessee shall operate the vehicles on behalf of the Section 5310 [§16] recipient and provide the transportation services as described in the original grant application.

(m) [(l)] Meal delivery. Section 5310 [16] program subrecipients [contractors] may coordinate and assist in providing meal delivery services for homebound persons on a regular basis if meal [such] delivery services do not conflict with the provision of transit services or result in a reduction of service to transit passengers. Section 5310 [16] funds shall [may] not be used to purchase special vehicles to be used solely for meal delivery or to purchase specialized equipment such as racks or heating or refrigeration units related to meal delivery. Vehicles shall not be altered to accommodate meal deliveries.

§31.36. Section 5311 [18] Grant Program.

(a) Purpose. The Federal Transit Act, codified at 49 U.S.C. §5311 [of 1964, Section 18 as amended (49 United States Code §5311], authorizes the Secretary of the United States Department of Transportation to make grants for public transportation projects in nonurbanized areas. The department has been designated by the governor to administer the Section 5311 [18] program.

(b) Goal and objectives. The Department's goal in administering the Section 5311 [18] program is to promote the availability of professional, cost-effective, efficient, and coordinated passenger transportation services to the general public in nonurbanized areas using the most efficient combination of financial and other resources. To achieve this goal, the objectives of the department are to:

(1) promote the development and maintenance of a network of general public transportation services in nonurbanized areas throughout the state, in partnership with local officials;

(2) fully integrate the Section 5311 [18] program with other federal, state, and local resources that are designed to serve nonurbanized populations;

(3) improve the efficiency, effectiveness, and safety of Section 5311 [18] systems through the provision of technical assistance and the establishment of performance goals and management objectives; and

(4) include private sector operators in the overall plan to provide public transportation services.

(c) Department role. The department acts as the designated recipient for all Section 5311 [18] funds appropriated to the state and has an oversight responsibility for all nonurbanized transit services within the state. The department, however, recognizes the subrecipients [contractors] as partners who shall retain control of daily operations. As the administering agency, the department will:

(1) develop application materials and disseminate information to prospective applicants and other interested parties;

(2) allocate the available program funds in a fair and equitable manner as described in subsection (g) of this section (the department will not provide Section 5311 [~~18~~] funds to more than one transit system in a geographical area);

(3) develop evaluation criteria and select projects for funding;

(4) prepare the state's annual program of projects and funding application and submit that material to the FTA [~~Federal Transit Administration~~] for approval;

(5) negotiate and execute contracts with local Section 5311 subrecipients [~~18 recipients~~];

(6) prepare requests for federal reimbursement, and process payment requests from Section 5311 subrecipients [~~18 recipients~~];

(7) monitor and evaluate the progress of ongoing transportation operations, including compliance with federal regulations; and

(8) provide technical assistance to Section 5311 subrecipients [~~18 recipients~~] to aid them in improving transit services.

(d) Eligible subrecipients. [~~recipients.~~] State agencies, local public bodies, private nonprofit organizations, Native American [~~Indian~~] tribes and organizations [~~groups~~], and operators of public transportation services are eligible to receive Section 5311 [~~18~~] funds through the department. Private for-profit operators of public transportation services may participate in the program through contracts with eligible subrecipients [~~recipients~~]. An entity must be a rural transit district [~~as defined in §31.3 of this title (relating to Definitions)~~] to receive Section 5311 [~~18~~] funds. Private for-profit operators of public transportation services and entities that are not rural transit districts are eligible to receive Section 5311 funds through the department under the intercity bus program, as set forth in subsections (g)(1) and (j) of this section.

(e) Eligible assistance categories. The following categories of expenses are eligible for federal reimbursement under the Section 5311 [~~18~~] program.

(1) State administrative expenses. The department will use up to 15% of the annual federal apportionment to defray its expenses incurred for the administration of Section 5311 [~~18~~] program. These [~~Such~~] funds may also be used to provide technical assistance to subrecipients [~~contractors~~]. Technical assistance may include project planning, program development, management development, coordination of public transportation projects, and related research. Projects are solicited from subrecipients [~~contractors~~] and other interested parties. State administrative and technical assistance expenses do not require a non-federal match.

(2) Capital expenses.

(A) Eligible items include, but are not limited to:

(i) buses;

(ii) vans or other paratransit vehicles;

(iii) radios and communications equipment;

(iv) passenger shelters, bus stop signs, and similar passenger amenities;

(v) wheelchair lifts and restraints;

(vi) vehicle rehabilitation, remanufacture, or overhaul;

(vii) preventive maintenance, including all maintenance costs;

(viii) extended warranties that do not exceed the industry standard;

(ix) the mass transit portion of ferry boats and terminals;

(x) operational support such as computer hardware or software;

(xi) installation costs and vehicle procurement, testing, inspection, and acceptance costs;

~~[(vii)~~ ~~operational support such as computer hardware/software;]~~

~~[(viii)~~ ~~other durable goods such as spare components or parts with a unit cost over $300 and a useful life of more than one year ;]~~

~~[(ix)~~ ~~installation costs;]~~

~~[(x)~~ ~~vehicle procurement, testing, inspection, and acceptance costs;]~~

(xii) [~~(xi)~~] construction or rehabilitation of transit facilities, including design, engineering, and land acquisition;

(xiii) [~~(xii)~~] (facilities to provide access for bicycles to mass transit facilities and equipment for transporting bicycles on mass transit vehicles;

(xiv) [~~(xiii)~~] the lease of equipment or facilities, provided that the local subrecipient, with the concurrence of the department, determines that a lease is more cost effective than the purchase of equipment or facilities after considering management efficiency, availability of equipment, staffing capabilities and guidelines on capital leases as contained in 49 C.F.R. Part 639;

(xv) the capital portions of costs for service under contract;

(xvi) joint development projects (FTA Circular 9300.1A, or its latest version, provides guidelines for joint development projects);

(xvii) the introduction of new technology, through innovative and improved products, into mass transportation;

(xviii) transit-related intelligent transportation systems; and

(xix) the provision of ADA paratransit service, which shall not exceed 10% of the state's annual apportionment of Section 5311 funds and shall be used only by subrecipients that are in compliance with ADA requirements for both fixed route and demand responsive service.

~~[(xiv)~~ ~~the capital cost of contracting as defined in FTA Circular 7010.1.]~~

(B) The capital cost of contracting includes depreciation, interest on facilities and equipment, and those allowable capital costs that would otherwise be incurred directly, including maintenance. No capital assets (vehicle, equipment, or facility) that have any remaining federal interest in them and no items purchased with state or local government funds may be capitalized under the grant agreement.

(C) [~~(B)~~] Based on funding availability, federal funds may be used to reimburse up to 80% of eligible capital expenditures. The federal share may increase to up to 90% for bicycle facilities projects or for incremental costs related to compliance with the Clean Air Act or with the Americans with Disabilities Act of 1990. Eligibility standards for the higher federal share are defined in FTA Circular 9040.1E, or its latest version [~~9040.1C~~]. The local subrecipient [~~contractor~~] must provide a 20% or 10% cash match at the time the equipment is delivered or the services are received.

(3) Project administrative expenses. Costs not directly tied, but essential, to the operations of passenger transportation systems may be reimbursed at up to 80% with federal funds. The local subrecipient [~~contractor~~] must provide a 20% match, either in cash or with in-kind donations.

(4) Operating expenses. Those costs directly tied to systems operations, such as fuel, oil, drivers', mechanics', and dispatchers' salaries, and replacement parts may be reimbursed at 50% of net operating costs. The local subrecipient [~~contractor~~] must provide a 50% match, either in cash or with in-kind donations.

(f) Local share requirements. FTA [~~Federal Transit Administration~~] program funds cannot be used as the local share required for Section 5311 [~~18~~] grants. Eligible match sources include local or state programs, or unrestricted federal funds. At least half of the local share for both net operating and non-operating expenses must be cash or cash equivalent from sources other than unrestricted federal funds. In-kind contributions, volunteer services, and donations are eligible as local share if the value is documented.

(g) Allocation of funds. As part of its administration of the Section 5311 [~~18~~] program, the department is charged with ensuring that there is a fair and equitable distribution of program funds within the state (FTA Circular 9040.1E, or its latest version) [~~9040.1D, Chapter 1, Section 4~~)]. The [~~Effective January 1, 1998, the~~] department will allocate Section 5311 [~~18~~] funds to local subrecipients [~~contractors~~] in the following manner.

(1) Unless the governor certifies to the Secretary of the United States Department of Transportation that the intercity bus service needs of the state are being adequately met, the department will reserve not less than 15% [~~5%~~] of the [~~fiscal year 1992~~] Section 5311 [~~18~~] federal apportionment for the development and support of intercity bus transportation. [~~The percentage to be reserved for intercity bus transportation will rise to 10% in fiscal year 1993 and 15% in fiscal year 1994 and beyond unless the governor certifies that such expenditures are not necessary.~~] If it is determined that all or a portion of the set-aside monies is [~~are~~] not required for intercity bus service, those funds will [~~shall~~] be applied to the formula apportionment process described in paragraph (3) of this subsection. Procedures for determining if a certification of adequacy is warranted are as follows.

(A) The department will review all data on intercity bus service availability, including outstanding requests from intercity operators, and levels of service.

(B) The department will consult with other state agencies that have jurisdiction with respect to intercity bus regulation and seek their recommendations as to the adequacy of current service.

(C) Based on the findings of subparagraphs (A) and (B) of this paragraph, the commission may [~~will~~] recommend that the governor certify to the adequacy of intercity bus service.

(2) An amount not to exceed 10% of the balance of the annual Section 5311 [~~18~~] federal apportionment, after the set-aside for intercity bus service described in paragraph (1) of this subsection and department administrative expenses are deducted, and 10% of the remaining balance of previous Section 5311 [~~18~~] federal apportionments will [~~shall~~] be reserved for the expansion of nonurbanized public transportation services or other strategic program priorities established by the commission. If the commission determines that state program needs and priorities would be better served by awarding these funds to existing nonurbanized systems for ongoing public transportation services as provided in paragraph (3) of this subsection, then all or a portion of the funds made available under this paragraph, as determined by the commission, will [~~shall~~] be distributed in accordance with the provisions of paragraph (3) of this subsection.

(A) Upon notification by the department that funds are available [~~No later than January 15 of each year~~], all applicants requesting funding for service expansions must [~~shall~~] file a notice of their intentions to expand services. All service expansions shall be initiated on September 1 following the filing of the notice of intent unless otherwise authorized by the department. The amounts to be awarded for each service expansion will [~~shall~~] be determined by the commission. After an applicant receives [~~receiving~~] an award under this subparagraph, service expansions, with the exception of capital awards, will [~~shall~~] become subject to the funding allocation process described in paragraph (3) of this subsection in succeeding fiscal years.

(B) The commission may also elect to use all or a portion of the funds made available under this paragraph to address strategic priorities for the nonurbanized public transportation program. The amounts to be awarded for each strategic priority will [~~shall~~] be determined by the commission, and awards made under this subparagraph are not subject to the funding allocation process described in paragraph (3) in succeeding fiscal years. For the purposes of this subparagraph, strategic program priorities are defined as projects that [~~which~~] the commission has determined will:

(i) stabilize funding levels;

(ii) increase transit operating efficiency or effectiveness as demonstrated by significant cost savings or substantial enhancements to service delivery; or

(iii) advance the level of coordination among transportation service providers [~~,~~] and among transportation service providers and health and human services agencies.

(3) Except as provided in paragraphs (1) and (2) of this subsection, the balance of the annual Section 5311 [~~18~~] federal apportionment, plus the remaining balance of previous Section 5311 [~~18~~] federal apportionments, and any state funds appropriated specifically for the purpose of funding nonurbanized public transportation services will be allocated to existing RPT subrecipients [~~contractors~~] as described in this paragraph. No later than June 1 of each calendar year, the department will announce the allocations for the fiscal year beginning on September 1 of the same year.

(A) Subject to the following limitations and adjustments, each RPT contractor will [~~shall~~] receive the same percentage of funds as were awarded to that subrecipient [~~contractor~~] by the commission for fiscal year 1994.

(i) The percentage awards to each RPT subrecipient [~~contractor~~] will be adjusted annually to include any projects funded under paragraph (2) of this subsection during the previous fiscal year.

(ii) If a portion of an RPT subrecipient's [~~contractor's~~] service area is declared an urbanized area by the United States Census Bureau or the service area is otherwise reduced, the department

and that subrecipient [~~contractor~~] shall negotiate an appropriate adjustment in the award of nonurbanized public transportation funding to that subrecipient [~~contractor~~].

(iii) If a previously designated urbanized area is declared nonurbanized by the United States Census Bureau, a public transportation subrecipient [~~contractor~~] serving that area must [~~shall~~] apply for funds in accordance with paragraph (2) of this subsection.

(B) Prior to receiving funds a subrecipient [~~contractor~~] must complete and comply with all application requirements, rules, and regulations applicable to the Section 5311 [~~18~~] program [~~,~~] and must negotiate a contract with the department pursuant to paragraph (4) of this subsection.

(4) A contract for the allocation of funds pursuant to paragraph (3) of this subsection shall have an effective date of September 1, shall be for a 12-month period unless otherwise authorized by the department, and shall provide for performance goals and management objectives for the RPT subrecipient [~~contractor~~] that are acceptable to the commission.

(A) Performance goals for each fiscal year shall at a minimum include at least one measure deemed appropriate by that RPT subrecipient [~~contractor~~] and the department after consultation with the affected RPT subrecipient [~~contractor~~] from each of the categories listed in clauses (i)-(iii) of this subparagraph and may include at least one measure as provided in clause (iv) of this subparagraph.

(i) Cost efficiency. Examples include, but are not limited to, specific performance targets related to revenue recovery ratio, cost per vehicle mile, or cost per service hour.

(ii) Cost effectiveness. Examples include, but are not limited to, specific performance targets related to cost per passenger trip or cost per passenger mile.

(iii) Service utilization. Examples include, but are not limited to, specific performance targets related to passenger trips per capita, passenger trips per mile, or passenger trips per hour.

(iv) Other measures. The department and the RPT subrecipient [~~contractor~~] may also adopt other performance goals that are deemed appropriate by the department and that RPT subrecipient [~~contractor~~] to address particular operational issues. For example, if an RPT subrecipient [~~contractor~~] has experienced a number of vehicular accidents during the preceding year, the department and that RPT subrecipient [~~contractor~~] might agree to institution of a safety program with the goal of reducing the number of accidents by a specified percentage.

(B) Management objectives for each fiscal year shall at a minimum include at least one measure deemed appropriate by that RPT subrecipient [~~contractor~~] and the department after consultation with the affected RPT subrecipient [~~contractor~~] from each of the following categories.

(i) Training. Examples include, but are not limited to, a target for hours of training to be provided to drivers, renewal of first aid and related certifications for all drivers and management employees, or completion of a total quality management course by a specified number of supervisory staff members.

(ii) Marketing and public involvement. Examples include, but are not limited to, the expenditure of a specified budget percentage or amount on marketing activities, the completion of a specified number of public meetings to obtain comments on system operations, or the administration of a passenger survey on quality of service.

(iii) Disadvantaged business enterprise participation. Examples include, but are not limited to, achievement of a specified percentage increase in the use of disadvantaged business enterprises, or recruitment and certification of a specified number of disadvantaged business enterprises.

(iv) General management activities. Examples include, but are not limited to, the automation of all financial and personnel records, preparation of a business plan to foster private sector partnerships, or completion of a staffing plan that identifies funding resources for anticipated personnel increases.

(C) A subrecipient's [~~contractor's~~] performance goals and management objectives will serve as a basis for the department's annual review of the subrecipient's [~~contractor's~~] efficiency and effectiveness in providing public transportation services. If the subrecipient [~~contractor~~] fails to meet those goals or objectives, and fails to demonstrate a good faith effort for their accomplishment, the commission may rule the subrecipient [~~contractor~~] ineligible to receive nonurbanized public transportation funding. However, the department will make all possible efforts to ensure continuity of service in that area to accommodate the needs of public transportation riders.

(i) The department will notify the subrecipient [~~contractor~~] of any deficiencies noted in the annual review, and will allow the subrecipient [~~contractor~~] a minimum grace period of one calendar year from the date of notification to correct those deficiencies. During the grace period, the department will make every reasonable effort to provide appropriate technical assistance to the RPT subrecipient [~~contractor~~].

(ii) If at the end of the grace period the deficiencies have not been corrected, the commission may by written order authorize the department to terminate funding to the RPT subrecipient [~~contractor~~]. The RPT subrecipient [~~contractor~~] may request a public hearing before the commission to present input on why termination is not warranted in accordance with the provisions of §1.5 of this title (relating to Public Hearing).

(h) Application requirements. A prospective applicant must submit an application for Section 5311 [~~18~~] grant funds to the appropriate [~~department~~] district office, on the forms and at the time specified by the department. The application must [~~shall~~] document the need and demand for general public passenger transportation services.

(i) Program of projects. All existing projects and proposed expansion projects for the following fiscal year will be identified in accordance with the allocation rules included in subsection (g) of this section [~~no later than February of each year~~]. Upon commission approval of the allocation, these projects will be submitted to the FTA [~~Federal Transit Administration~~] as the annual program of projects for the fiscal year beginning the following September 1.

(j) Intercity bus. If the governor does not certify to the adequacy of intercity bus transportation within the state, funds will be made available in accordance with subsection (g)(1) of this section. An annual request for proposals will be issued for projects complying with FTA [~~Federal Transit Administration~~] definitions of intercity bus transportation.

§31.37. Rural Transit Assistance Program.

(a) Purpose. The Rural Transit Assistance Program (RTAP) will foster the development of state and local capacity to meet the training and technical assistance needs of nonurbanized public transportation systems.

(b) Objectives. The RTAP will develop training and training materials to improve the quality of information and technical assistance

available to local transit operators, develop networks of transit professionals, and support the coordination of public, private, specialized, and human service transportation services.

(c) Eligible recipients. Private consultants, universities, nonprofit organizations, state transit associations, state agencies, and transit operators are eligible to receive RTAP funds.

(d) Program development and project selection. [~~The Transit Operators' Advisory Committee, as established under §1.85 of this title (relating to Department Advisory Committees), will advise the department on the development of the annual RTAP program of projects.~~] Budgetary requirements for the annual RTAP program of projects will be determined by the department for individual projects. The department retains final approval for all RTAP projects. Projects will be selected as follows.

(1) Research and statewide technical assistance projects will be competitively advertised and evaluated by department personnel. [~~In cases where the department deems it appropriate, an ad hoc evaluation committee may be established in accordance with §1.85 of this title (relating to Department Advisory Committees) to advise on the evaluation process.~~] The department will establish evaluation criteria specific to each project to be funded under this paragraph.

(2) Requests from individual transit operators for technical assistance funds will be reviewed and evaluated by the [~~division~~] director, or the director's [~~his or her~~] designee, based on the following criteria:

(A) the demonstrated need for technical assistance, examples of which may include, but are not limited to, agency training plans and resolutions from local governments requesting feasibility studies;

(B) the applicant's capability to benefit from technical assistance;

(C) anticipated benefits of the project that can be replicated or used by other transit operators in the state;

(D) evidence of local support for the proposal, if applicable, which includes, but is not limited to, resolutions by local governing bodies and endorsement letters from other organizations or individuals; and

(E) the availability of funds.

(e) Local matching requirements. The department may require RTAP subrecipients [~~contractors~~] to defray a portion of project expenses either through cash payments or in-kind donations if:

(1) a match requirement will allow the department to extend RTAP benefits to a broader audience; or [~~and/or~~]

(2) the benefits of a project are limited to that RTAP subrecipient [~~contractor~~] and cannot be replicated or used by other transit operators in the state.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006835

Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

SUBCHAPTER D. PROGRAM ADMINISTRATION

43 TAC §§31.42 - 31.44, 31.48

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules concerning rail fixed guideway mass transportation system safety oversight, and Transportation Code, §456.008, which requires the commission to by rule prepare and issue a report on the performance of certain public transportation providers in this state.

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

§31.42. Standard Federal Requirements.

(a) Purpose. This section describes the standard federal requirements that apply to recipients of FTA [~~Federal Transit Administration~~] grant funds under the following programs codified at 49 United States Code (U.S.C.):

(1) Section 5303 Grants to MPOs;

(2) Section 5307 Urbanized Area Formula Grants;

(3) Section 5309 Capital Investment Grants and Loans;

(4) Section 5310 Formula Grants and Loans for Special Needs of Elderly Individuals and Individuals with Disabilities;

(5) Section 5311 Formula Grants for Other Than Urbanized Areas; and

(6) Section 5313 State Planning and Research Programs.

(b) Requirements. All entities that receive funds under the Federal Transit Act, codified at 49 U.S.C. §5301 et seq., shall [~~§16 (49 United States Code §1612) or §18 (49 United States Code §1614), must~~] comply with the provisions of the following statutes and regulations:

(1) Title VI of the Civil Rights Act of 1964,42 U.S.C. §2000(e) [~~(42 United States Code §2000(e))~~];

(2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), [~~(42 United States Code §2000(e))~~] as it applies to equal employment opportunity;

(3) §105(f) of the Surface Transportation Assistance Act of 1982, §1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (Public Law 102-240), and the United States Department of Transportation Minority Business Enterprise Regulations (49 Code of Federal Regulations (C.F.R.) Part 23[~~, as amended~~]) as they apply to disadvantaged business enterprises;

(4) §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, [~~(29 United States Code §794)~~] as it relates to the prohibition of discrimination on the basis of handicap;

(5) Americans with Disabilities Act of 1990, 42 U.S.C. [~~(42 United States Code~~] §12101 et seq.[~~)~~];

(6) Federal Transit Act, 49 U.S.C. §5333(b), and 29 C.F.R. Part 215, as they relate [~~§13(c) of the Federal Transit Act (49 United States Code §1609) as it relates~~] to the protection of labor;

(7) National Environmental Policy Act, 42 U.S.C. [~~(42 United States Code~~] §4321 et seq.[~~)~~];

(8) Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. [~~(42 United States Code~~] §4601 et seq.[~~)~~];

(9) National Historical Preservation Act of 1966, 16 U.S.C. [~~(16 United States Code~~] §470a et seq.[~~)~~];

(10) Archaeological and Historic Preservation Act of 1966, 16 U.S.C. [~~(16 United States Code~~] §469a-1 et seq.[~~)~~];

(11) Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, 33 U.S.C. [~~(33 United States Code~~] §1251 et seq.[~~)~~];

(12) Clear Air Act of 1991, 42 U.S.C. [~~(42 United States Code~~] §7401 et seq.[~~)~~];

(13) Energy Policy and Conservation Act, 42 U.S.C. [~~(42 United States Code~~] §6321[~~)~~];

(14) §165 of the Surface Transportation Assistance Act of 1982 (Public Law 97-424), as amended by §337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17), as they relate to "Buy America" requirements for products purchased with financial assistance from the FTA [~~Federal Transit Administration~~];

(15) FTA regulations on preaward and post-delivery [~~post delivery~~] audits of vehicle purchases, 49 C.F.R. [~~(49 Code of Federal Regulations~~] Part 663[~~)~~];

(16) Drug-Free Workplace Act of 1988, 41 U.S.C. [~~(41 United States Code~~] §701 et seq.[~~)~~];

(17) drug and alcohol testing program regulations, 49 C.F.R. [~~(49 Code of Federal Regulations~~] Part 653[~~)~~];

(18) charter service regulations, 49 C.F.R. [~~(49 Code of Federal Regulations~~] Part 604[~~)~~];

(19) school bus operations regulations, 49 C.F.R. [~~(49 Code of Federal Regulations Part 605)~~]; and

(20) Surface Transportation and Uniform Relocation Assistance Act of 1987 (Public Law 100-17, §317) as it relates to the testing of new model buses.

§31.43. Contracting Requirements.

(a) Purpose. This section describes contracting standards and related requirements for recipients of state and federal public transportation grant funds.

(b) Standards. The standards contained in the common rule [~~shall~~] apply to public transportation contracting activities. The department will monitor subrecipient [~~contractor~~] compliance with those standards.

(c) Subcontracts. Subrecipients [~~Contractors~~] shall furnish the department notice of the intent to award a purchase order or contract to any individuals or organizations not a part of the subrecipient's organization when the amount of the purchase exceeds $10,000. Purchases shall not be split out to stay below the $10,000 threshold [~~award of any subcontracts for professional services to be rendered by individuals or organizations not a part of the contractor's organization~~]. No subcontract will [~~shall~~] relieve the subrecipient [~~contractor~~] of the subrecipient's [~~his/her~~] legal responsibilities to the department. All subcontracts in excess of $25,000 shall contain the following required provisions from the pro forma grant contract between the department and the subrecipient [~~contractor~~]:

(1) financial management;

(2) civil rights; and

(3) disadvantaged business enterprise program requirements.

§31.44. Procurement Requirements.

(a) Purpose. This section describes procurement standards and related requirements for recipients of state and federal public transportation grant funds.

(b) Standards. The standards contained in the common rule [~~shall~~] apply to public transportation procurement activities. All subrecipients shall [~~contractors must~~] maintain written procurement policies. Those policies shall [~~must~~], at a minimum, provide the following.

[~~(1) Vehicle purchases. All vehicle purchases, irrespective of unit price, shall be accomplished through formal sealed bids.~~]

(1) [~~(2)~~] Goods, services and equipment [~~Equipment~~] purchases.

(A) Goods, services, or equipment [~~Equipment~~] with a unit cost of $10,000 [~~$15,000~~] or greater shall require sealed bids. Bids for computer and radio systems shall include all subcomponents necessary for the system to be operated in the unit cost. Exceptions will be allowed for those entities that are eligible to purchase items through the state open contract procedures.

(B) Goods, services, or equipment [~~Equipment~~] with a unit cost of less than $10,000 do [~~$15,000 does~~] not require written bids, but do [~~does~~] require the solicitation of bids from at least three sources. The subrecipient [~~contractor~~] shall retain a written record of these solicitations. Exceptions will be allowed for those entities that are eligible to purchase items through the state open contract procedures.

(2) [~~(3)~~] Real property.

(A) Acquisition of real property shall be accomplished in accordance with federal and state statutes, regulations, and policies. In particular, projects that receive federal funds shall [~~must~~] comply with the uniform relocation and real property acquisition standards established in 49 CFR Part 25.

(B) Specific standards for construction and rehabilitation projects will be negotiated as part of the project agreement between the department and the subrecipient [~~contractor~~].

(3) [~~(4)~~] Records retention. All procurement documents are public information and shall be maintained by the subrecipient [~~contractor~~] for at least three years after award of the purchase order or subcontract.

(c) Department role.

(1) Oversight and approval. The subrecipient shall furnish the department notice of the intent to award a purchase order or contract to any individuals or organizations not a part of the subrecipient's organization when the amount of the purchase exceeds $10,000. Purchases shall not be split out to stay below the $10,000 threshold. The subrecipient shall at a minimum provide the following documentation as requested by the department describing the procurement history:

(A) the rationale the subrecipient used for the method of procurement;

(B) the rationale the subrecipient used for the selection of contract type;

(C) the reasons the bidder or proposer was selected; and

(D) the methodology used to determine the contract price, including a cost justification.

[~~(1) Oversight and approval. The contractor shall furnish the department with notice of procurement awards. In competitive bidding situations in which a purchase order is awarded to other than the lowest bidder, the contractor shall also provide written justification for that action. Similarly, the contractor shall provide documentation as requested by the department in instances where only one bid is received in response to a competitive solicitation. With respect to professional services subcontracts, the department may request a written description of the contractor's methodology for selecting the successful firm.~~]

(2) Technical assistance. The department will provide vehicle specifications and guidance on competitive bidding procedures to a subrecipient [~~contractors~~] upon request. If subrecipients [~~contractors~~] choose to develop their own specifications, they assume full responsibility for ensuring that the specifications do not restrict competition.

§31.48. Project Oversight.

(a) Purpose. This section describes reporting requirements for recipients of state and federal public transportation grant funds and monitoring activities to be performed by the department.

(b) Reporting requirements. The subrecipient [~~contractor~~] shall submit reports to the department in a format [~~quarterly operations reports and survey reports on the form~~] prescribed by the department within deadlines established by the department. [~~The contractor shall also assist the department in the completion of the biennial inventory of project equipment as described in §31.50 of this title (relating to Recordkeeping and Inventory Requirements).~~]

(1) Accident reports. Subrecipients shall report all accidents that meet criteria established by the department. The subrecipient shall submit the report within five days of the accident or discovery of the accident.

(2) Asset inventory. Each subrecipient shall provide information on state and federally funded equipment as described in §31.50 of this title (relating to Recordkeeping and Inventory Requirements).

(3) Charter service. Section 5311 subrecipients shall provide charter service only under the specific circumstances established by the FTA. Operators shall advise the department of any charter service provided and the exemption under which charter service is provided.

(4) Disadvantaged Business Enterprises and Historically Underutilized Businesses. Subrecipients shall submit reports in accordance with §9.54 of this title (relating to Good Faith Effort).

(5) Operations reports. All FTA Section 5307, Section 5310, and Section 5311 subrecipients shall submit monthly, quarterly, and annual operations reports.

(A) Pursuant to the requirements of Transportation Code, §456.008(a) and (b), the department will publish annually the following performance-based indicators for recipients of FTA Section 5307 funds, including metropolitan transportation authorities.

(i) Service efficiency - Operating expense per vehicle revenue hour and operating expense per vehicle revenue mile.

(ii) Cost effectiveness - Operating expense per unlinked passenger trip.

(iii) Service effectiveness - Unlinked passenger trips per vehicle revenue mile and unlinked passenger trips per vehicle revenue hour.

(iv) Safety - Total accidents per 100,000 miles of service and average number of miles between road calls.

(B) Pursuant to the requirements of Transportation Code, §456.008(a) and (b), the department will publish annually the following performance-based indicators for RPT subrecipients of FTA Section 5311 funds.

(i) Service efficiency - Cost per vehicle mile and average vehicle utilization.

(ii) Cost effectiveness - Cost per unlinked passenger trip.

(iii) Service effectiveness - Unlinked passenger trips per capita and unlinked passenger trips per vehicle mile.

(iv) Safety - Total accidents per 100,000 miles of service and average number of miles between road calls.

(6) Performance goals and management objectives. All recipients of state and federal assistance through the department shall develop annual performance goals and management objectives in accordance with §31.36 of this chapter. A written status report shall be submitted at the end of the state fiscal year.

(7) Significant events. The recipient shall promptly advise the department in writing of events that have a significant effect on the delivery of public transportation services, including:

(A) problems, delays, and adverse conditions that will materially affect the ability to attain program objectives, prevent the meeting of time schedules and goals, or preclude the attainment of project work units by established time periods, accompanied by a statement of the action taken or contemplated and any departmental assistance needed to resolve the situation; and

(B) favorable developments and events that will enable meeting time schedules and goals sooner than anticipated or producing more work units than originally projected.

(8) Rail Transit Agency Report. Rail Transit Agency Reports shall be submitted in accordance with §31.61 and §31.65 of this chapter.

(9) Miscellaneous reports. Entities receiving funds from either the department or the FTA shall cooperate with the department in providing other information as requested by state and federal funding agencies.

[~~(1) Quarterly reports. The contractor must forward quarterly operations reports for each calendar quarter until the contractor ceases providing public transportation services and/or equipment is disposed of in accordance with §31.57 of this title (relating to Disposition).~~]

[~~(2) Survey forms. Contractors under the Sections 16 and 18 federal grant programs must also provide survey forms for the months of March and September each year. The surveys provide more detailed information to the department on ridership classification, categories of expenditures, and sources of revenue.~~]

[~~(3) Biennial inventory. Each contractor must provide information on state and federally funded equipment as described~~

in §31.50 of this title (relating to Recordkeeping and Inventory Requirements).]

[(4) Reports of significant events. The recipient shall promptly advise the department in writing of events that have a significant impact upon the delivery of public transportation services, including:]

[(A) problems, delays, or adverse conditions that will materially affect the ability to attain program objectives, prevent the meeting of time schedules and goals, or preclude the attainment of project work units by established time periods (this disclosure shall be accompanied by a statement of the action taken, or contemplated, and any departmental assistance needed to resolve the situation); and]

[(B) favorable developments or events that will enable meeting time schedules and goals sooner than anticipated or producing more work units than originally projected.]

[(5) Miscellaneous reports. The contractor shall cooperate with the department in providing other information as requested by state and federal funding agencies, including information described in §31.11 of this title (relating to Formula Program).]

(c) Department monitoring. The department will [shall] rely on subrecipient [contractor] reports as described in subsection (b) of this section as the primary means of monitoring subrecipient [contractor] performance. In addition, department personnel will meet with the subrecipient [contractor] at least quarterly to discuss problems encountered, the subrecipient's [contractor's] need for technical assistance, and other topics related to the provision of public transportation services. Routine monitoring activity will occur in the following areas according to a schedule that accommodates federal deadlines and department and operator workloads. Most, but not all, monitoring activities will occur on a quarterly basis.

(1) Civil rights. The department will monitor Section 5310 and Section 5311 subrecipients for compliance with Title VI Civil Rights requirements.

(2) Drugs and alcohol.

(A) Each Section 5311 subrecipient and each of its subcontractors with safety-sensitive employees shall have policies and programs in place that comply with drug and alcohol standards established by the FTA. The department will monitor subrecipients for compliance with these regulations. In addition, the FTA requires each subrecipient to file a calendar year report (January 1 - December 31) with the department on drug and alcohol testing and compliance activities.

(B) Each Section 5310 subrecipient shall comply with Federal Highway Administration requirements for drug and alcohol compliance if it owns a vehicle that requires a commercial drivers license to operate. The department will monitor Section 5310 subrecipients for compliance with these regulations.

(3) Fiscal responsibility. The district employee responsible for coordinating the district's public transportation program will make on-site quarterly visits to review agency financial records that support requests for payment.

(4) Insurance. Subrecipients of state or federal funds through the department shall insure all facilities, equipment, and vehicles from loss. Checks for appropriate insurance levels will occur at the time the local agency renews its policies.

(5) Maintenance. Subrecipients are required to have written maintenance plans, schedules, and logs to ensure the proper care and longevity of vehicles and facilities in accordance with §31.53 (c) of this chapter. The plans, schedules, and logs are subject to periodic on-site inspection by the department.

(6) Meal delivery. State and FTA funded vehicles shall be used only for incidental meal delivery that does not interfere with passenger transportation. Special warming, cooling, or carrying racks shall not be installed in the vehicles. Physical inspection of vehicles may occur at any time.

(7) Procurement. The district employee responsible for coordinating the district's public transportation program will work with subrecipients to ensure that procurement activities meet applicable state and federal requirements and that all required documents are received and actions completed in a timely manner. Checksheets developed by the department will be maintained by the district to ensure all benchmark activities are accomplished in the proper sequence.

(d) Noncompliance. A subrecipient's [contractor's] failure to observe and comply with federal and state program requirements will cause the department to find that subrecipient [contractor] in noncompliance and take actions as specified in this subsection.

(1) Minor deficiencies. A minor deficiency is cited when an error occurs that [which] can generally be attributed to a subrecipient's [contractor's] lack of knowledge about [on] a particular requirement, is easily corrected, and does not create legal, safety, or other hazards to employees, passengers, or other members of the public. An example of a minor deficiency is [would be] failure to submit a required report. In these cases, [such instances,] the department will [would] issue a warning letter to the ,subrecipient [contractor,] describing the deficiency and establishing a deadline for compliance. Failure to respond in the prescribed manner will cause the department to consider this a major deficiency as described in paragraph (2) of this subsection.

(2) Major deficiencies. A major deficiency is cited when the department finds that a subrecipient [contractor] has knowingly violated program requirements[,] or has pursued actions that are illegal or that pose a safety hazard to employees, passengers, or other members of the public. Examples include, but are not limited to, failure to maintain required insurance coverage, violation of charter regulations, and nonpayment of subcontractors or vendors. In these [such] cases, the department will issue a certified letter advising the subrecipient [contractor] to immediately address the deficiency, and the subrecipient's compliance will be [such action to be] verified by department personnel within 48 hours of the subrecipient's [contractor's] receipt of the certified letter. If the subrecipient [contractor] does not respond in the prescribed manner, the department will, within ten working days, exercise its contract termination rights, [and/or] direct the disposition of equipment purchased with grant funds, or both. Subrecipients [Contractors] that have been cited for major deficiencies that [which] were not corrected will [shall] be ineligible to receive financial assistance from the department for a period of two years from the date of the certified notification letter. A decision that a subcontractor is ineligible for financial assistance because of a major deficiency [Such decisions] may be appealed in accordance with the provisions of §1.21 et seq. of this title (relating to Procedures in Contested Cases [Contested Case Procedure]).

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006836

Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

SUBCHAPTER E. PROPERTY MANAGEMENT STANDARDS

43 TAC §31.53, §31.57

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules concerning rail fixed guideway mass transportation system safety oversight, and Transportation Code, §456.008, which requires the commission to by rule prepare and issue a report on the performance of certain public transportation providers in this state.

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

§31.53. Maintenance Requirements.

(a) Purpose. To protect the public investment in real property and equipment purchased in whole or in part with state or [~~and/or~~] federal public transportation funds administered by the department, subrecipients shall [~~contractors will~~] comply with the standards described in this section.

(b) Real property. Subrecipients [~~Contractors~~] shall perform necessary maintenance and groundskeeping to preserve the value of the original investment and its physical appearance and integrity. Failure to establish and observe a maintenance program constitutes [~~perform necessary work may be~~] grounds for the department to direct the transfer or disposition of the real property.

(c) Equipment. Subrecipients [~~Contractors~~] shall maintain equipment [~~in accordance with the manufacturer's recommended servicing schedule~~] to ensure that the equipment remains in good condition. Failure to establish and observe a maintenance program constitutes [~~observe such schedules may be~~] grounds for the department to direct the transfer or disposition of the equipment. Subrecipients shall have a maintenance program that includes:

(1) a written maintenance plan;

(2) preventive maintenance inspections and scheduled services, which shall include at a minimum the manufacturers' recommended servicing schedules;

(3) provisions for accessible equipment;

(4) management of maintenance resources;

(5) warranty compliance and recovery; and

(6) standards for maintenance subcontractors.

§31.57. Disposition.

(a) Purpose. This section describes the standards that apply to the disposition of equipment purchased in whole or in part with state or [~~and/or~~] federal public transportation funds.

(b) Like-kind exchanges. In the case of like-kind exchanges, the percentage of the department's original contractual interest shall be applied to the fair market value of the equipment being sold at the time of the exchange. That dollar value shall then be transferred as the department's interest in the equipment being acquired and, as appropriate, added to any additional funding provided by the department towards the purchase of the new equipment.

(c) Federal standards. The federal standards contained in the common rule shall govern the disposition of real property and equipment purchased under contracts in which the department provides all or part of the local share requirement of federally assisted capital improvements. In cases in which [~~where~~] the common rule does not require reimbursement of the federal grantor agency, the department will similarly release the state interest in the capital improvement provided that the state's percentage share of any proceeds derived by the subrecipient [~~contractor~~] in the disposition process shall be used by the subrecipient [~~contractor~~] for public transportation purposes similar to those for which the contract award was originally made. If the subrecipient [~~contractor~~] does not intend to use the state's percentage share of the proceeds for public transportation purposes, those monies shall be refunded as described in subsection (d)(2)(B) of this section. In cases in which [~~where~~] the common rule requires reimbursement of the federal grantor agency, the subrecipient [~~contractor~~] shall provide the department a percentage of the proceeds of the [~~any such~~] disposition equal to the percentage of the state's original investment in the property or equipment. Once disposition is authorized, the subrecipient [~~contractor~~] shall relinquish title to the property through either sale, auction, or transfer to a third party. The department shall be notified of the disposition [~~any such dispositions~~] and shall be provided information necessary to delete the property from inventory records described in §31.50 of this title (relating to Recordkeeping and Inventory Requirements).

(d) State standards. All real property and equipment obtained through contracts in which the department's contractual interest includes federal funds or state monies [~~as 50% of a non-federally assisted capital improvement~~] shall be governed by the disposition standards contained in paragraphs (1) and (2) of this subsection. The department shall be notified of the subrecipient's [~~contractor's~~] intent to proceed with the [~~such~~] dispositions and provided information necessary to delete the property from inventory records described in §31.50 of this title (relating to Recordkeeping and Inventory Requirements). Prior to disposition of property under the terms of this subsection, the subrecipient [~~contractor~~] shall obtain written concurrence from the department and receive disposition instructions. Once disposition is authorized, the subrecipient [~~contractor~~] shall relinquish title to the property through either sale, auction, or transfer to a third party.

(1) Disposition criteria.

(A) Vehicles. Disposition may occur when the current per-unit market value is less than $5,000.

(B) Other equipment. Disposition may occur when the current per-unit market value is less than $5,000.

(C) Real property. When real property is no longer needed for the originally authorized purpose, the subrecipient shall [~~contractor will~~] request disposition instructions from the department pursuant to this subsection.

(D) Exceptions. As allowed under the Federal Transit Act of 1946, §12(k), as amended, [~~{~~] 49 United States Code (U.S.C.) §1608[~~}~~], a subrecipient [~~contractor~~] may petition the department to allow the transfer of the federal interest in any real property and equipment subject to the standards contained in this subsection. If a petition is filed, [~~In such instances,~~] the subrecipient must [~~contractor will~~] furnish information requested by the department to determine if the real

property or equipment is no longer needed for public transportation purposes. The department will consider other exceptions to the standards contained in subparagraphs (A) and (B) of this paragraph on a case-by-case basis. If an exception is claimed, the subrecipient must [~~In such instances, the contractor will~~] furnish information requested by the department to determine if an exception is warranted due to special circumstances.

(2) Distribution of disposition proceeds.

(A) Refund not required. In cases in which [~~where~~] the disposition criteria contained in paragraph (1)(A) and (B) of this subsection have been met, the department will release its contractual interest in the capital improvement. The department will similarly release its contractual interest in cases in which [~~where~~] exceptions are granted for early disposition in accordance with the provisions contained in paragraph (1)(D) of this subsection. However, the department's release of its interest in a capital improvement is contingent upon the subrecipient's [~~contractor's~~] assurance that the department's contractually specified percentage share of any proceeds derived by the subrecipient [~~contractor~~] in the disposition process will [~~shall~~] be used by the subrecipient [~~contractor~~] for public transportation purposes similar to those for which the contract award was originally made. In the case of transfers to non-transit uses, as allowed under the Federal Transit Act of 1964, §12(k), as amended, [~~(~~] 49 U.S.C. [~~United States Code~~] §1608[~~)~~], the department will [~~shall~~] release only the federal portion of its contractual interest. The state's percentage share shall be refunded as described in subparagraph (B) of this paragraph.

(B) Refund required. In cases in which [~~where~~] the disposition criteria contained in paragraph (1)(A) and (B) of this subsection have not been met, but the subrecipient [~~contractor~~] has received authorization from the department to proceed with the disposition of property [~~from the department~~], the subrecipient [~~contractor~~] shall provide the department a percentage of the proceeds of the [~~any such~~] disposition equal to the percentage of the department's original contractual interest in the property or equipment. In cases of real property, as described in paragraph (1)(C) of this subsection, and when [~~where~~] exceptions are not granted for early disposition, as described in paragraph (1)(D) of this subsection, the subrecipient shall [~~contractor will~~] similarly provide the department a percentage of the proceeds of the [~~any such~~] disposition equal to the percentage of the department's original contractual interest in the property or equipment. In the case of transfers to non-transit uses, as allowed under the Federal Transit Act of 1964, §12(k), as amended, 49 U.S.C. [~~(49 United States Code~~] §1608[~~)~~], the subrecipient shall [~~contractor will~~] provide the department a percentage of the proceeds of the [~~any such~~] disposition equal to the percentage of the original state percentage interest in the property or equipment, excluding any federal percentage interest that might [~~may~~] have been included in the contract of assistance.

(C) Net proceeds from sale of capital assets. In cases in which the common rule requires a reimbursement, when the subrecipient receives proceeds from the disposition of the capital property or equipment and those funds will be used for subsequent federal public transportation purposes, the subrecipient shall establish a record of liability demonstrating that these funds are owed. The liability will be removed when the subrecipient uses the proceeds for a subsequent transit project.

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006837
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

SUBCHAPTER F. RAIL SAFETY OVERSIGHT PROGRAM

43 TAC §31.61, §31.65

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation, and more specifically, Transportation Code, §455.005, which requires the commission to adopt rules concerning rail fixed guideway mass transportation system safety oversight, and Transportation Code, §456.008, which requires the commission to by rule prepare and issue a report on the performance of certain public transportation providers in this state.

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

§31.61. Rail Transit Agency Responsibilities.

(a) Plan. A rail transit agency shall develop and submit to the department a system safety program plan that:

(1) addresses the topics outlined in "Implementation Guidelines for State Safety Oversight of Rail Fixed Guideway Systems," [~~(~~]DOT-FTA-MA-90-7006-96-3[~~)~~] (available from the department);

(2) complies with the APTA guidelines (available from the department) including:

(A) standards for the personal security of passengers and employees of the rail fixed guideway system;

(B) lines of authority;

(C) levels of responsibility and accountability; and

(D) methods of documentation for the system; and

(3) contains a security system program plan ,that [~~which~~] complies with the "Transit Security Procedures Guide," [~~(~~] FTA-MA-90-7001-94-2[~~)~~] and the "Transit System Security Program Planning Guide," [~~(~~]FTA-MA-90-7001-94-1[~~)~~] (available from the department), and includes:

(A) current security conditions and existing security capabilities and practices;

(B) management of the system security plan and roles and responsibilities for planning, proactive measures, training, and day-to-day activities;

(C) threat and vulnerability identification, assessment, and resolution;

(D) prevention and resolution of security problems [~~incidents~~], including general security issues and crimes against passengers, the rail transit system, and the public; and

(E) implementation, evaluation, and modification of system security plan.

(b) Rail accident [~~Accident~~] notification and report. A rail transit agency shall[~~:~~]

[~~(1)~~] report rail accidents and unacceptable hazardous conditions to the department[~~:~~]

[~~(A)~~] by telephone or facsimile within 24 hours of the occurrence of the rail accident or the discovery of the unacceptable hazardous condition [~~;~~] and

[~~(B)~~] in writing within 30 days of the last day of the reporting month, including a final corrective action plan and a summary report for the month. [~~48 hours of the accident or discovery of the unacceptable hazardous condition; and~~]

[~~(2) submit the final investigatory report to the department within 30 days after the report's completion.~~]

(c) Internal safety audit. A rail transit agency shall conduct an annual internal safety audit in accordance with APTA guidelines and submit a written report to the department that shall [~~will~~], at a minimum:

(1) summarize the rail transit agency's safety activities for the preceding 12 months including a report of the internal safety audits performed during the preceding 12 months; and

(2) describe major findings of the rail transit agency's safety audits and inspections including:

(A) areas of non-compliance and corrective actions taken;

(B) outcomes of safety and related initiatives; and

(C) progress of training efforts and evaluations.

(d) Hazardous conditions and investigations. A rail transit agency shall:

(1) minimize, control, correct, or eliminate any investigated unacceptable hazardous conditions as required by §31.62(c) of this subchapter [~~title (relating to State Responsibilities)~~]; and

(2) provide all necessary assistance to allow the department, or its agent, to conduct:

(A) appropriate on-site investigations of rail accidents and unacceptable hazardous conditions under §31.62(c) of this subchapter [~~title (relating to State Responsibilities)~~]; and

(B) an on-site triennial safety review under §31.62(c) of this subchapter [~~title (relating to State Responsibilities)~~].

(e) Reports and certification. A rail transit agency shall submit:

(1) reports and other information to the department as required by 49 United States Code §5330 and Transportation Code, Chapter 455; and

(2) a certification, signed by an authorized official of the rail transit agency, to the department stating that the rail transit agency has complied with the provisions of this subchapter.

§31.65. Deadlines.

[~~(a)~~] A rail transit agency shall submit to the department:

(1) prior to beginning revenue service, a system safety program plan required by §31.61(a) of this subchapter [~~title (relating to Transit Agency Responsibilities)~~], excluding the system security portion of the plan [~~within 30 days of the effective date of this subchapter~~];

(2) by February 1 of each year, a written report of its annual internal safety audit conducted as required by §31.61(c) of this subchapter [~~title (relating to Transit Agency Responsibilities) by September 1, 1997 and February 1 of each year thereafter~~];

(3) by February 1 of each year, a certification, signed by an authorized official of the rail transit agency, that the rail transit agency has complied with the provisions of this subchapter; [~~by September 1, 1997 and February 1 of each year thereafter; and~~]

(4) the security system program portion of the safety plan required by §31.61(a)(3) of this subchapter; and [~~by November 1, 1997.~~]

(5) by February 1 of each year, a written report of the rail transit agency's safety activities for the preceding 12 months as required by §31.61(c) of this subchapter.

[~~(b) The department will complete the first triennial review as required in §31.62(c) of this title (relating to State Responsibilities) for each rail transit agency before January 1, 1999.~~]

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

Filed with the Office of the Secretary of State, on October 2, 2000.

TRD-200006838
Richard D. Monroe
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: November 12, 2000
For further information, please call: (512) 463-8678

♦ ♦ ♦

WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the ***Texas Register***. The notice is effective immediately upon filling or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the ***Texas Register***, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the ***Texas Register.***

TITLE 34. PUBLIC FINANCE

PART 11. OFFICE OF THE FIRE FIGHTER'S PENSION COMMISSION

CHAPTER 301. RULES OF THE TEXAS STATEWIDE EMERGENCY SERVICES RETIREMENT FUND

34 TAC §301.5, §301.6

The Fire Fighters' Pension Commission (FFPC) has withdrawn from consideration for permanent adoption amendments to §301.5 and §301.6, concerning Rules of the Texas Statewide Emergency Services Retirement Fund, which appeared in the April 21, 2000, issue of the *Texas Register* (25 TexReg 3504).

Filed with the Office of the Secretary of State on October 2, 2000.

TRD-200006842
Morris E. Sandefer
Commissioner
Office of the Fire Fighter's Pension Commission
Effective date: October 2, 2000
For further information, please call: (512) 936-3372

♦ ♦ ♦

ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the ***Texas Register***. The section becomes effective 20 days after the agency files the correct document with the ***Texas Register***, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID FRAUD AND ABUSE PROGRAM INTEGRITY

SUBCHAPTER E. OPERATING AGENCY RESPONSIBILITIES

1 TAC §371.1002

The Texas Health and Human Services Commission (HHSC) adopts new §371.1002 in chapter 371, concerning the minimum goal for the Texas Department of Human Services that specifies the percentage of the amount of benefits granted by the department in error under the food stamp program or the program of financial assistance under chapter 31, Human Resources Code. No public comments were received regarding the proposed rule. The rule is adopted without change from the proposed text published in the August 18, 2000, of the *Texas Register* (25 TexReg 7965) and will not be republished. Section 531.050 of the Texas Government Code directs the Health and Human Services Commission to set the minimum collection goal for each year. New §371.1002 sets out the minimum collection goal for state fiscal year 2000.

The new rule is adopted under the Texas Government Code, §531.033, which authorizes the Commissioner of Health and Human Services to adopt rules necessary to carry out the Health and Human Services Commission's duties under Chapter 531.

The new rule implements Texas Government Code, §531.050.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 2, 2000.

TRD-200006863

Marina S. Henderson

Executive Deputy Commissioner

Texas Health and Human Services Commission

Effective date: October 22, 2000

Proposal publication date: August 18, 2000

For further information, please call: (512) 424-6576

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 41. AUDITING

SUBCHAPTER C. RECORDS AND REPORTS BY LICENSEES AND PERMITTEES

16 TAC §41.22

The Texas Alcoholic Beverage Commission adopts the repeal of §41.22 as originally published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7448).

Section 41.22 required package store permittees to prepare an invoice for each sale or delivery of more than three gallons of liquor. The permittees were required to maintain the invoice for two years. The invoices prepared under this rule reflected a variety of information about the purchase and the identity of the purchaser.

This rule was originally adopted to provide the agency with information helpful in the detection and arrest of persons purchasing liquor for unlawful resale. A review of the agency's enforcement activities over the last several years reveals, however, that these records have not been particularly helpful in enforcement efforts. The commission concluded, therefore, that the rule imposed an unwarranted administrative and financial burden on package store permittees.

No comments were received regarding the repeal.

The repeal is adopted under Alcoholic Beverage Code, §5.31, which provides the commission with the authority to prescribe and publish rules necessary to carry out the provisions of the Alcoholic Beverage Code.

Cross Reference: Alcoholic Beverage Code, §5.32, is affected by the repeal.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006826

Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Effective date: October 19, 2000
Proposal publication date: August 11, 2000
For further information, please call: (512) 206-3204

♦ ♦ ♦

TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS NATURAL RESOURCE CONSERVATION COMMISSION

CHAPTER 286. ON-SITE WASTEWATER TREATMENT RESEARCH COUNCIL

The Texas On-Site Wastewater Treatment Research Council (Council) adopts the repeal of 30 TAC Chapter 286, On-Site Wastewater Research Council, Subchapter A, The Council, §§286.1-286.14; Subchapter B, Grants, §§286.31-286.34, 286.51-286.53, 286.74, and 286.91-286.98; and Subchapter C, Grants and Donations to the Council, §286.131. The repeals are adopted *without changes* to the proposed text as published in the July 21, 2000 issue of the *Texas Register* (25 TexReg 6935).

EXPLANATION OF ADOPTED RULES

The repeal of Chapter 286 is adopted by the Council. New rules related to the Council's activities have been adopted under 31 TAC Chapter 286, relating to the Texas On-Site Wastewater Treatment Research Council. These newly adopted rules provide for clearer administration of the Council's programs as a separate state agency from the Texas Natural Resource Conservation Commission (the commission). The existence of Chapter 286 is confusing because it is imbedded within Title 30, Part 1, which is reserved for rules of the commission. As per the Texas Health and Safety Code (THSC), Chapter 367, relating to the On-Site Wastewater Treatment Research Council, the Council is a separate state agency for which the commission provides staff and other administrative support. The repeal of Chapter 286 completes the process of transferring the Council's rules from Title 30 to Title 31.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The Council has reviewed the repeal of the chapter in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that repeal of the chapter is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute.

TAKINGS IMPACT ASSESSMENT

The Council has prepared a takings impact assessment for repeal of this chapter pursuant to Texas Government Code, §2007.043. The purpose of this repeal of the chapter is to eliminate redundancy of two sets of rules. Therefore, the repeal of this chapter will not constitute a takings under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The Council has determined that the repeal of this chapter does not relate to an action subject to the Texas Coastal Management Program in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.).

HEARING AND COMMENTERS

A public hearing was not held on the proposed rules repeal. The comment period closed on August 21, 2000. No comments were received.

SUBCHAPTER A. COUNCIL PROCEDURES

30 TAC §§286.1-286.14

STATUTORY AUTHORITY

The repeal is adopted under the authority and affect the provisions of THSC, §367.008, which authorizes the Council to establish procedures for awarding competitive grands and disbursing grant money. The repeal has been reviewed by legal counsel from the Office of the Attorney General and has been found to be within the Council's authority to adopt.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006818
Warren Samuelson
Executive Secretary, Texas On-Site Wastewater Treatment Research Council
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: July 21, 2000
For further information, please call: (512) 239-4799

♦ ♦ ♦

SUBCHAPTER B. GRANTS

30 TAC §§286.31-286.34, 286.51-286.53, 286.74, 286.91-286.98

STATUTORY AUTHORITY

The repeal is adopted under the authority and affect the provisions of THSC, §367.008, which authorizes the Council to establish procedures for awarding competitive grands and disbursing grant money. The repeal has been reviewed by legal counsel from the Office of the Attorney General and has been found to be within the Council's authority to adopt.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006819
Warren Samuelson
Executive Secretary, Texas On-Site Wastewater Treatment Research Council
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: July 21, 2000
For further information, please call: (512) 239-4799

♦ ♦ ♦

SUBCHAPTER C. GRANTS AND DONATIONS TO THE COUNCIL

30 TAC §286.131

STATUTORY AUTHORITY

The repeal is adopted under the authority and affect the provisions of THSC, §367.008, which authorizes the Council to establish procedures for awarding competitive grands and disbursing grant money. The repeal has been reviewed by legal counsel from the Office of the Attorney General and has been found to be within the Council's authority to adopt.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006820

Warren Samuelson

Executive Secretary, Texas On-Site Wastewater Treatment Research Council

Texas Natural Resource Conservation Commission

Effective date: October 19, 2000

Proposal publication date: July 21, 2000

For further information, please call: (512) 239-4799

♦ ♦ ♦

CHAPTER 291. UTILITY REGULATIONS

The Texas Natural Resource Conservation Commission (TNRCC or commission) adopts the amendments to §291.3, Definitions of Terms; §291.21, Form and Filing of Tariffs; §291.26, Suspension of Rates; §291.32, Rate Design; §291.74, Maintenance and Location of Records; §291.81, Customer Relations; §291.83, Refusal of Service; §291.85, Response to Requests for Service by a Retail Public Utility Within Its Certificated Area; §291.86, Service Connections; §291.87, Billing; §291.88, Discontinuance of Service; §291.89, Meters; §291.93, Adequacy of Water Utility Service; §291.102, Criteria for Considering and Granting Certificates or Amendments; §291.106, Notice for Applications for Certificates of Convenience and Necessity; §291.112, Transfer of Certificate of Convenience and Necessity; §291.128, Petition or Appeal Concerning Wholesale Rate; §291.131, Executive Director's Determination of Probable Grounds; §291.132, Evidentiary Hearing on Public Interest; and §291.134, Commission Action to Protect Public Interest, Set Rates. Section 291.93 is adopted *with changes* to the proposed text as published in the June 30, 2000, issue of the *Texas Register* (25 TexReg 6298). Sections 291.3, 291.21, 291.26, 291.32, 291.74, 291.81, 291.83, 291.85 - 291.89, 291.102, 291.106, 291.112, 291.128, 291.131, 291.132, and 291.134 are adopted *without changes* and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The commission adopts these amendments to conform with the drought contingency rules in 30 TAC Chapter 288, Subchapters B and C that were effective on February 21, 1999 and adopted pursuant to requirements in Senate Bill (SB) 1, 75th Legislature, 1997; to implement SB 1421, 76th Legislature, 1999; to clarify, simplify, and cure problems that have arisen in the interpretation of the former rules as part of the commission's regulatory reform effort, and to incorporate comments received as part of the commission's quadrennial review of its rules.

SB 1 included new provisions pertaining to drought-related issues and water conservation plans which were incorporated in Chapter 288 of this title (relating to Water Conservation Plans, Guidelines and Requirements). Several amendments conform terminology in this chapter with terminology adopted in Chapter 288, such as substituting "drought contingency plan" for" water rationing plan" and "water use restrictions" in place of "water rationing." Some amendments implement SB 1421. Senate Bill 1421 amended the definition of "affected county" in §13.002 of the Water Code. Senate Bill 1421 also amended §13.241 of the Water Code to require the commission by rule to develop a standardized method for determining which of two or more retail public utilities or water supply or sewer service corporations that apply for a certificate of public convenience and necessity to provide water or sewer utility service to an uncertificated area located in an economically distressed area is more capable financially, managerially, and technically of providing continuous and adequate service. Several amendments are in response to public comments received during the quadrennial review of this chapter. The balance of the amendments are in response to input from commission staff as part of the agency's regulatory reform initiative. In addition to the specific changes discussed below, there are several minor changes adopted for clarification or consistency in terminology.

SECTION BY SECTION DISCUSSION

The following amendments implement SB 1421, 76th Legislature, 1999.

The amendment to §291.3(2) changes the definition of an "affected county" to simply be "a county any part of which is within 50 miles of an international border" to conform terminology with SB 1421.

The adopted new §291.102(g) is added, in accordance with SB 1421, to set general criteria for determining which of two or more retail public utilities in an affected county is more capable financially, managerially and technically of providing continuous and adequate service. An assessment for making the determination will be conducted after the preliminary hearing and only if the parties are unable to resolve the service area dispute.

The following amendments conform this chapter to the drought contingency rules in Chapter 288 of this title, that became effective on February 21, 1999.

The amendment to §291.3(48) changes the definition of "water rationing" to "water use restrictions."

The amendment to §291.21(c)(7) requires that the tariff contain an approved drought contingency plan, instead of a water rationing plan, to match requirements established in §288.20 of this title (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers).

The adopted amendment to §291.32(b)(2)(A) clarifies that conservation rates can be used to conserve water supplies or for other reasons specified in an approved drought contingency plan. The term "drought contingency plan" replaces the term "water rationing plan."

The amendments to §291.93(a)(2) substitute "drought contingency plan" for "water rationing plan"; substitutes "water use restrictions," "restrictions" or "plan" in place of "water rationing" or "rationing"; clearly authorize the use of restrictions in accordance with the approved drought contingency plan required by §288.20 of this title; and replace specific time frames in the rules for submitting required reports in accordance with the approved drought contingency plan.

The following amendments are adopted in response to comments received during the commission's quadrennial review of its rules.

The amendment to §291.74 allows access to a utility's records between 8:00 a.m. and 5:00 p.m. Monday through Friday, except holidays, unless the utility provides a written request for alternate hours 72 hours in advance of any scheduled inspection.

The amendment to §291.83(a)(3) requires that a utility provide service to a customer who is indebted to another utility as the result of a disputed bill if the customer makes a deposit, demonstrates having registered the dispute with the utility, and has made a payment equal to the customer's average monthly usage at current rates.

The amendments to §291.85(a) include a provision in paragraph (1) that allows a utility to require that an applicant for service provide written documentation that it has the legal right to occupy the premises. Documentation may include a lease, contract for deed, or a warranty deed. A purchase contract is not sufficient unless the applicant provides documentation that the sale has been closed. A provision in paragraph (3) increases the number of days for reconnecting service at a previous location from one to three working days, and a provision in paragraph (4) increases the number of days for connecting service where a tap is required from five to ten working days.

The amendment to §291.86(a)(2)(B) allows a utility to require a customer owned cut-off valve for new service at an existing tap.

The amendment to §291.87(g) allows a utility to backbill a customer for undercharges for up to 12 months instead of six months as previously allowed.

The amendment to §291.87(k)(1) requires that a customer with a disputed bill provide written notice and make a payment equal to the customer's average monthly usage at current rates prior to the date of proposed discontinuance in order for a customer to avoid discontinuance of service.

The amendment to §291.88(g) allows a utility until the end of the next working day to disconnect service after receiving a written request from the customer.

The amendment to §291.88(h) requires that a utility restore service within 36 hours, instead of 24 hours, after the service has been disconnected as a result of past due charges or other circumstances and the circumstances have been corrected.

The amendment to §291.89(a)(4) adds condominiums and manufactured housing communities to those facilities that could be considered a single commercial facility for the one meter requirement.

The amendment to §291.89(h) expands the definition of meter tampering to include removal or alteration of utility-owned equipment or locks, connection or reconnection of service without utility authorization, or connection into the service line of adjacent customers or of the utility.

The following amendments are adopted as part of the commission's regulatory reform effort to clarify, simplify, and cure problems that have arisen in the interpretation of the former rules.

The amendments to §291.3 define the terms "certificate," "certificate of convenience and necessity," and "certificate of public convenience and necessity." The inclusion of these definitions caused the renumbering of existing definitions.

The amendment to §291.26(a) allows the executive director to suspend a rate change, if the utility has included in the cost of service for the noticed rates, rate case expenses, other than those necessary to complete and file the application.

The amendments to §291.102(a) clarify that copies of written responses to water or sewer service requests only need to be submitted from those systems to which written requests for service were made. The amendments also redesignate former subsection (a)(3) as subsection (b), causing the redesignation of the succeeding subsections.

The amendment to §291.106(b) clarifies that the distance for notice of an application for issuance of a new certificate of public convenience and necessity is measured from the corporate boundaries or the boundaries of the service areas in question.

The amendment to §291.112(c)(3) clarifies that the distance for notice of proposed sale, acquisition, lease, rental, merger, or consolidation and transfer of a certificate of convenience and necessity is measured from the corporate boundaries or the boundaries of the service areas in question.

The amendments to §291.112 deleted former subsection (c)(5) because it required that applications be processed in accordance with Chapter 263 of this title, which had been repealed. Also, the amendments added subsection (e) to limit the term of the executive director's approval for a sale to one year. At the end of the year, if the sale has not been made, the approval is void and a new application must be filed.

The following amendments are adopted in response to consumer complaints pertaining to a utility's interpretation of the former rules requiring the use of backflow prevention devices.

The amendment to §291.21(c)(5) requires that a utility's tariff contain copies of the customer service inspection forms required to be completed under §290.46(j) of this title (relating to Minimum Acceptable Operating Practices for Public Drinking Water Systems) if the forms deviate from the form specified in §290.47(d) of this title (relating to Customer Service Inspection Certification).

The amendment to §291.81(a) adds a new paragraph (2) which requires that the utility give notice to each service applicant or customer who is required to have a customer service inspection performed. The notification must be in writing, include the right to obtain a second opinion, and include the right for the customer to use the least expensive acceptable backflow prevention assembly as defined in §290.44(h) of this title (relating to Water Distribution). The customer must receive a copy of the completed inspection form and information related to thermal expansion problems which may be created if a backflow prevention assembly is installed. The former paragraph (2) has been renumbered as (3) and each succeeding paragraph in the subsection has also been renumbered in sequence.

The amendments to §291.83(c) add a new paragraph (6), that requires a utility to provide service where the service applicant or customer chooses to use a type of backflow prevention assembly approved under §290.44(h) of this title (relating to Water

Distribution) even if the assembly is not the one preferred by the utility. Under the amendments, former paragraph (6) was renumbered as (7).

The amendment to §291.85(a)(2) requires a utility to make available to a service applicant an application for service and information about customer service inspections, and to accept from the applicant the completed application along with a completed customer service inspection form.

The amendment to §291.93(a)(5) requires each retail public utility to include cross- connection control as a means of protecting public health and requires the utility to receive prior approval for a cross-connection control program which exceeds the minimum requirements of §290.44(h) of this title (relating to Water Distribution). The amendment provides that a utility may be required to fund any expenses above the costs associated with the minimum requirements without customer reimbursement.

The following amendments are adopted to clarify when a public interest hearing versus a cost of service hearing is appropriate.

The amendment to §291.128 makes this section applicable to petitions for the review of rates charged for the resale of water regardless of whether there is a contract or not.

The amendments to §291.131 change the section title from "Executive Director's Determination of Probable Grounds" to "Executive Director's Review of Petition or Appeal" and add subsections (b), (c), and (d) that allow the executive director to forward petitions to review a rate that is charged pursuant to a written contract to the State Office of Administrative Hearings (SOAH) for an evidentiary hearing on public interest or, where there is no contract, to SOAH for an evidentiary hearing on the rate. The amendments also provide that if the seller and buyer do not agree that the protested rate is charged pursuant to a written contract, the administrative law judge (ALJ) will abate the hearing until the dispute is resolved by a court of proper jurisdiction.

The amendment to §291.132 is proposed to be amended to remove the 120-day requirement for an ALJ to prepare a proposal for decision.

The amendments to §291.134 require the seller to provide a cost of service study and other information necessary to support the appealed rates within 90 days after the appeal is forwarded to SOAH. The amendments limit discovery prior to the evidentiary hearing on the rate to matters relevant to the evidentiary hearing on the rate. The amendments also require the ALJ to include a recommendation on the rate in the proposal for decision.

FINAL REGULATORY IMPACT ANALYSIS The commission has reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the Texas Government Code. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The rule amendments do not change the basic requirements in the current rules. The rules incorporate new legislative requirements, address comments received during the commission's quadrennial review of its rules, and clarify, simplify, and cure problems that have arisen in the interpretation of the former rules. The changes will not affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Further, this rulemaking does not meet the applicability criteria of a "major environmental rule" because the amendments do not exceed a standard set by federal law, exceed an express requirement of state law, nor exceed a requirement of a delegation agreement. In addition, the changes are not adopted solely under the general rulemaking authority of the commission but also under Texas Water Code, §§ 11.036, 11.041, 11.272, 12.013, 13.043(f), 13.136, 13.137, and 13.187(a).

TAKINGS IMPACT ASSESSMENT

The commission has prepared a takings impact assessment for these rule amendments pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the rule amendments is to implement applicable requirements of SB 1421, 76th Legislature, 1999, relating to utility regulations, to conform language with the drought contingency rules in Chapter 288, to respond to public comments received during the quadrennial review of Chapter 291 and to revise the rules as part of the agency's regulatory reform initiative. The rule amendments substantially advance the stated purpose by incorporating the applicable requirements of SB 1421, the drought contingency rules, and the recommendations made through public comments and by commission staff. Promulgation and enforcement of these amendments will not burden private real property because the actions that are required by the amendments relate primarily to the relationships between water utility operators and their customers, concerning establishment of rates, procedures for providing services, and billing for the services. The rules will provide protection to both the utility operators and their customers. Therefore, this rulemaking will not constitute a takings under Chapter 2007 of the Texas Government Code.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission has reviewed the rulemaking and found that the rules are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, relating to Actions and Rules Subject to the Texas Coastal Management Program (CMP), nor will the rules affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC 505.11. Therefore, the rulemaking is not subject to the CMP.

HEARING AND COMMENTERS

A public hearing was not held for this rulemaking. The comment period closed on July 31, 2000. Only Tecon Water Companies, Inc., (Tecon) submitted written comments. During the comment period, commission staff discovered some additional discrepancies between the proposed Chapter 291 rules and existing Chapter 288 rules.

ANALYSIS OF COMMENTS

Concerning §291.26, Tecon objected to adding the phrase "...has included in the cost of service for the noticed rates rate case expenses other than those necessary to complete and file the application, ..." The commenter wanted to know which costs were specifically excluded and did not see any reason why this change should be added to the rule.

The commission disagrees with this comment and believes that the change should be added to the rules. The costs that are excluded are any and all costs associated with a hearing that may

be held in connection with the application because of customer or staff protests. Many applications for a rate change are processed administratively and, therefore, do not require a hearing or the associated expense. Consequently, to include any expenses in the revenue requirement for anything other than those necessary to complete and file the application would have the effect of the customers paying for costs that were not incurred. If a hearing is held, §291.28(6) allows the utility to add on any expenses associated with that hearing. The utility is therefore able to add those expenses into its cost of service if a hearing is held.

The commission has made no change in response to this comment.

Concerning §291.81(a)(2), the commenter requested information related to the proposed changes. Specifically, the commenter asked for the following information: 1) what information is required; 2) how the proposed change affects their ability to control backflow contamination to their system when customers or contractors break their mains; and 3) if this warning affects their liability in any way.

In response to the first request, a backflow prevention device creates a closed system in the customer's home. When all lines in the home are full, hot water can expand and increase the pressure inside the home to the point that a hot water heater without an operable pressure relief valve can explode. This provision specifically addresses those cases where the utility is requiring that a customer install a backflow prevention device. In these cases, the customers should be informed of the danger involved and the methods for ensuring that the pressure can be released before building to dangerous levels.

In response to the second request, this provision does not apply to instances where there is a break in the utility's mains.

In response to the third request, the issue of liability is a private legal matter that cannot be addressed in the rules.

The commission has made no change in response to this comment.

Concerning §291.93(1)(A), the commenter questioned replacing the term "water rationing plans" with "drought contingency plans." The commenter stated that implementing a drought contingency plan to temporarily reduce water consumption due to equipment failure is misleading to customers. The commenter suggested that the name of the plan be changed to "Drought Contingency/Water Rationing Plan". The commenter contends that monetary increases are the only effective way to monitor and/or control water conservation during emergencies. The commenter also requested that investor-owed utilities (IOUs) be allowed a 90-day extension to obtain tariff approval for these plans.

While the commenter refers to §291.93(1)(A), the comments made address changes in §291.93(2)(A).

Chapter 288 of this title (relating to Water Conservation Plans) addresses the requirements for drought contingency plans. A water rationing plan is specifically included as a part of a drought contingency plan. This language was added to ensure that Chapter 291 was consistent with the language in Chapter 288. The intent is for regulated entities to have to comply with the provisions of only one chapter.

The commission agrees with the commenter that using the name "drought contingency plan" can be confusing to the customers. However, during the proposal stage for amendment of Chapter 288 in 1998, there was significant discussion involving the name of the drought contingency plan. Chapter 288 is not limited only to droughts but also is intended to address all emergency situations.

The commission does not agree that a monetary increase is the only way to control consumption. As an example, customer education information has been shown to have a positive effect on consumption. While IOUs have not been granted the statutory authority to impose fines and penalties, current §291.32(b) of this title (relating to Rate Design) allows IOUs to apply for and implement conservation rates including inclining block rates (tier rates) which increase the amount the customer pays per gallon as their consumption increases. Additionally, IOUs are allowed to issue warnings when customers are not complying with legally imposed requirements to restrict water usage. If the customer fails to comply with those warnings, the IOU may be authorized to install flow restrictors or terminate service to that customer for a period of time.

The commenter's request for a 90-day extension cannot be approved or denied as a part of these rules. The requirements for filing a drought contingency plan are found in Chapter 288. Additionally, IOUs have been notified at least twice in the last year of the need to file their plan, the deadline for filing the plan, and the procedure for getting their tariff amended to include the plan.

The commission has made no change in response to this comment.

Concerning §291.93(5)(C), the commenter asked for a definition of "documented health hazards" and the phrase "funded by the utility without reimbursement."

Section 291.93(5)(C) refers to requirements in §290.44(h) of this title (relating to Water Distribution). Documented health hazards are currently defined in §290.44(h) as being those listed in American Water Works Association Manual M14. However, there are changes to Chapter 290 of this title (relating to Public Drinking Water) pending approval by the commission. If adopted as proposed, a list of documented health hazards will be in a table to be found in §290.47, Appendix I.

Section 291.93(5)(C) addresses those instances when a utility chooses to implement a cross- connection control program that exceeds the minimum requirements necessary for protecting public health and for complying with §290.44(h) of this title. If the utility elects to exceed the minimum requirements, the incremental cost over and above the cost of meeting the minimum requirements cannot be passed on to the affected individual customer or included in the rates charged to any customer.

The commission has made no change in response to this comment.

Concerning §291.112(E)(e), the commenter objects to adding this section. The commenter wants to know why the proposed change is needed, how many times it has taken more than a year to complete a sale, and the problems caused by the delay in completing the sale.

While the commenter refers to §291.112(E)(e), the comments made address the addition of §291.112(e).

Texas Water Code §13.251 requires the commission to consider the factors found in Texas Water Code §13.246(c) before a certificate of convenience and necessity can be sold, assigned, or leased. The requirements found in §13.246(c) include consideration "...of the need for additional service in the requested area,

the effect of granting the certificate on the recipient of the certificate and on any retail public utility of the same kind already serving the proximate area, the ability of the applicant to provide adequate service, the feasibility of obtaining service from an adjacent retail public utility, the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio, environmental integrity, and the probable improvement of service or lowering of cost to consumers in that area resulting from the granting of the certificate." It is the commission's position that the ability of an applicant to comply with many of these requirements can change significantly in a year. It is, therefore, not an issue of how many times this has happened, but of ensuring that the commission does not approve the application of an applicant who can no longer meet the requirements found in §13.246(c). Section 291.112(e) does allow the applicant to request from the executive director an extension of time to consummate the sale.

The commission has made no change in response to this comment.

With respect to §291.93, staff discovered during the comment period that this section needed to be modified to clarify the conditions under which a utility is required to provide notice of water use restrictions to the executive director in accordance with §288.20 of this title (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers).

The changes are designed to make this provision less restrictive. As proposed, utilities would have to notify the executive director every time that any type of water use restrictions were implemented. The requirements in §288.20 only require notification when mandatory water use restrictions are implemented.

The commission has made changes to this section to modify the language to require notice to the executive director only when a utility implements mandatory water use restrictions.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §291.3

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; TWC, §13.250, which requires a retail public utility that possesses a certificate of convenience and necessity to provide continuous and adequate service within its certified area; TWC, §13.241, which establishes requirements for granting certificates of convenience and necessity, and requirements for developing a standardized method for determining the financial, managerial, and technical capacity of a retail public utility; TWC, §13.246, which establishes requirements pertaining to applications for certificates of public convenience and necessity; TWC, §13.136, which requires utilities to file tariffs of rates, rules and regulations and annual financial reports; TWC, §13.187(a), which requires the commission to regulate utility rate changes; TWC, §11.1272, which requires the commission to adopt rules requiring public water suppliers to adopt drought contingency plans; TWC, §13.137, which requires every utility to have an office where it keeps all its books, accounts, records, and memoranda required by the commission to be kept in this state; TWC, §§11.036, 11.041, and 12.013, pertaining to the commission's jurisdiction to consider the rate charged in a contract for the resale cost of water; and TWC, §13.043(f), pertaining to the commission's appellate jurisdiction to consider the water or sewer service rate charged by one retail public utility to another.

The amendments implement TWC, Chapters 11, 12, and 13.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006806
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 239-5017

♦ ♦ ♦

SUBCHAPTER B. RATES, RATE MAKING, AND RATES/TARIFF CHANGES

30 TAC §§291.21, 291.26, 291.32

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; TWC, §13.136, which requires utilities to file tariffs of rates, rules and regulations and annual financial reports; TWC, §13.187(a), which requires the commission to regulate utility rate changes; and TWC, §11.1272, which requires the commission to adopt rules requiring public water suppliers to adopt drought contingency plans.

The amendments implement TWC, Chapters 11 and 13.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006807
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 239-5017

♦ ♦ ♦

SUBCHAPTER D. RECORDS AND REPORTS

30 TAC §291.74

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; and TWC, §13.137, which requires every utility to have an office where it keeps all its books, accounts, records, and memoranda required by the commission to be kept in this state.

The amendments implement TWC, Chapter 13.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006808
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 239-5017

♦ ♦ ♦

SUBCHAPTER E. CUSTOMER SERVICE AND PROTECTION

30 TAC §§291.81, 291.83, 291.85 - 291.89

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; and TWC, §13.250, which requires a retail public utility that possesses a certificate of convenience and necessity to provide continuous and adequate service within its certified area.

The amendments implement TWC, Chapter 13.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006809
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 239-5017

♦ ♦ ♦

SUBCHAPTER F. QUALITY OF SERVICE

30 TAC §291.93

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; and under TWC, §13.250, which requires a retail public utility that possesses a certificate of convenience and necessity to provide continuous and adequate service within its certified area.

The amendments implement TWC, Chapter 13.

§291.93. Adequacy of Water Utility Service.

Sufficiency of service. Each retail public utility which provides water service shall plan, furnish, operate, and maintain production, treatment, storage, transmission, and distribution facilities of sufficient size and capacity to provide a continuous and adequate supply of water for all reasonable consumer uses.

(1) The water system quantity and quality requirements of the commission shall be the minimum standards for determining the sufficiency of production, treatment, storage, transmission, and distribution facilities of water suppliers and the safety of the water supplied for household usage. Additional capacity shall be provided to meet the reasonable local demand characteristics of the service area, including reasonable quantities of water for outside usage and livestock.

(2) In cases of drought, periods of abnormally high usage, or extended reduction in ability to supply water due to equipment failure, to comply with a state agency or court order on conservation or other reasons identified in the utility's approved drought contingency plan required by §288.20 of this title (relating to Drought Contingency Plans for Municipal Uses by Public Water Suppliers), restrictions may be instituted to limit water usage in accordance with the utility's approved drought contingency plan. For utilities, these temporary restrictions must be in accordance with an approved drought contingency plan. Unless specifically authorized by the executive director, retail public utilities may not use water use restrictions in lieu of providing facilities which meet the minimum capacity requirements of the commission's rules in Chapter 290 of this title (relating to Rules and Regulations for Public Water Systems), or reasonable local demand characteristics during normal use periods, or when the system is not making all immediate and necessary efforts to repair or replace malfunctioning equipment.

(A) An approved drought contingency plan must be on file with the utility's approved tariff to comply with §288.20 of this title. The utility may not implement mandatory water use restrictions without an approved drought contingency plan unless authorized by the executive director.

(B) Temporary restrictions must be in accordance with the utility's approved drought contingency plan on file or specifically authorized by the executive director. The utility shall file a status report with the executive director in accordance with the requirements and time frames in the drought contingency plan for as long as water use restrictions continue or as required by the executive director. The executive director may suspend implementation of the restrictions at any time with written notice to the utility.

(C) The utility must provide written notice to each customer in accordance with the drought contingency plan prior to implementing the provisions of the plan. Mailed notice is acceptable and water use restrictions may be enforced by the utility if notice is mailed 72 hours prior to the start of rationing. If notice is hand delivered, the utility cannot enforce the provisions of the plan for 24 hours after notice is provided unless authorized by the executive director. Customer notice must contain:

(i) the date water use restrictions is to begin;

(ii) the expected duration of the water use restrictions;

(iii) the restrictions or stage of the plan being implemented and the specific restrictions which apply; and

(iv) the penalties for violations of the drought contingency plan.

(D) Notice shall be provided to the commission in accordance with §288.20(b) of this title and prior to implementing the mandatory provisions of the plan.

(3) A retail public utility that possesses a certificate of public convenience and necessity that has reached 85% of its capacity as compared to the most restrictive criteria of the commission's minimum capacity requirements in Chapter 290 of this title shall submit to the executive director a planning report that clearly explains how the retail public utility will provide the expected service demands to the remaining areas within the boundaries of its certificated area. A report is not required if the source of supply available to the utility service provider is reduced to below the 85% level due to a court or agency conservation order unless that order is expected to extend for more than 18 months from the date it is entered in which case a report shall be required.

(A) After any commission field inspection, a retail public utility must analyze the system's capacity to determine if it has reached 85% of its capacity. If the retail public utility has reached 85% of its capacity, it must file this report no later than 90 days after the date of a commission letter detailing the results of the inspection. Capacity is considered to be the overall rated capacity in number of residential connection equivalents based on the most restrictive criteria for production, treatment, storage, or pumping.

(B) The report should be submitted in writing and should contain the following:

(i) a brief description of the overall utility system and service area;

(ii) an analysis of the plant capacity as defined in subparagraph (A) of this paragraph;

(iii) details on how the retail public utility will provide service to the remaining areas within the boundaries of its certificated area. This includes projections of cost and expected design and installation dates for additional facilities.

(C) The executive director may waive or limit the reporting requirements if the retail public utility demonstrates that the projected growth of the area will not require the retail public utility to exceed 100% of its current capacity for the next five years.

(D) Any retail public utility required to file reports under this section of the rules, including those requesting waivers, shall file updated reports within 90 days after the retail public utility receives a copy of each subsequent commission field inspection report until the system demand is below 85% capacity.

(E) Submission of this report shall not relieve the retail public utility from abiding by the requirements of other regulatory agencies as set forth in §291.92 of this title (relating to Requirements by Others).

(4) Each retail public utility which possesses or is required to possess a certificate of convenience and necessity shall furnish safe water which meets the minimum quality criteria for drinking water prescribed by the commission. The supply must meet the requirements of Health and Safety Code, §341.031 and commission rules. A utility or water supply corporation which is authorized to operate without a certificate of convenience and necessity pursuant to Health and Safety Code, §13.242(c) may be required by the executive director to meet the minimum criteria prescribed by the commission if so instructed in writing.

(5) In order to protect the public health at all times, each retail public utility must promptly take all reasonable actions necessary which include implementing an effective cross-connection control program necessary to comply with §290.44(h) of this title (relating to Water Distribution). If a utility elects to develop and implement a program that exceeds the minimum requirements set forth in §290.44(h) of this title, it must secure the prior approval of the executive director and may be required to fund any expenses above the costs associated with meeting the minimum requirements without reimbursement. For example, a requirement that customers on systems without documented health hazards have backflow prevention assemblies tested on an annual basis would need to be funded by the utility without reimbursement.

(6) Every retail public utility shall maintain its facilities to protect them from contamination, ensure efficient operation, and promptly repair leaks.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006810
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 239-5017

♦ ♦ ♦

SUBCHAPTER G. CERTIFICATES OF CONVENIENCE AND NECESSITY

30 TAC §§291.102, 291.106, 291.112

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; TWC, §13.241, which establishes requirements for granting certificates of convenience and necessity, and requirements for developing a standardized method for determining the financial, managerial, and technical capacity of a retail public utility; and TWC, §13.246, which establishes requirements pertaining to applications for certificates of public convenience and necessity.

The amendments implement TWC, Chapter 13.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006811
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 239-5017

♦ ♦ ♦

SUBCHAPTER I. WHOLESALE WATER OR SEWER SERVICE

30 TAC §§291.128, 291.131, 291.132, 291.134

STATUTORY AUTHORITY

The amendments are adopted under TWC, §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under the TWC and other laws of the state; TWC, §13.041(b), which requires the commission to adopt rules reasonably required to exercise its jurisdiction; TWC, §§11.036, 11.041, and 12.013, pertaining to the commission's jurisdiction to consider the rate charged in a contract for the resale cost of water; and TWC, §13.043(f), pertaining to the commission's appellate jurisdiction to consider the water or sewer service rate charged by one retail public utility to another.

The amendments implement TWC, Chapters 11, 12, and 13.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 29, 2000.

TRD-200006812
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Effective date: October 19, 2000
Proposal publication date: June 30, 2000
For further information, please call: (512) 239-5017

♦ ♦ ♦

TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER L. MOTOR FUEL TAX

34 TAC §3.185

The Comptroller of Public Accounts adopts an amendment to §3.185, concerning diesel tax prepaid user permit, without changes to the proposed text as published in the August 11, 2000, issue of the *Texas Register* (25 TexReg 7606).

The 76th Legislature, 1999, in Senate Bill 1547, amended Tax Code, Chapter 153, to limit the diesel tax prepaid user permit to users whose use of diesel fuel is predominately for a nonhighway agricultural purpose. The amendment to this section adds a new subsection defining agricultural nonhighway purpose.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which authorizes the comptroller 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, §153.210.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 28, 2000.

TRD-200006788
Martin Cherry
Deputy General Counsel for Tax Policy and Agency Affairs
Comptroller of Public Accounts
Effective date: October 18, 2000
Proposal publication date: August 11, 2000
For further information, please call: (512) 463-4062

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. TEXAS DEPARTMENT OF HUMAN SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION
SUBCHAPTER T. ADMINISTRATION

40 TAC §19.1926

The Texas Department of Human Services (DHS) adopts new §19.1926, without changes to the proposed text published in the August 4, 2000 issue of the *Texas Register* (25 TexReg 7330).

The justification for the new section is to delineate the responsibilities nursing facilities have when they contract with a hospice provider because there has been some confusion in this area. The new section addresses the content of the contract between the nursing facility and hospice, the responsibilities of both providers, the plan of care, and the documentation that must be a part of the nursing facility's clinical records.

The department received no comments regarding adoption of the new section.

The new section is adopted under the Human Resources Code, Title 2, Chapters 22 and 32, which authorizes the department to administer public and medical assistance programs and under Texas Government Code §531.021, which provides the Health and Human Services Commission with the authority to administer federal medical assistance funds.

The new section implements the Human Resources Code, §§22.001-22.030 and §§32.001-32.042.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 27, 2000.

TRD-200006786
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: December 1, 2000
Proposal publication date: August 4, 2000
For further information, please call: (512) 438-3108

♦ ♦ ♦

CHAPTER 48. COMMUNITY CARE FOR AGED AND DISABLED
SUBCHAPTER F. IN-HOME AND FAMILY SUPPORT PROGRAM

40 TAC §48.2703

The Texas Department of Human Services (DHS) adopts an amendment to §48.2703 without changes to the proposed text published in the August 4, 2000, issue of the *Texas Register* (25 TexReg 7343).

The justification for the amendment is to exempt certain sources of income from calculations used to determine eligibility for the In-Home and Family Support Program (IHFSP). The department has reviewed its eligibility rules for simplicity and consistency across programs. Because the exemptions are similar to income exemptions in Community Care for Aged and Disabled and Medicaid Eligibility, the proposed rule change will allow for consistency across programs.

The department received no comments regarding the adoption of the amendment.

The amendment is adopted under the Human Resources Code, Title 2, Chapters 22 and 35, which authorizes the department to administer public assistance and support services for persons with disabilities.

The amendment implements the Human Resources Code, §§22.001- 22.030 and §§35.001-35.012.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on September 27, 2000.

TRD-200006785
Paul Leche
General Counsel, Legal Services
Texas Department of Human Services
Effective date: November 1, 2000
Proposal publication date: August 4, 2000
For further information, please call: (512) 438-3108

♦ ♦ ♦

PART 5. VETERANS LAND BOARD

CHAPTER 177. VETERANS HOUSING ASSISTANCE PROGRAM

40 TAC §§177.1, 177.5, 177.6

The Veterans Land Board of the State of Texas (the "Board") adopts the amendments to §177.1, relating to Definitions, §177.5, relating to Loan Eligibility Requirements and §177.6, relating to Application Procedures. Section 177.1 and §177.5 are being adopted with changes to the proposed text as published in the July 21, 2000, issue of the *Texas Register* (25 TexReg 6943). Section 177.6 is being adopted without changes and will not be republished. The Board voted to adopt these amendments at its regularly scheduled meeting on September 14, 2000.

Four non-substantive, editorial changes appeared in the published version of the rules and have been corrected. In §177.1(11) the word "foresee" has been changed to correctly read "force" and in §177.5(d) the word "land" was inserted between the words "the" and "program." In §177.5(c)(4) and §177.5(d) minor spacing and punctuation corrections were made.

The adopted amendments to these rules address the eligibility of persons to participate in the Veterans Housing Assistance Program and the Veterans Home Improvement Program ("the programs"), and procedures for applying for loan benefits in those programs. In order to be approved for a loan in the programs, the applicant must: (1) be certified as an eligible Texas veteran, as defined in Chapter 177, and (2) satisfactorily complete all loan approval requirements of the Board and the participating lending institution, if any.

Section 177.1, relating to Definitions, defines terms used in all other sections of Chapter 177. The adopted amendment deleted the definition for "Commission" (the Texas Veterans Commission), corrected the meaning of the term "VA" and added a definition for the term "missing in action."

Section 177.5, relating to Loan Eligibility Requirements, describes loan eligibility requirements for the programs. The adopted amendment deleted all references to the Texas Veterans Commission (TVC), deleted the requirement that loan applicants be citizens of the United States, increased the scope of eligibility to include members of the reserves of the various military branches of the United States and to include the spouses of those missing in action. The adopted amendment also deleted repetitive language and clarified the eligibility of persons who have previously participated in any of the loan programs of the Board, and the maximum total loan available to spouses who are both individually eligible and wish to combine two loans on a single home.

Section 177.6, relating to Application Procedures, describes loan application procedures for the programs. The adopted amendment deleted all references to the Texas Veterans Commission and further provides that the Board may adopt resolutions from time to time that describe specific guidelines and procedures for processing and approving loan applications in the programs.

The adopted amendments now will transfer all eligibility certification functions that were previously performed by the TVC to the Board, clarifies the description of persons eligible to participate in the programs, and allows the Board to adopt resolutions that implement loan application and processing procedures.

No comments were received regarding the adoption of the proposed amendments.

The amendments are adopted under the Natural Resources Code, Title 7, Chapter 162, Subchapter A, §162.003, which provides authorization for the Board to contract with other agencies or with private entities to administer all or part of the programs, set and collect reasonable fees, and adopt rules governing the administration of the programs.

Natural Resources Code §§162.001(a)(8), 162.003(a)(2), 164.002(a)(6), and 164.003 are affected by this adopted action.

§177.1. Definitions.

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

(1) Administrator--The entity appointed by the board to assist the board in administering the processing of loan applications under these sections.

(2) Board--The Veterans Land Board of the State of Texas.

(3) Bona fide resident--An individual actually living within the State of Texas with the intention to so remain.

(4) Chairman--The commissioner of the General Land Office who is also chairman of the Veterans Land Board.

(5) Covenants--The bond covenants undertaken by the Veterans Land Board in association with the sale of bonds.

(6) FHA--The Federal Housing Administration of the Department of Housing and Urban Development of the United States of America or any successor thereto.

(7) FHLMC--Federal Home Loan Mortgage Corporation or any successor thereto.

(8) FNMA--Federal National Mortgage Association or any successor thereto.

(9) FSLIC--The Federal Savings and Loan Insurance Corporation.

(10) Fund--The veterans housing assistance fund.

(11) Missing/Missing in Action -- To have an official designation of "missing status" as provided by Title 37, Chapter 10 of the United States Code. The term "missing status" means the status of members of a uniformed service who are officially carried or determined to be absent in a status of missing; missing in action; interned in a foreign country; captured, beleaguered, or besieged by a hostile force; or detained in a foreign country against their will.

(12) Participating lending institution--Any bank, trust company, savings bank, national banking association, savings and loan association, building and loan association, mortgage banker, mortgage company, credit union, life insurance company, or other financial institution that customarily provides services or aids in the financing of mortgages on single-family residential housing, including a holding company for any of the foregoing, which has sought and received approval to participate in the Veterans Housing Assistance Program.

(13) Program--The Veterans Housing Assistance Program.

(14) VA--The United States Department of Veterans Affairs or any successor thereto.

(15) VA guaranty--A guaranty of a mortgage loan by the VA under the Serviceman's Readjustment Act of 1944 as amended.

§177.5. Loan Eligibility Requirements.

(a) The Veterans Land Board (board) shall be the final authority in defining and interpreting all eligibility requirements, and whether a veteran loan applicant has actually satisfied those requirements. The board may prescribe the procedures and forms to be used by veteran loan applicants to evidence eligibility.

(b) For purposes of this program a veteran is someone who:

(1) is at least 18 years of age;

(2) is a bona fide resident of Texas at the time of application for a loan. For purposes of this chapter, bona fide resident means a person actually living in the State of Texas, with the intention to remain;

(3) meets the following service requirements:

(A) has served not less than 90 continuous days of active duty or active duty training time in the Army, Navy, Air Force, Coast Guard, Marine Corps, United States Public Health Service, or the reserve component of one of the listed branches of service, unless discharged earlier because of a service-connected disability, which service must have been after September 16, 1940; or

(B) has completed all initial active duty training required as a condition of the enlistment or appointment in the Texas National Guard; or

(C) has at least 20 years of active or reserve military service as computed when determining the applicant's eligibility to receive retired pay under applicable federal law.

(4) has not been dishonorably discharged from military service; and

(5) was a bona fide resident of Texas at the time of enlistment, induction, commissioning, or drafting; or, has resided in Texas continuously for at least two years immediately before the date of application for a loan;

(A) for purposes of determining if an applicant has resided in Texas for two continuous years preceding the date of application, the board may require an affidavit from the applicant setting forth residence addresses for this two year period. In addition, the board may require the applicant to furnish documentary evidence of such residence, including, but not limited to driver's licenses, voter registrations, tax receipts, W-2 forms, etc.;

(B) if there is doubt about an applicant's bona fide residence at time of enlistment, induction, commissioning, or drafting, the board may require that an affidavit of Texas residence be submitted to show evidence of at least two years of continuous residence in Texas immediately prior to the date of application. The board may establish other procedures for verifying that the veteran applicant was a bona fide resident of Texas at time of enlistment, induction, commissioning, or drafting;

(c) If a veteran dies after the date of filing an application for a loan and before the transaction has been completed, the surviving spouse shall be eligible to complete that transaction if the spouse otherwise meets the qualification requirements of the participating lending institution. In addition, the unmarried surviving spouse of a veteran who dies in the line of duty or is identified as missing in action shall be eligible to participate in the program if the following requirements are satisfied:

(1) the surviving spouse has not remarried and is a bona fide resident of Texas at the time of filing the application with the board;

(2) at the time of enlistment, induction, commissioning, appointment or drafting, the deceased or missing veteran was a bona fide resident of Texas (the two years residence alternative is not available);

(3) the deceased veteran had served on active duty or active duty training time in the Army, Navy, Air Force, Coast Guard, Marine Corps, Public Health Service, or reserve component of one of the listed branches of service after September 16, 1940, or enlisted or received an appointment in the Texas National Guard. The deceased veteran need not have served at least 90 continuous days of active duty; and

(4) certification is received from the VA that the unmarried surviving spouse is currently entitled to benefits as the spouse of a veteran who died in the line of duty or is missing in action. This requirement may be satisfied upon the presentation of other evidence.

(d) A veteran may be able to obtain more than one housing assistance loan under this chapter, provided that all previous Veterans Housing Assistance Program loans have been repaid in full and that only one home may be financed by a veteran at any time. However, for purposes of this chapter, an eligible veteran may obtain both a purchase money loan and a home improvement loan under the Veterans Housing Assistance Program. An eligible veteran may also receive a loan under the land program.

(e) If both a husband and wife are individually eligible to participate in the program, nothing herein shall be construed to prohibit each of them from applying for a loan to jointly purchase the same home. Therefore, the board may make two loans for the purchase of the same home by two veterans who are husband and wife, but only in the event that both spouses together satisfy the loan qualification requirements of the participating lending institution. The total amount of these two loans shall not exceed the maximum amount allowable for a similar home mortgage loan through the VA or any successor agency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 2, 2000.

TRD-200006839
Larry R. Soward
Chief Clerk, General Land Office
Veterans Land Board
Effective date: October 22, 2000
Proposal publication date: July 21, 2000
For further information, please call: (512) 305-9129

♦ ♦ ♦

PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 362. DEFINITIONS

40 TAC §362.1

The Texas Board of Occupational Therapy Examiners adopts amendments to §362.1, Definitions, without changes to the proposed text as published in the August 18, 2000 issue of the *Texas Register* (25 TexReg 8014), and will not be republished. The amendment will add a definition for a term which is used in the rules, but which is not defined.

No comments were received regarding these amendments.

The rule is adopted under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 454, Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this 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 September 26, 2000.

TRD-200006758
John P. Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Effective date: October 16, 2000
Proposal publication date: August 18, 2000
For further information, please call: (512) 305-6900

♦ ♦ ♦

TEXAS DEPARTMENT OF INSURANCE

Notification Pursuant to the Insurance Code, Chapter 5, Subchapter L

As required by the Insurance Code, Article 5.96 and 5.97, the ***Texas Register*** publishes notice of proposed actions by the Texas Board of Insurance. Notice of action proposed under Article 5.96 must be published in the ***Texas Register*** not later than the 30th day before the board adopts the proposal. Notice of action proposed under Article 5.97 must be published in the ***Texas Register*** not later than the 10th day before the Board of Insurance adopts the proposal. The Administrative Procedure Act, the Government Code, Chapters 2001 and 2002, does not apply to board action under Articles 5.96 and 5.97.

The complete text of the proposal summarized here may be examined in the offices of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas 78714-9104.)

This notification is made pursuant to the Insurance Code, Article 5.96, which exempts it from the requirements of the Administrative Procedure Act.

Texas Department of Insurance

Proposed Action

The Commissioner of Insurance, at a public hearing under Docket No. 2469 on November 9, 2000, at 10:00 a.m., in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a staff petition. Staff's petition requests amendments to the Texas Automobile Rules and Rating Manual (Manual) regarding Private Passenger Personal Injury Protection (PIP) and Medical Payments (MP) coverages. Staff's petition (Ref. No. A-1000-24-I), was filed on October 4, 2000.

Staff proposes adoption of amendments to the Manual rules, which would clarify the rating methodology insurers should use when calculating PIP and MP insurance rates for the following vehicle classes: named non-owner; motorhomes; all-terrain vehicles; antique, collectible and special interest automobiles; dune buggies; golfmobiles; golf carts; and motorcycles. Staff's petition proposes amendments to the following Manual rules: Rule 80 in Rule Section IV; Rule 77 in Rate Section IV; Rule 120 in Rate Section VII; Rule 123 in Rate Section VII; Rule 129 in Rate Section VII; Rule 132 in Rate Section VII; and Rule 136 in Rate Section VII. The proposed amendments would conform the Manual rules to the changes in rating methodology adopted in Commissioner's Order No. 00-0909, dated August 10, 2000 (Order). In the Order, the Commissioner made determinations concerning benchmark rates and flexibility bands for private passenger and commercial automobile insurance. The rating structure for private passenger PIP and MP was changed by the Order. Previously, PIP and MP premiums were not individually calculated under the rating structure but were determined by which of six categories an associated Bodily Injury liability premium fell into. Under the new rating structure ordered by the Commissioner, premiums for PIP and MP are calculated by applying a driver class differential to a territorial base rate, an approach comparable to that currently used for the Bodily Injury and Property Damage liability coverages. Some of the current Manual rules (Rule 80 in Rule Section IV; Rule 77 in Rate Section IV; Rule 120 in Rate Section VII; Rule 123 in Rate Section VII; Rule 129 in Rate Section VII; Rule 132 in Rate Section VII; and Rule 136 in Rate Section VII) are outdated because they rely on the previous PIP and MP rating structure. Staff proposes to amend the outdated Manual rules to conform them to the new rating structure, implemented by the Order.

A copy of the petition, including exhibits with the full text of the proposed amendments to the Manual, is available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A1000-24-I).

To be considered, written comments on the proposed changes must be submitted no later than November 13, 2000, to the Office of the Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Marilyn Hamilton, Deputy Commissioner, Personal and Commercial Lines Division, Texas Department of Insurance, P.O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

TRD-200006895
Lynda Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Filed: October 4, 2000

REVIEW OF AGENCY RULES

This Section contains notices of state agency rules review as directed by Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the ***Texas Administrative Code*** on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the ***Texas Register*** office.

Agency Rule Review Plan

Texas Optometry Board

Title 22, Part 14

Filed: October 3, 2000

♦ ♦ ♦

Proposed Rule Reviews

Texas Alcoholic Beverage Commission

Title 16, Part 3

The Texas Alcoholic Beverage Commission files its notice of intention to review its rules contained in Title 16, Texas Administrative Code, Chapter 47, regarding blanket rules. This review is conducted pursuant to Appropriations Act, 1997, House Bill 1, Article IX, §167.

The commission will conduct its review through December, 2000 and will receive comments on whether the need for any rule contained within this chapter still exists and whether any of these rules require amendment. Amendments or repeal of existing rules proposed by the commission will appear in the proposed rules section of the *Texas Register* and will be acted on in accordance with normal state rule making procedures.

Comments may be directed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711.

TRD-200006824
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Filed: September 29, 2000

♦ ♦ ♦

The Texas Alcoholic Beverage Commission files its notice of intention to review its rule contained in Title 16, Texas Administrative Code, Chapter 49, regarding production of alcoholic beverages. This review is conducted pursuant to Appropriations Act, 1997, House Bill 1, Article IX, §167.

The commission will conduct its review through December 2000 and will receive comments on whether the need for the rule contained within this chapter still exists and whether the rule requires amendment. Amendments or repeal of the existing rule proposed by the commission will appear in the proposed rules section of the Texas Register and will be acted on in accordance with normal state rule making procedures.

Comments may be directed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711.

TRD-200006823
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Filed: September 29, 2000

♦ ♦ ♦

The Texas Alcoholic Beverage Commission files its notice of intention to review its rules contained in Title 16, Texas Administrative Code, Chapter 50, regarding alcohol awareness and education. This review is conducted pursuant to Appropriations Act, 1997, House Bill 1, Article IX, §167.

The commission will conduct its review through December, 2000 and will receive comments on whether the need for any rule contained within this chapter still exists and whether any of these rules require amendment. Amendments or repeal of existing rules proposed by the commission will appear in the proposed rules section of the *Texas Register* and will be acted on in accordance with normal state rule making procedures.

Comments may be directed to Lou Bright, General Counsel, Texas Alcoholic Beverage Commission, P. O. Box 13127, Austin, Texas 78711.

TRD-200006822
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Filed: September 29, 2000

♦ ♦ ♦

Texas Turnpike Authority Division of the Texas Department of Transportation

Title 43, Part 2

Notice of Intention to Review: In accordance with the General Appropriation Act of 1999, House Bill 1, Section 10.13, Article IX, and Government Code, §2001.039, as added by Senate Bill 178, 76th Legislature, the Texas Turnpike Authority (authority) of the Texas Department of Transportation files this notice of intention to review Title 43 TAC, Part 2, §§50.1-50.2, general provisions; §§50.3-50.30, governance of the authority; and §§50.32-50.33 public meetings and public access.

§50.1. The Authority.

§50.2. Definitions.

§50.3. Principal Office.

§50.4. General Powers.

§50.5. Number.

§50.6. Appointment.

§50.7. Qualifications.

§50.8. Term.

§50.9. Vacancies.

§50.10. Resignation and Removal.

§50.11. Compensation of Directors.

§50.12. Meetings.

§50.13. Quorum.

§50.14. Meetings by Telephone.

§50.15. Procedure.

§50.16. Committees.

§50.17. Notice.

§50.18. Waiver of Notice.

§50.19. Attendance as Waiver.

§50.20. Officers.

§50.21. Election and Term of Office.

§50.22. Removal and Vacancies.

§50.23. Chair.

§50.24. Vice Chair.

§50.25. Secretary.

§50.26. Treasurer.

§50.27. Administrators.

§50.28. Director.

§50.29. Assistant Secretary.

§50.30. Assistant Treasurer.

§50.32. Public Access to Board Meetings.

§50.33. Public Access to Information and Auxiliary Aids.

The authority will accept comments regarding whether the reasons for adopting these rules continue to exist. The comment period will last 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this rule review may be submitted in writing to Teresa Lemons, Director of Finance and Administration, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2438, or at (512) 936-0980.

TRD-200006901
Phillip Russell
Director
Texas Turnpike Authority Division of the Texas Department of Transportation
Filed: October 4, 2000

Adopted Rule Review

Texas Alcoholic Beverage Commission

Title 16, Part 3

The Texas Alcoholic Beverage Commission adopts the review of Title 16, Texas Administrative Code, Chapter 45, governing marketing practices as published in the February 4, 2000, edition of the *Texas Register* (25 TexReg 823).

The commission finds that the reasons for adopting the rules contained within this chapter continues to exist.

No comments were received regarding the review of Chapter 45.

TRD-200006825
Doyne Bailey
Administrator
Texas Alcoholic Beverage Commission
Filed: September 29, 2000

Texas Natural Resource Conservation Commission

Title 30, Part 1

The Texas Natural Resource Conservation Commission (commission) adopts the rules review and readopts Chapter 114, Control of Air Pollution from Motor Vehicles, in accordance with Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. The review must include an assessment of whether the reasons for the rules continue to exist. The proposed notice of intention to review was published in the July 21, 2000, issue of the *Texas Register*(25 TexReg 6986).

CHAPTER SUMMARY

Chapter 114 requires control of air pollution from motor vehicles and was initially adopted on October 30, 1973. Since its adoption, Chapter 114 has gone through numerous revisions. A completely reformatted Chapter 114 was adopted on November 7, 1997, to ensure consistency with commission guidelines on format, style, and tone. The reformatting arranged the rules into program- specific subchapters and renumbered the sections to create a more logical organization. Currently, the chapter contains nine subchapters. Subchapter A, Definitions, contains the definitions for the entire chapter. Subchapter B, Motor Vehicle Anti-Tampering Requirements, contains the requirements for the maintenance and operation of motor vehicle emission controls as well as certain exclusions and exceptions. Subchapter C, Vehicle Inspection and Maintenance, contains the requirements for the vehicle inspection and maintenance program. Subchapter D, Oxygen Requirements for Gasoline, contains the oxygenated fuel requirements for persons supplying, selling, or dispensing gasoline in the affected county. Subchapter E, Low Emission Vehicle Fleet Requirements, contains the low emission vehicle fleet program requirements for mass transit authorities, local

governments, and private entities. Subchapter F, Mobile Emission Reduction Credits, has two divisions: Division 1, Mobile Emission Reduction Credits, which contains the requirements for the mobile emission reduction credits program, and Division 2, Vehicle Scrappage Program, which contains the requirements for voluntary accelerated vehicle retirement. Subchapter G, Transportation Planning, contains a memorandum of understanding with the Texas Department of Transportation and requirements for transportation conformity and transportation control measures. Subchapter H, Low Emission Fuels, has two divisions: Division 1, Gasoline Volatility, which contains requirements for persons storing or handling gasoline in an affected county, and Division 2, Low Emission Diesel, which contains requirements for persons selling, storing, or handling diesel fuel in an affected county. Subchapter I, Non-Road Engines, has four divisions: Division 1, Airport Ground Support Equipment, which contains requirements for the owners and operators of ground support equipment at subject airports in affected counties; Division 2, Heavy Equipment Fleets - Compression-Ignition Engines, which contains requirements for the owners and operators of subject non-road equipment powered by compression-ignition engines; Division 3, Non-Road Large Spark-Ignition Engines, which contains emission specifications and control requirements for new non-road, large spark-ignition engines used or sold in an affected county; and Division 4, Construction Equipment Operating Restrictions, which contains requirements for persons operating construction equipment in an affected county.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission determined that the reasons for the rules in Chapter 114 continue to exist. The rules are needed to control the formation of ground-level ozone; to reduce emissions of hazardous air pollutants; to reduce emissions of oxides of nitrogen, volatile organic compounds, and other pollutants for counties included in designated nonattainment areas which must demonstrate attainment with the national ambient air quality standards (NAAQS); and to implement requirements of the Federal Clean Air Act, Title 42 of the United States Code (42 USC), and the Texas Health and Safety Code, Chapter 382, Texas Clean Air Act (TCAA).

The mobile source control program rules contained in Chapter 114 were specifically developed to meet the NAAQS set by the United States Environmental Protection Agency (EPA) under 42 USC, §7409; therefore, the rules meet a federal requirement. States are primarily responsible for ensuring attainment and maintenance of NAAQS once the EPA has established those standards. Under 42 USC, §7410 and related provisions, states must submit state implementation plans (SIPs) for EPA approval that provide for the attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. These control programs were developed specifically to meet the air quality standards established under federal law as NAAQS, although some of the rules are not expressly required by state law. Generally, the Chapter 114 rules also implement Texas Health and Safety Code, TCAA, §382.002, relating to Policy and Purpose; §382.011, relating to General Powers and Duties; §382.012, relating to State Air Control Plan; §382.019, relating to Methods Used to Control and Reduce Emissions from Land Vehicles; and §382.039, relating to Attainment Program. State and federal statutes and regulations implemented more specifically by a particular subchapter or section are discussed in the following paragraphs.

Subchapter C, Vehicle Inspection and Maintenance, §§114.50 - 114.53 implement TCAA, §§382.037 - 382.0375, Vehicle Emissions Inspection and Maintenance Program; 42 USC, §7511a(c)(3), Enhanced Vehicle Inspection and Maintenance Program; and Title 40 of the Code of Federal Regulations (40 CFR), Part 51, Subpart S, Inspection/Maintenance Program Requirements. Subchapter D, Oxygen Requirements for Gasoline, §114.100 implements 42 USC, §7545(m), Oxygenated Fuels. The rules contained in Subchapter E, Low Emission Vehicle Fleet Requirements, implement 42 USC, §7511a(c)(4), Clean-Fuel Vehicle Programs; 42 USC, §7586, Centrally Fueled Fleets; and 40 CFR, Part 88, Clean Fuel Vehicles. Additionally in Subchapter E, §114.150 implements TCAA, §382.133, Mass Transit Fleet Vehicles; §114.151 implements TCAA, §382.134, Local Government and Private Fleet Vehicles; §114.153 and §114.154 implement TCAA, §382.136, Exceptions; §114.155 and §114.156 implement TCAA, §382.137, Data Collection; and §114.157 implements TCAA, §382.142, Program Compliance Credits. Subchapter F, Division 1, Mobile Emission Reduction Credits, §114.201 and §114.202 implement TCAA, §382.143, Texas Mobile Emissions Reduction Credit Program. Subchapter G, Transportation Planning, §114.250 implements TCAA, §382.035, Memorandum of Understanding; §114.260 implements 40 CFR, Part 93, Subpart A, Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded, or Approved Under Title 23 United States Code or the Federal Transit Laws; and §114.270 implements requirements relating to transportation control measures as required by 42 USC, §7408(e) and (f) and §7511a(c)(5).

PUBLIC COMMENT

The public comment period closed on August 21, 2000, and no comments were received.

TRD-200006804
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: September 29, 2000

♦ ♦ ♦

The Texas Natural Resource Conservation Commission (commission) adopts the rules review and readopts Chapter 344, Landscape Irrigators, in accordance with Texas Government Code, §2001.039, and the General Appropriations Act, Article IX, §9 - 10.13, 76th Legislature, 1999, which require state agencies to review and consider for readoption each of their rules every four years. A review must include an assessment of whether the reasons for the rules continue to exist. The proposed notice of intention to review was published in the July 21, 2000, issue of the *Texas Register* (25 TexReg 6987).

CHAPTER SUMMARY

Chapter 344 provides standards for the connection of landscape irrigation systems to public and private water supplies, water conservation, irrigation system design and installation, and conformance with municipal codes. Additionally, Chapter 344 establishes procedures for the registration of licensed irrigators and licensed installers, and establishes the requirements for training and renewal of licenses.

ASSESSMENT OF WHETHER THE REASONS FOR THE RULES CONTINUE TO EXIST

The commission determined that the reasons for the rules in Chapter 344 continue to exist. The rules are needed to implement provisions of state law including Texas Water Code (TWC), Chapter 34, Irrigators. More specifically, TWC, §34.006, requires the commission to adopt rules governing the conduct of its business and proceedings authorized under this chapter and to adopt standards governing connections to public and private water supplies by a licensed irrigator or by a licensed installer. The section further authorizes the commission to adopt standards for landscape irrigation including water conservation,

irrigation system design, and conformance with municipal codes by a licensed irrigator or a licensed installer.

The commission's review of Chapter 344 revealed a number of provisions which require clarification or elimination as well as some provisions which may be modified to improve program efficiency. The commission intends to consider correction of these items during another rulemaking in the future. Possible changes include clarification of the duties and responsibilities of license holders, elimination of the requirement to provide the commission with a copy of the licensee's stamp or seal prior to issuing the license, and establishment of renewals based on the anniversary date.

PUBLIC COMMENT

The public comment period closed on August 21, 2000, and no comments were received.

TRD-200006805
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: September 29, 2000

TABLES & GRAPHICS

Graphic material from the emergency, proposed, and adopted sections is published separately in this tables and graphics section. Graphic material is arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic material is 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: 28 TAC §3.1607(b)(7)

This opinion is provided in accordance with 28 TAC §3.1607. As such it does not include an opinion regarding the adequacy of reserves and related actuarial items when considered in light of the assets which support them.
Eligibility to submit under §3.1607 is confirmed as follows:

The ratio of the sum of capital and surplus to the sum of cash and invested assets is (insert amount), which equals or exceeds the applicable criterion based on the admitted assets of the company (28 TAC §3.1606(c)).

The ratio of the sum of the reserves and liabilities for annuities and deposits to the total admitted assets is (insert amount), which is less than the applicable criteria based on the admitted assets of the company (28 TAC §3.1606(c)).

The ratio of the book value of the non-investment grade bonds to the sum of capital and surplus is (insert amount), which is less than the applicable criteria of .50.

To my knowledge there is not a specific request from any commissioner requiring an asset adequacy analysis opinion.

_____
Signature of Appointed Actuary

_____
Address of Appointed Actuary

_____
Telephone Number of Appointed Actuary

Figure: 28 TAC §3.1608(b)(6)

In my opinion the reserves and related actuarial values concerning the statement items identified above:
are computed in accordance with appropriate actuarial standards consistently applied and are fairly stated, in accordance with sound actuarial principles;
are based on actuarial assumptions which produce reserves at least as great as those called for in any contract provision as to reserve basis and method, and are in accordance with all other contract provisions;
meet the requirements of the insurance law and regulations of the state of (state of domicile) and are at least as great as the minimum aggregate amounts required by the state in which this statement is filed;
are computed on the basis of assumptions consistent with those used in computing the corresponding items in the annual statement of the preceding year-end (with any exceptions as noted below); and
include provision for all actuarial reserves and related statement items which ought to be established.
The reserves and related items, when considered in light of the assets held by the company with respect to such reserves and related actuarial items including, but not limited to, the investment earnings on such assets, and the considerations anticipated to be received and retained under such policies and contracts, make adequate provision, according to appropriate actuarial standards of practice, for the anticipated cash flows required by the contractual obligations and related expenses of the company.
The actuarial methods, considerations and analyses used in forming my opinion conform to the appropriate Standards of Practice as adopted by the Actuarial Standards Board which standards form the basis of this statement of opinion.
This opinion is updated annually as required by statute. To the best of my knowledge, there have been no material changes from the applicable date of the annual statement to the date of the rendering of this opinion which should be considered in reviewing this opinion.
(or)
The following material change(s) which occurred between the date of the statement for which this opinion is applicable and the date of this opinion should be considered in reviewing this opinion: (Describe the change or changes.)
Choose whichever of the two immediately preceding statements is appropriate.
The impact of unanticipated events subsequent to the date of this opinion is beyond the scope of this opinion. The analysis of asset adequacy portion of this opinion should be viewed recognizing that the company's future experience may not follow all the assumptions used in the analysis.

_____
Signature of Appointed Actuary

_____
Address of Appointed Actuary

_____
Telephone Number of Appointed Actuary

Figure: 40 TAC §48.2614(b)

Copay Schedule for the Consumer-Managed Personal Assistance Services (CMPAS) Program

Monthly Net Income	Copay (as % of Billed Services)
$1,200.01-$1,350.00	3%
$1,350.01-$1,400.00	5%
$1,400.01-$1,600.00	7%
$1,600.01-$1,800.00	10%
$1,800.01-$2,000.00	15%
$2,000.01-$2,200.00	22%
$2,200.01-$2,400.00	30%
$2,400.01-$2,600.00	35%
$2,600.01-$2,800.00	40%
$2,800.01-$3,000.00	45%
$3,000.01-$3,300.00	50%
$3,300.01-$3,600.00	55%
$3,600.01-$4,000.00	60%
$4,000.01-$4,400.00	65%
$4,400.01-$4,800.00	70%
$4,800.01-$5,200.00	75%
$5,200.01-$5,600.00	80%
$5,600.01-$6,000.00	85%
$6,000.01-$6,500.00	90%
$6,500.01-$7,000.00	95%
$7,000.01-$7,500.00	Full Pay

Figure: 43 TAC §31.11(b)(1)(B)(ii)

$$D = T \times F/A$$

"D" The amount distributed to a designated recipient.

"T" The total amount allocated under this subparagraph for a fiscal year of the state.

"F" The amount of federal public transportation money available to the state through the federal formula grant program for areas other than urbanized areas in accordance with 49 U.S.C. §5311, including money transferred for that purpose in accordance with 49 U.S.C. §5307, that was approved during the state's preceding fiscal year for the designated recipient.

"A" The amount of federal public transportation money available to the state through the federal formula grant program for areas other than urbanized areas in accordance with 49 U.S.C. §5311, including money transferred for that purpose in accordance with 49 U.S.C. §5307, that was approved during the state's preceding fiscal year for all designated subrecipients eligible to receive money under this subparagraph.

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, changes in interest rate and applications to install remote service units, and consultant proposal requests and awards.

To aid agencies in communicating information quickly and effectively, other information of general interest to the public is published as space allows.

Texas Department of Agriculture

Request for Proposals

The Texas Department of Agriculture (TDA) is publishing this request for proposals (RFP) to obtain consultant services of business process mapping, analysis and improvement techniques. TDA is committed to improving its business processes to better serve its customers. To this end, TDA requests proposals to provide business process mapping, analysis and improvement techniques as described in this RFP.

1. Background. There are seven major divisions within the Texas Department of Agriculture. Each Division will be analyzed and have all of its processes mapped with various mapping techniques. The order in which the analysis will be conducted is: Finance & Agribusiness Development, Marketing & Promotion, Pesticide Programs, Regulatory Programs, Producer Services, General Counsel, and Regional Offices (5).

In order to meet the target date for implementation, TDA is adhering to the following time schedule. The successful respondent, if any, shall assist the TDA in meeting this schedule for the required services on and after October 30, 2000 or the effective date of any contract resulting from this RFP:

October 3, 2000 - Issuance of RFP (after 2:00 p.m. CZT)

October 18, 2000 - Deadline for Submission of Questions (2:00 p.m. CZT)

October 23, 2000 (or as soon thereafter as practical) - Electronic Posting of Official Response to Questions

October 26, 2000 - Deadline for Submission of Proposals (2:00 p.m. CZT). Late proposals will not be considered.

October 30, 2000 (or as soon thereafter as practical) - Contract Execution

December 31, 2000 (or as soon as negotiated) - Completion of Project

The above dates are subject to change. Notices of changes to items directly impacting the original RFP or proposal process will be posted electronically on the Texas Marketplace (www.marketplace.state.tx.us).

2. Contract.TDA is prepared to award a contract to a qualified respondent for services within the scope of this RFP. The TDA expects this contract to have a term from approximately October 30, 2000 through December 31, 2000. Any contract resulting from this RFP shall contain TDA's standard contract terms and conditions for these services. A copy of that language is available upon request. This RFP shall be incorporated as part of the contract and shall control over conflicting language in respondent's proposal. Time is of the essence in making a contract award and respondents that cannot agree to these terms should not respond to this RFP. Proposals in response to this RFP will be evaluated under the following criteria and weights.

Cost: 75%

Qualifications and Experience: 25%

3. Scope. The following scope will be used for this RFP.

3.1 Technical Requirements. The consulting firm who is awarded the contract will provide TDA with consultants who have had successful documented working experience mapping and analyzing business processes for Fortune 500 companies. They must demonstrate a superior knowledge of process improvement techniques and be able to lead others through process improvement. Some of the required skills are:

(1) Mapping business processes: flow charting, cause and effect diagrams;

(2) Analyzing processes for possible improvement: pareto charts, matrix diagrams;

(3) Teaching quality improvement techniques: identifying improvement opportunities, brainstorming.

3.2 Proposed Project Workplan, Project Timelines and Project Deliverables. Respondents must include the following items in their proposals:

3.2.1 An overall project workplan;

3.2.2A project timeline that includes a detailed list of tasks, the estimated amount of time required to perform each activity, and deliverables that TDA should expect to receive and retain;

3.2.3A description of all project management and how vendor will handle all services.

3.2.4 The consulting firm awarded the contract is to provide a team leader who will guide the selected TDA employees through the process analysis and mapping of one division. The consultant will also lead the remainder of the process mapping effort. The consultant will review the results of the process mapping efforts of TDA employees, provide advice and mentoring, and perform process mapping when necessary to ensure completion of the project by the deadline

3.3 Miscellaneous Matters. The successful respondent shall provide all labor, materials, and other resources necessary for completion of all work in the manner required by any contract resulting from this RFP.

The successful respondent and any subcontractors respondent might hire shall be independent contractors. Respondent and their subcontractors are solely responsible for their employees. The successful respondent shall provide adequate supervision of its employees and subcontractors in performing all work. Respondent shall provide quality assurance review of all work performed.

The successful respondent will be the sole point of contact under any contract resulting from this RFP.

The successful respondent shall ensure that all of its employees conduct themselves in a professional manner and dress in appropriate business attire at all times when on premises of any participating agency as a result of any contract resulting from this RFP. In addition, the successful respondent shall ensure that all of its employees comply with all guidelines established by TDA and other participating agencies for independent contractors providing consulting/contracted services for TDA.

The successful respondent shall perform services without interruption except as provided herein. Respondent's services must not in any way affect, void or jeopardize any license or warranty owned or rights of the State of Texas or TDA.

TDA reserves the right to accept or reject any or all proposals submitted. TDA is not under any legal or other obligation to execute a contract on the basis of this RFP or distribution of any other information. In addition, TDA is not obligated to, and will not reimburse an applicant for costs incurred in the preparation of its proposal.

4. Compensation and Payment. The successful respondent's compensation will consist of payments after completion of all services and provision of all deliverables under any contract resulting from this RFP. The payments are estimated to occur in February 2001, for successful completion of all services described in this RFP and subsequent contract, and the TDA's written acceptance of all services submitted by successful respondent. No other interim payments will be approved or made.

5. Qualifications and Experience. Each respondent must detail in its proposal the firm's experience in providing services to public sector and other entities. In addition to this experience, respondents must possess the following qualifications and experience:

Prior experience mapping and analyzing business processes for Fortune 500 companies.

Respondents must also include a detailed resume of project manager for this operation. Respondent will also provide TDA with a listing of personnel who will provide services with their response to the RFP. Respondents must identify all personnel who will provide services under or have a financial interest in any such contracts. Respondents must identify all proposed personnel who are current or former TDA or State of Texas employees. See also the disclosures required under §9 of this RFP.

6. Deadlines for Proposals. To be considered, all proposals must be submitted by 2:00 p.m. Central Zone Time ("CZT") on Friday, October 26, 2000. Proposals must be submitted to Darryl Glenn Gaona, Purchasing Supervisor, Texas Department of Agriculture, 1700 N. Congress, Room 950, Stephen F. Austin Building, Austin, Texas 78701. An original and three (3) copies of the proposal must be submitted. The TDA prefers hand or overnight delivery of the proposals. Faxed proposals will not be accepted in response to this RFP.

7. Indemnification. The successful respondent shall indemnify, save and hold harmless TDA, its officers, agents, representatives and employees, and the State of Texas, its officers, agents, representatives and employees from any and all claims, damages, losses, costs, expenses, judgments, or any other amounts, including, but not limited to, attorneys' fees and court costs, resulting from respondent's acts, errors, or omissions of respondent its agent, contractors, subcontractors or its employees, or representatives of such subcontractors. The TDA shall not indemnify, save and hold harmless respondent or any other entity for any amounts for any purpose.

8. Insurance. Within five (5) business days of receipt of notice of contract award, the successful respondent shall provide TDA with a current certificate of insurance demonstrating acceptable proof of respondent's amount of professional liability (errors and omissions) insurance coverage. The amount and terms of coverage must be satisfactory to TDA. Respondent shall also provide insurance certificates evidencing the following insurance coverages for the respondent and the respondent's employees: workers compensation and commercial general liability. The successful respondent shall maintain all such coverages during the term of this agreement. Coverage must be maintained throughout the term of the contract and must be written by insurance carriers licensed and authorized to do business in the State of Texas.

9. Disclosures; Conflicts of Interest. In submitting a proposal in response to this RFP, each respondent represents and warrants that it and its proposed personnel have no actual or potential conflict of interest in providing services to the TDA under any contract resulting from this RFP. Each respondent also represents and warrants that its provision of services under such contract would not create the appearance of impropriety. In its proposal, each respondent must disclose any existing or potential conflict of interest that respondent might have in providing services to the TDA under any contract resulting from this RFP. The TDA will decide, in its sole discretion, whether an actual or perceived conflict should result in proposal disqualification or contract termination. In addition to these disclosures, each respondent must also disclose any proposed personnel who are current or former employees of the TDA or the State of Texas. Each respondent must also disclose any proposed personnel who are related to any current or former employees of the TDA or the State of Texas. Under §2252.901, Texas Government Code, the TDA may not enter into a consulting services contract under Chapter 2254 with a former or retired employee of the agency before the first anniversary of the last date on which the individual was employed by the agency, if appropriated money will be used to make payments under the contract. Also, under §2254.033, Texas Government Code, an individual who offers to provide consulting services to TDA and who has been employed by TDA or another agency at any time during the two years preceding the making of the offer shall disclose in the offer: the nature of the previous employment with TDA or the other agency; the date the employment was terminated; and the annual rate of compensation for the employment at the time of its termination. Respondents must include in their proposals any information that is or may be pertinent to TDA's compliance with §2252.901 and §2254.033, Texas Government Code.

10. Written Questions. All questions concerning this RFP must be in writing and submitted no later than **2:00 p.m. CZT, October 18, 2000.** Questions must be faxed to (512) 463-7582, Attn.: Darryl Glenn Gaona, Purchasing Supervisor. On or before October 10 2000, TDA

will post answers to these written questions as a revision to the Texas Marketplace notice of the issuance of this RFP. This notice is posted on (www.marketplace.state.tx.us).

11. Confidential Information; Nondisclosure. All information gathered, produced, derived, obtained, analyzed, controlled or accessed by respondent in connection with this RFP or contract ("Confidential Information"), shall be and remain Confidential Information and shall not be released or disclosed by respondent without the prior written consent of TDA, which consent must specifically identify the Confidential Information to be disclosed by respondent, and the nature of the disclosure for which consent is sought. Respondent must execute and return with its proposal a Nondisclosure Agreement with TDA, in the form of **Exhibit A** to this RFP.

12. Independent Contractor. Respondent shall serve as an independent contractor in providing services under any contract resulting from this RFP. Respondent's employees shall not be construed as employees of the TDA or the State of Texas.

13. Limitation on Authority; No Other Obligations. Respondent shall have no authority to act for or on behalf of the TDA or the State of Texas except as expressly provided for in the contract; no other authority, power or use is granted or implied. Respondent may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of the TDA or the State of Texas.

14. Representations and Warranties. By signing and submitting a proposal in response to this RFP, a respondent represents and warrants to the TDA all of the following:

(a) that respondent fully understands this RFP and shall abide by the terms and conditions contained herein.

(b) that respondent is in full compliance with §231.006 of the Texas Family Code. All respondents must prepare and submit with their proposals a completed Texas Family Code Certification form, found at **Exhibit B** to this RFP.

(c) that neither respondent, nor any of its employees, agents, or representatives, including any subcontractors and employees, agents, or representatives of such subcontractors, to be assigned to the contract have been convicted of a felony criminal offense, or that, if such a conviction has occurred, respondent will fully advise the TDA as to the facts and circumstances. Failure to so certify and/or disclose may result in disqualification of any subsequent proposal or contract termination.

(d) that respondent is not currently delinquent in the payment of any franchise taxes owed the State of Texas under Chapter 171, Texas Tax Code. In addition, if respondent is an individual not residing in Texas or a business entity not incorporated in or whose principal domicile is not in Texas, the following sentence applies. Respondent represents and warrants that it holds a permit issued by the Comptroller of Public Accounts to collect or remit all state and local sales and use taxes that become due and owing as a result of the individual's or entity's business in Texas or certifies that it does not sell tangible personal property or services that are subject to the state and local sales and use tax. Under §2155.004, Texas Government Code, the individual or business entity named in its proposal represents and warrants that it is not ineligible to receive the specified contract and acknowledges that any contract awarded hereunder may be terminated and payment withheld if this representation and warranty is inaccurate.

(e) that respondent has no actual or potential conflicts of interest in providing services to the TDA under the contract and that its provision of services under the contract would not reasonably create an appearance of impropriety.

(f) that neither respondent nor any person or entity which will participate financially in the contract has received compensation for TDA for preparation of the RFP or other specifications of the contract.

(g) that respondent has not been the subject of a Deceptive Trade Practices Act or any unfair business practice administrative hearing or court suit and that respondent has not been found to be guilty of such practices in such proceedings. Respondent certifies that it has no officers who have served as officers of other entities who have been the subject of a Deceptive Trade Practices Act or any unfair business administrative hearing or court suit and that such officers have not been found to be guilty of such practices in such proceedings.

(h) that respondent shall comply with the Civil Rights Act in giving equal opportunity without regard to race, color, creed, sex or national origin.

(i) that respondent shall purchase products and materials produced in Texas when they are available at a comparable price and in a comparable period of time.

(j) that respondent shall comply with the requirements of the Americans with Disabilities Act (ADA).

15. Taxes. The successful respondent shall be solely responsible for payment of all taxes, including applicable sales taxes, resulting from its performance under any contract resulting from this RFP. The TDA shall be responsible for no such amounts. The successful respondent shall promptly respond to requests by the TDA for independent verification that respondent has paid all such taxes on behalf of respondent and its employees.

16. Release of Information and Open Records. All proposals shall be deemed, once submitted, to the property of the department. Information submitted in response to this RFP shall not be released by the department during the proposal evaluation process or prior to the awarding of a contract. After the department completes the process and a contract is awarded, proposals and information included therein may be subject to public disclosure under the Texas Open Records Act.

17. Force Majeure. Except as otherwise provided, neither respondent nor the TDA shall be liable to the other for any delay in, or failure of performance, of any requirement contained in the contract caused by force majeure. The existence of such causes of delay or failure shall extend the period of performance in the exercise of reasonable diligence until after the causes of delay or failure have been removed. Force majeure is defined as those causes generally recognized under Texas law as constituting impossible conditions. Each party must inform the other in writing with proof of receipt within three business days of the existence of such force majeure or otherwise waive this right as a defense.

18. Supporting Documents; Inspection of Records. The successful respondent shall maintain and retain supporting fiscal documents adequate to ensure that claims for contract funds are in accordance with applicable State of Texas requirements. These supporting fiscal documents will be maintained and retained by respondent for a period of four (4) years after the date of submission of the final invoices or until a resolution of all billing questions, whichever is later. The successful respondent shall make available at reasonable times and upon reasonable notice, and for reasonable periods, work papers, reports, books, records, and supporting documents pertaining to the contract for purposes of inspecting, monitoring, auditing, or evaluating by TDA or the State of Texas.

19. Dispute Resolution Processes. HB 826, 76th Legislature, added Chapter 2260 of the Government Code. Chapter 2260 prescribes dispute resolution processes for certain breach of contract claims applicable to certain contracts for goods and services. The TDA may adopt rules under Chapter 2260 as described in that statute.

If and to the extent that Chapter 2260 applies to any contract resulting from this RFP and to a specific breach of contract claim under that contract, the following shall apply:

The dispute resolution process provided for in Chapter 2260 of the Government Code shall be used, as further described herein, by TDA and respondent to attempt to resolve any claim for breach of contract made by respondent under any contract resulting from this RFP:

(a) Respondent's claim for breach of the contract that the parties cannot resolve in the ordinary course of business shall be submitted to the negotiation process provided in Chapter 2260. To initiate the process, respondent shall submit written notice, as required by Chapter 2260, to the Deputy Commissioner of TDA or his or her designee. Said notice shall also be given to all other representatives of the TDA and respondent otherwise entitled to notice under the parties' contract. Compliance by respondent with Chapter 2260 is a condition precedent to the filing of a contested case proceeding under Chapter 2260.

(b) The contested case process provided in Chapter 2260 is respondent's sole and exclusive process for seeking a remedy for an alleged breach of contract by TDA if the parties are unable to resolve their disputes under subparagraph (a) of this Section.

(c) Compliance with the contested case process provided in Chapter 2260 is a condition precedent to seeking consent to sue from the Legislature under Chapter 107, Civ. Prac. and Rem. Code. Neither the execution of the contract by TDA nor any other conduct of any representative of TDA relating to the contract shall be considered a waiver of sovereign immunity to suit.

If and to the extent that Chapter 2260 does not apply to any contract resulting from this RFP or to a specific breach of contract claim under that contract, the following shall apply:

Should a dispute arise out of any contract resulting from this RFP, TDA and respondent shall first attempt to resolve it through direct discussions in a spirit of mutual cooperation. If the parties' attempts to resolve their disagreements through negotiations fail, the dispute will be mediated by a mutually acceptable third party to be chosen by TDA and respondent within fifteen (15) days after written notice by one of them demanding mediation under this section. Respondent shall pay all costs of the mediation unless TDA, in its sole good faith discretion, approves its payment of all or part of such costs. By mutual agreement, TDA and respondent may use a non-binding form of dispute resolution other than mediation. The purpose of this section is to reasonably ensure that TDA and respondent shall in good faith utilize mediation or another non-binding dispute resolution process before pursuing litigation. TDA's participation in or the results of any mediation or another non binding dispute resolution process under this section or the provisions of this section will not be construed as a waiver by TDA of (1) any rights, privileges, defenses, remedies or immunities available to TDA as an agency of the State of Texas or otherwise available to TDA; (2) TDA's termination rights; or (3) other termination provisions or expiration dates of the contract.

Notwithstanding any other provision of this RFP or any resulting contract to the contrary, respondent shall not be excused from performance during the period any breach of contract claim or dispute is pending under either of the above processes.

20. Provision For Direct Deposit. The electronic funds transfer (EFT) provisions of Texas law were revised by H.B. 2429, which is now in effect. Depending on eligibility under the law, certain payments from the State may be directly deposited into respondent's bank account or may be made by warrant. Respondents who may be eligible for direct deposit and who wish to be paid by direct deposit, must complete the form titled "Vendor Direct Deposit Authorization" and return it as soon as possible to: Comptroller of Public Accounts, Attention: Budget and Internal Accounting Division, Accounts Payable Section, LBJ State Office Building, 111 E. 17th Street, Austin, Texas 78774.

The Claims Division of the Comptroller of Public Accounts oversees the distribution of the state payments, both warrants (paper checks) and direct deposit. For questions regarding the statewide process, you may contact the Claims Payment Processing Section, at 1-800-531-5441, ext. 6-2499 or (512) 936-2499, or send an email message to claims.division@cpa.state.tx.us.

21. No Waiver. This RFP and any contract resulting from it shall not constitute or be construed as a waiver of any of the privileges, rights, defenses, remedies, or immunities available to TDA as an agency of the State of Texas or otherwise available to TDA. The failure to enforce or any delay in the enforcement of any privileges, rights, defenses, remedies, or immunities available to TDA under this RFP, the contract or under applicable law will not constitute a waiver of such privileges, rights, defenses, remedies, or immunities or be considered as a basis for estoppel. TDA does not waive any privileges, rights, defenses, or immunities available to TDA as an agency of the State of Texas, or otherwise available to the TDA, by issuing this RFP, by entering into any contract resulting from this RFP, or by its conduct prior to or subsequent to entering into such contract.

22. No Liability Upon Termination. If any contract resulting from this RFP is terminated for any reason, TDA and the State of Texas shall not be liable to respondent for any damages, claims, losses, or any other amounts arising from or related to any such termination.

23. Prohibited Payments. SB583 added §403.055(h), Government Code. Under that law, if at any time during the term of the Contract, TDA is prohibited from issuing a warrant to respondent under §403.055, the following sentence shall apply: All of respondents' payments under the contract shall be applied toward the debt or delinquent taxes that respondent owes the State of Texas until the debt or delinquent taxes are paid in full.

Respondent shall comply with the rules adopted under §403.055(h), Texas Government Code.

24. HUB Participation. The Texas Department of Agriculture is committed to assisting historically underutilized businesses (HUBs) through the contract award process. Pursuant to the requirements of Chapter 111 of the Texas Administrative Code, a vendor must establish its good faith effort to voluntarily meet or exceed the goal set by the General Services Commission (GSC) of a minimum of 33% HUB participation in all state services contracts. The Texas Department of Agriculture may accomplish this goal either through directly contracting with HUBs or through bidding direction in the subcontracting process.

Qualified HUBs are encouraged to submit an offer. Similarly, all businesses that submit offers are encouraged to include HUBs as subcontractors and material suppliers at any tier, at any level of at least 33% of the amount of their bid. A vendor must state in its offer whether it is a HUB.

To be included as a participant in a state contract in this context, each HUB should at the time of contract award, be certified, or have applied for certification with the State of Texas through GSC. Interested vendors should contact GSC at (512) 463-5872.

A good faith effort to satisfy GSC's goals with respect to HUB participation in this procurement, shall include the following:

(a) the division of work, as set forth on the bid, into reasonable lots for the purpose of facilitating subcontracting opportunities;

(b) prior to the submission of a bid, notification to at least five (5) HUBs of the procurement, and of the vendor's intent to subcontract;

(c) under some circumstances, documenting the vendor's subcontractor selection process; and

(d) proposer maintenance of business documenting its compliance with GSC's good faith effort requirements.

Additionally, vendors must submit with their bids the completed HUB Participation Forms with HUB Checklist, **Exhibit C** to this RFP.

25. Incorporation of Exhibits. The following Exhibits A, B and C are incorporated as part of this RFP for all purposes.

Figure 1: Exhibit A - Non-Disclosure Agreement

EXHIBIT A
NON-DISCLOSURE AGREEMENT

In consideration of the Texas Department of Agriculture ("TDA") retaining the services of _____, ("Contractor") and because of the sensitivity of certain information which may come under the care and control of Contractor, both parties agree that all information regarding TDA subject to this Contract; or gathered, produced, derived or access as a result of this RFP or any resulting contract ("Confidential Information") must remain confidential subject to release only by permission of TDA, and more specifically agree as follows:

1. The Confidential Information may be used by Contractor only to assist Contractor in connection with its engagement with TDA.

2. Contractor will not, at any time, use the Confidential Information in any fashion, form, or manner except in its capacity as independent consultant to TDA.

3. Contractor agrees to maintain the confidentiality of any and all deliverables resulting from this Contract in the same manner that it protects the confidentiality of its own proprietary products of like kind.

4. The Confidential Information may not be copied or reproduced without TDA's written consent.

5. All Confidential materials made available to Contractor, including copies thereof, must be returned to TDA upon the first to occur of; (a) completion of the project, or (b) request by TDA.

6. The foregoing must not prohibit or limit Contractor use of the information (including, but not limited to, ideas, concepts, know-how, techniques and methodologies) (a) previously known to it, (b) independently developed by it, (c) acquired by it from a third party, or (d) which is or becomes part of the public domain through no breach to Contractor of this agreement.

7. This agreement shall become effective as of the date Confidential Information is first made available to Contractor and must survive the contract and be a continuing requirement.

8. The breach of this Nondisclosure Agreement by Contractor shall entitle TDA to immediately terminate the Agreement upon written notice to Contractor for such breach. The parties acknowledge that the measure of damages in the event of a breach of this Nondisclosure Agreement may be difficult or impossible to calculate, depending on the nature of the breach. Regardless of whether TDA elects to terminate the Agreement upon the breach hereof, TDA may require Contractor to pay to TDA the sum of $1,000 for each breach as liquidated damages. This amount is not intended to be in the nature of a penalty, but is intended to be a reasonable estimate of the amount of damages to TDA in the event of a breach hereof by Contractor. TDA does not waive any right to seek additional relief, either equitable or otherwise, concerning any breach of this Agreement.

[Printed Name of Contractor]

By: _____

Title: _____

Date: _____

Figure 2: Exhibit B: Texas Family Code Certification

EXHIBIT B

TEXAS FAMILY CODE CERTIFICATION

If a respondent is on the General Services Commission's Centralized Master Bidders List, the respondent must certify as set forth below by signing and dating this form in the blanks provided. All other respondents must supply all the information required on this form. In either case, the properly completed form must be included as part of the respondent's proposal for this procurement.

Under Section 231.006, Family Code, the respondent certifies that the individual or business entity named in this contract, bid, proposal, or offer is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate.

To comply with Section 231.006, this form must be signed by the person who is authorized to sign and submit a proposal on behalf of a business entity that is subject to Section 231.006, and thereby binds the respondent. This form must be returned with the proposal.

_____ _____

Signature of Authorized Personnel Date Signed

_____ _____

Printed Name of Authorized Personnel Title of Authorized Personnel

If the respondent submitting this proposal is not on the General Services Commission's Centralized Master Bidders List, the following information must be completed before the respondent's proposal will be considered.

Please Circle Business type: Sole *proprietorship partnership corporation other (explain)*

Name and Social Security Number of the individual or sole proprietor and/or each partner, shareholder, or owner with an ownership interest of at least twenty-five percent (25%) of the business entity submitting the proposal:

_____ _____

Name Social Security Number

_____ _____

Name Social Security Number

_____ _____

Name Social Security Number

_____ _____

Name Social Security Number

Note: THIS FORM MUST BE RETURNED WITH THE PROPOSAL.

Figure 3: Exhibit C - HUB Participation Form

EXHIBIT C
HUB PARTICIPATION FORM

The HUB Participation Form is intended for use by all prime Respondents participating in the contract awards process. Respondents must review each section carefully and complete the appropriate information. If after a good faith effort as required by these forms, respondent is unable to utilize HUB subcontractors, respondent must complete Part D of this form.

RE: Purchase order no(s)/Requisition number 551-0-3186DGG

Prime Respondent_____

Authorized representative_____

Title_____

Address_____

City_____ State_____ ZIP code_____

Telephone (Area code and number)_____

FAX number_____

****

PART A - Identification of HUB subcontractors/suppliers contacted prior to the contract award

Respondent must identify HUB subcontractors/suppliers contacted prior to the award. Respondent must attach supporting documentation of actions taken to include HUBs in the performance of the contract. Additional pages may be added, if necessary.

HUB subcontractor/supplier_____

Address_____

City_____State_____ZIP code_____

VID number, FEI number, Social Security number or GSC certification number_____

Contact name_____

Telephone (Area code and number)_____

****

HUB subcontractor/supplier_____

Address_____

City_____State_____ZIP code_____

VID number, FEI number, Social Security number or GSC certification number_____

Contact name_____

Telephone (Area code and number)_____
****

HUB subcontractor/supplier_____

Address_____

City_____State_____ZIP code_____

VID number, FEI number, Social Security number or GSC certification number_____

Contact name_____

Telephone (Area code and number)_____

****

HUB subcontractor/supplier_____

Address_____

City_____State_____ZIP code_____

VID number, FEI number, Social Security number or GSC certification number_____

Contact name_____

Telephone (Area code and number)_____

****

HUB subcontractor/supplier_____

Address_____

City_____State_____ZIP code_____

VID number, FEI number, Social Security number or GSC certification number_____

Contact name_____

Telephone (Area code and number)_____

Note: THIS FORM MUST BE RETURNED WITH PROPOSAL.

PART B - Division of work into reasonable lots

Respondent must describe how it proposes to divide the work to be performed into reasonable lots for purposes of facilitating HUB participation. (Additional pages may be added, if necessary.)

Note: THIS FORM MUST BE RETURNED WITH PROPOSAL.

PART C - Disclosure of HUB subcontractors/suppliers
Part C must be completed and returned by the 10th of each month for all HUBs utilized during the prior month in the execution of the below-referenced contract. Additional pages may be added, if necessary. **Please type or print** (Complete this section for each subcontract utilized, additional copies can be made.)

RE: Purchase order no(s)/Requisition number 304-_____

Prime Respondent_____

Authorized representative_____

Title_____

Address_____

City_____State_____ZIP code_____

Telephone (Area code and number)_____

FAX number_____
****

HUB SUBCONTRACTING INFORMATION - An invoice with the following information must be submitted.

Name of HUB subcontractor/supplier_____

Street address_____

City_____State_____ZIP code_____

Telephone (Area code and number)_____

VID number, FEI number, Social Security number or GSC number_____

Dollar amount paid to HUB subcontractor_____

Dates that payment is for/break down cost by month_____

If a respondent intends to utilize a HUB which is not yet certified in Texas, respondent must complete the following information and return with the proposal or proposal to expedite the certification process.

___Black American	Male _____%	Female _____%
___Asian Pacific American	Male _____%	Female _____%
___Hispanic American	Male _____%	Female _____%
___Native American	Male _____%	Female _____%

___American Women (of any ethnicity other than those listed above)

Note: THIS FORM MUST BE RETURNED WITH PROPOSAL.

PART D -

Non-participation for a prime Respondent(s) that does not claim HUB subcontractor participation in the contract.

Please type or print

RE: Purchase order no(s)/Requisition number 304-_____

Prime Respondent_____

Authorized representative_____

Title_____

Address_____

City_____ State_____ ZIP code_____

Telephone (Area code and number)_____

FAX number_____

Respondent must indicate reasons for HUB rejection; otherwise the proposal may not be considered. Additional pages may be added, if necessary.

I have read and understand the instructions and represent and warrant that the information I have provided is true and accurate. My proposal does not satisfy the state's HUB participation goals for these services; however, I represent and warrant that I made a good faith effort (as defined under criteria established by the General Service Commission) to satisfy the state's HUB participation goals.

Authorized signature and date:

Sign & Date here_____

Name of person authorized to sign (*Print or type*)_____

Title_____

Note: THIS FORM MUST BE RETURNED WITH PROPOSAL.

HUB Checklist

As part of the good faith effort requirement, state agencies must require respondents to complete a checklist, which must contain, at a minimum, the information set forth below. Respondents must complete and submit this checklist along with their HUB Participation Forms. Submission of this checklist will not of itself fully satisfy the State's HUB good faith effort requirements.

____Respondent has provided written notices to at least five (5) HUBs, or respondent has advertised in publications of general circulation, trade association publications, and/or minority/women focus media concerning subcontracting opportunities. (Attach copies of notices or advertisements.)

____Respondent has provided written notices to at least five (5) HUBs allowing reasonable time for the HUBs to participate effectively. (Attach copies of notices)

____Respondent has divided the proposed work into reasonable portions consistent with standard industry practices.

____Respondent has documented its reasons for rejection of a HUB subcontracting opportunity, or respondent has met with the rejected HUB to discuss the reasons for the rejection.

____Respondent has provided qualified HUBs with adequate information regarding bonding, insurance, and other requirements of the contract.

____Respondent has negotiated in good faith with HUBs, not rejecting qualified HUBs who are also the lowest responsive respondent.

Respondents are encouraged to use the services of available minorities and women; community organizations' respondent groups; local, state and federal business assistance offices; and other organizations that provide support services to HUBs.

Respondent's authorized representative must complete and sign this form.

Name of person authorized to sign (*Print or type.*)_____

Title_____

Authorized signature and date:

Sign & Date here_____

Note: THIS FORM MUST BE RETURNED WITH PROPOSAL.

If you have any questions on this RFP, or if you wish to obtain copies of Exhibits A, B, or C, please contact Darryl Glenn Gaona via facsimile at (512) 463-7582 or by e-mail at (dgaona@agr.state.tx.us).

TRD-200006896

Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Filed: October 4, 2000

♦ ♦ ♦

Texas Commission on Alcohol and Drug Abuse

Notice of Intent to Fund Through Noncompetitive Funding

Under the authority of the Texas Health and Safety Code, Title 6, Subtitle B, Chapter 461, the Texas Commission on Alcohol and Drug Abuse (TCADA) is proposing entering into a noncompetitive contract with Texas A&M University, whereby the university would be the oversight administrator of the award funding amount and program functions of the contract.

Goal: The goal of this noncompetitive funding process is to purchase services to develop a prevention service model that could be replicated within the infrastructure of the 12 community resource centers currently existing along the Texas-Mexico border. There are no TCADA funded substance abuse programs that are situated within the colonias. To expedite the delivery of services to the colonias, a sole source contract will be awarded to the Center for Housing and Urban Development, College of Architecture, Texas A&M University (TAMU). This contract would create a partnership with TAMU's successful colonias program currently operating in El Paso.

Available Services and Funds for Competition: There is approximately $300,000 available through this noncompetitive funding process. The amount of funding is subject to change.

Contract Period: The initial contract period of proposals selected through this noncompetitive funding process will be approximately November 4, 2000 through August 31, 2001.

TRD-200006893
Karen Pettigrew
General Counsel
Texas Commission on Alcohol and Drug Abuse
Filed: October 4, 2000

♦ ♦ ♦

Texas Bond Review Board

Biweekly Report of the 2000 Private Activity Bond Allocation Program

The information that follows is a report of the Private Activity Bond Allocation Program for the period of September 15, 2000 through September 29, 2000.

Total amount of state ceiling remaining unreserved for the $250,551,762 subceiling for qualified mortgage bonds under the Act as of September 29, 2000: $0

Total amount of state ceiling remaining unreserved for the $110,242,776 subceiling for state-voted issue bonds under the Act as of September 29, 2000: $0

Total amount of state ceiling remaining unreserved for the $75,165,529 subceiling for qualified small issue bonds under the Act as of September 29, 2000: $0

Total amount of state ceiling remaining unreserved for the $165,364,163 subceiling for residential rental project bonds under the Act as of September 29, 2000: $2,000,000

(Although this amount was released under this subceiling, it is considered to be part of a general pool of allocation to be distributed based on the highest lottery number regardless of project.)

Total amount of state ceiling remaining unreserved for the $105,231,740 subceiling for student loans bonds under the Act as of September 29, 2000: $35,000,000

Total amount of state ceiling remaining unreserved for the $295,651,080 subceiling for all other issue bonds under the Act as of September 29, 2000: $0

Total amount of the $1,002,207,050 state ceiling remaining unreserved under the Act as of September 29, 2000: $37,000,000

Following is a comprehensive listing of applications, which have received a Certificate of Reservation pursuant to the Act from September 15, 2000 through September 29, 2000: None

Following is a comprehensive listing of applications, which have issued and delivered the bonds and received a Certificate of Allocation pursuant to the Act from September 15, 2000 through September 29, 2000:

Issuer: 1) Port of Corpus Christi Authority of Nueces County, Texas

User: Koch Petroleum Group, LP

Description: All Other Issues - West Plant

Amount: $12,900,000

Issuer: 2) TDHCA

User: TCR Highland Meadow, LP

Description: Residential Rental -- Highland Meadow Village Apts.

Amount: $12,750,000

Following is a comprehensive listing of applications, which were either withdrawn or cancelled pursuant to the Act from September 15, 2000 through September 29, 2000: None

Following is a comprehensive listing of applications, which released a portion or all of their reserved amount pursuant to the Act from September 15, 2000 through September 29, 2000:

Issuer: 1) Tom Green County HFC

User: San Angelo Meadows Apts., Ltd.

Description: Residential Rental Meadows on the River Apts.

Amount: $2,000,000

For a more comprehensive and up-to-date summary of the 2000 Private Activity Bond Allocation Program, please visit our website (www.brb.state.tx.us). If you have any questions or comments, please contact Steve Alvarez, Program Administrator, at 512/475-4803 or via email at alvarez@brb.state.tx.us.

TRD-200006840
Jim Buie
Executive Director
Texas Bond Review Board
Filed: October 2, 2000

♦ ♦ ♦

Coastal Bend Council of Governments

Feasibility Study Request for Proposals

The Coastal Bend Council of Governments, a political subdivision of the State of Texas covering the 12 county Uniform Planning Region 20, is soliciting a request for proposal (RFP) for the preparation of a study to determine the feasibility of the direct marketing of grain sorghum from the Coastal Bend Region to the end-users of grain in Mexico. This study will involve assessing the current market for grain and evaluation of existing infrastructure in the Coastal Bend and Mexico. Because transportation is a key factor in the marketing of grain, the study will look into the need for additional rail facilities, their location and design.

The study will evaluate the risks associated with this project and present a cost-benefit analysis of the direct shipping of grain to Mexico.

Potential respondents may obtain a copy of the RFP by contacting Richard Bullock, Director of Planning and Development , Coastal Bend Council of Governments, P.O. Box 9909, Corpus Christi, Texas 78469 or by calling (361) 883-5743. The deadline for RFP submission is 5:00 P. M., Tuesday, October 24, 2000.

TRD-200006898
John P. Buckner
Executive Director
Coastal Bend Council of Governments
Filed: October 4, 2000

♦ ♦ ♦

Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41 the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. Requests for federal consistency review were received for the following projects(s) during the period of September 21, 2000, through September 28, 2000. The public comment period for these projects will close at 5:00 p.m. on November 4, 2000:

FEDERAL AGENCY ACTIONS:

Applicant: Stapp Towing Company, Inc.; Location: Near the northeast end of Dickinson Bayou, across the channel from Dickinson Bayou Channel Marker 35, at the terminus of Avenue S. CCC Project No.: 00-00341-F1; Description of Proposed Action: The applicant proposes to construct a 900-ft.-long bulkhead and dredge immediately in front of the bulkhead up to 30 ft. out. Applicant also proposes to remove two existing anchored barges near the shoreline and dredge the 175 X 175-ft. area immediately below the south barge to a depth of 18 ft. This dredged spot is to be used for a portable dry docking area. Type of Application: U.S.A.C.E. permit application #21953 under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

Applicant: Fairplay Partners, Ltd.; Location: Northeast quadrant of the intersection of Beltway 8 and Fairmont Parkway, in Pasadena, Harris County; CCC Project No.: 00-00342-F1; Description of Proposed Action: The applicant proposes to fill approximately 1.3 acres of jurisdictional wetlands to construct a hospital and commercial office and retail space. Site development plans necessitate the filling of a drainage ditch. The site of the 0.7-acre stock tank is located within a planned 15.9-acre detention pond. Type of Application: U.S.A.C.E. permit application # 22080 under §404 of the Clean Water Act (33 U.S.C.A. §§125-1387). Applicant: Aransas County Navigation District No. 1; Location: Leggett Light Entrance Channel, Rockport, Aransas County; CCC Project No.: 00-00343-F1; Description of Proposed Action: The applicant proposes to install two breakwaters on each side of Leggett Light Channel. Plastic sheet-pile walls will be used and dredged material from the channel will be placed inside. The breakwater on the north side of the channel will be 1,200 ft. long and the south side breakwater will be 500 ft. long. Type of Application: U.S.A.C.E. permit application #09621(05) under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. 403) and §404 of the Clean Water Act (33 U.S.C.A. §§125-1387).

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 for the applications listed above may be obtained from Ms. Diane P. Garcia, Acting Council Secretary, Coastal Coordination Council, 1700 North Congress Avenue, Room 617, Austin, Texas 78701-1495, or diane.garcia@glo.state.tx.us. Comments should be sent to Ms. Garcia at the above address or by fax at 512/475-0680.

TRD-200006888
Larry R. Soward
Chief Clerk, General Land Office
Coastal Coordination Council
Filed: October 4, 2000

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the market competitive rate ceiling by use of the formulas and methods described in §§345.151 through 345.154 Tex. Fin. Code. The market competitive rate ceiling for the period October 1, 2000, through September 30, 2001, is 21%.

TRD-200006821
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: September 29, 2000

♦ ♦ ♦

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in Sections 303.003 and 303.009, Tex. Fin. Code.

The weekly ceiling as prescribed by Sections 303.003 and 303.009 for the period of 10/09/00 - 10/15/00 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit thru $250,000.

The weekly ceiling as prescribed by Sections 303.003 and 303.09 for the period of 10/09/00 - 10/15/00 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-200006867
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 3, 2000

♦ ♦ ♦

Credit Union Department

Application(s) for a Merger or Consolidation

Notice is given that the following application has been filed with the Texas Credit Union Department and is under consideration:

An application was received from Ryerson of Texas Credit Union (Dallas) seeking approval to merge with Koch-Glitsch Credit Union (Dallas) with the latter being the surviving credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Texas Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-200006789
Howard E. Feeney
Commissioner
Credit Union Department
Filed: September 28, 2000

♦ ♦ ♦

Texas Department of Criminal Justice

Notice of Award

The Texas Department of Criminal Justice hereby gives notice of a Contract Award for the Texas Youth Commission Fiscal Year 2000-2001 Building Program, Requisition Number: 696-FD-0-R002-2.

The Contract was awarded to Wiginton, Hooker & Jeffry, P.C. Architects, 9696 Skillman Street, Suite 255, Dallas, Texas 75243, on September 27, 2000, Contract Number: 696-TY-1-3-C0026, for a dollar amount of $311,879.

TRD-200006803
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: September 29, 2000

♦ ♦ ♦

Notice to Bidders

The Texas Department of Criminal Justice invites bids for the construction of a new chiller cooling tower, and related work at the Southern Regional Medical Facility Central Plant, Texas City, Texas.

The work will be preformed under a single lump sum contract and includes general construction, mechanical and electrical construction. Provide all necessary labor/materials as per the contract documents prepared by O'Connell Robertson & Associates incorporated.

The successful bidder will be required to meet the following requirements and submit evidence within five days after receiving notice of intent to award from the Owner:

A. Contractor must have a minimum of five consecutive years of experience as a HVAC General Contractor and provide references for at least three projects that have been completed of a dollar value and complexity equal to or greater than the proposed project.

B. Contractor must be bondable and insurable at the levels required.

All Bid Proposals must be accompanied by a Bid Bond in the amount of 5.0% of greatest amount bid. Performance and Payment Bonds in the amount of 100% of the contract amount will be required upon award of a contract. The Owner reserves the right to reject any or all bids, and to waive any informality or irregularity.

Bid Documents can be purchased from the Architect/Engineer at a cost of $50.00 (Fifty Dollars), non-refundable per set, inclusive of mailing/delivery costs, or they may be viewed at various plan rooms. Payment checks for documents should be made payable to the Architect/Engineer: O'Connell Robertson & Associates , 811 Barton Springs Road, Suite 900, Austin, Texas 78704, Phone: (512)-478-7286, Fax: (512)-478-7441.

A Pre-Bid Conference will be held at 2:00 pm on October 18, 2000, at the Southern Regional Medical Center, Central Plant, Texas City, Texas, followed by a site-visit. ATTENDANCE IS MANDATORY.

Bids will be publicly opened and read at 2:00 pm on November 8, 2000, in the Blue Conference Room at the Facilities Division located in the warehouse building of the TDCJ Administrative Complex (formally Brown Oil Tool) on Spur 59 off of Highway 75 North, Huntsville, Texas.

The Texas Department of Criminal Justice requires the Contractor to make a good faith effort to include Historically Underutilized Businesses (HUBs) in at least 57.2% of the total value of this construction contract award. Attention is called to the fact that not less than the minimum wage rates prescribed in the Special Conditions must be paid on these projects.

TRD-200006886
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: October 4, 2000

♦ ♦ ♦

Request for Qualifications

Request for Qualifications - (Solicitation No. 696-FD-1-Q006)

The Texas Department of Criminal Justice (TDCJ) requires professional design services in connection with new Operations and Maintenance projects, remodeling of existing facilities, and other maintenance activities at various locations throughout the State, pursuant to the provisions in the Government Code, Chapter 2254, Subchapter A.

TDCJ intends to contract with one or more firms to provide predominately Civil, Structural, MEP, Electronic Security and Environmental Services on an as needed basis through December 31, 2002. Since there is a necessity to respond rapidly to problems, TDCJ is limiting the selection of Design Professional(s) to within a 60 to 75 mile radius of Huntsville, Texas.

Documents available on: October 12, 2000, Contact - Connie West, TDCJ - Purchasing & Leases, Contracts Branch, P.O. Box 4014, Huntsville, Texas 77342, (936) 437-6743, (936) 437-6986 FAX.

TRD-200006887
Carl Reynolds
General Counsel
Texas Department of Criminal Justice
Filed: October 4, 2000

♦ ♦ ♦

Golden Crescent Workforce Development Board

Marketing Campaign Request for Application--Deadline Extension

The Golden Crescent Workforce Development Board is herewith extending the deadline date for its Request for Applications for the development of a Marketing Campaign to 5 p.m., October 25, 2000.

A complete set of specifications may be obtained at 120 South Main, Victoria, Texas, Phone: (361) 576-5872, Fax: 573-0225, or email: sandy.heiermann@twc.state.tx.us.

TRD-200006890
Isabel Simmons
Administrative Clerk
Golden Crescent Workforce Development Board
Filed: October 4, 2000

♦ ♦ ♦

Texas Department of Housing and Community Affairs Manufactured Housing Division

Notice of Administrative Hearing (MHD1998001742UI)

Texas Department of Housing and Community Affairs, Manufactured Housing Division, Thursday, October 19, 2000, 1:00 p.m. State Office of Administrative Hearing, Stephen F. Austin Building, 1700 N Congress, 11th Floor, Suite 1100, Austin, Texas.

AGENDA

Administrative Hearing before an administrative law judge of the State Office of Administrative Hearings in the matter of the complaint of the Texas Department of Housing and Community Affairs vs. Scott William Gjedrem dba Highland Transport to hear alleged violations of §4(f) and §7(d) of the Act and §80.125(e) and §80.51 of the Rules regarding installation of a manufactured home without obtaining, maintaining or possessing a valid installer's license and not properly installing the manufactured home. SOAH 332-01-0179. Department MHD1998001742UI

Contact: Jerry Schroeder, P.O. Box 12489, Austin, Texas 78711-2489, (512) 475-3589.

TRD-200006897
Daisy A. Stiner
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 4, 2000

♦ ♦ ♦

Texas Department of Insurance

Notice

The Commissioner of Insurance, or his designee, will consider approval of a rating manual filing submitted by American Fire and Indemnity Company, American Indemnity Lloyds, and United Fire and Casualty Company proposing to use a rating manual different than that promulgated by the Commissioner of Insurance, pursuant to TEX. INS. CODE ANN. art 5.101 §3(l). The companies are proposing to adopt a companion policy discount. The discount provides a 5% reduction in premium for private passenger automobile policyholders if the named insured has a Homeowner's, Dwelling Fire or Watercraft policy written through any of the United Fire Group of Companies. The discount is applicable to premiums for bodily injury, property damage, combined single limit and collision coverages.

Copies of the filing may be obtained by contacting George Russell, at the Texas Department of Insurance, Automobile/Homeowners Division, P.O. Box 149104, Austin, Texas 78714-9104, telephone (512) 305-7468.

This filing is subject to Department approval without a hearing unless a properly filed objection, pursuant to art. 5.101, §3(h), is made with the Senior Associate Commissioner for Property & Casualty, Mr. C.H. Mah, at the Texas Department of Insurance, MC 105-5G, P.O. Box 149104, Austin, Texas 78701 within 30 days after publication of this notice.

TRD-200006790
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: September 28, 2000

♦ ♦ ♦

Notice of Public Hearing

The Commissioner of Insurance, at a public hearing under Docket No. 2469 on November 9, 2000, at 10:00 a.m., in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street in Austin, Texas, will consider a proposal made in a staff petition. Staff's petition requests amendments to the Texas Automobile Rules and Rating Manual (Manual) regarding Private Passenger Personal Injury Protection (PIP) and Medical Payments (MP) coverages. Staff's petition (Ref. No. A-1000-24-I), was filed on October 4, 2000.

Staff proposes adoption of amendments to the Manual rules, which would clarify the rating methodology insurers should use when calculating PIP and MP insurance rates for the following vehicle classes: named non-owner; motorhomes; all-terrain vehicles; antique, collectible and special interest automobiles; dune buggies; golfmobiles; golf carts; and motorcycles. Staff's petition proposes amendments to the following Manual rules: Rule 80 in Rule Section IV; Rule 77 in Rate Section IV; Rule 120 in Rate Section VII; Rule 123 in Rate Section VII; Rule 129 in Rate Section VII; Rule 132 in Rate Section VII; and Rule 136 in Rate Section VII. The proposed amendments would conform the Manual rules to the changes in rating methodology adopted in Commissioner's Order No. 00-0909, dated August 10, 2000 (Order). In the Order, the Commissioner made determinations concerning benchmark rates and flexibility bands for private passenger and commercial automobile insurance. The rating structure for private passenger PIP and MP was changed by the Order. Previously, PIP and MP premiums were not individually calculated under the rating structure but were determined by which of six categories an associated Bodily Injury liability premium fell into. Under the new rating structure ordered by the Commissioner, premiums for PIP and MP are calculated by applying a driver class differential to a territorial base rate, an approach comparable to that currently used for the Bodily Injury and Property Damage liability coverages. Some of the current Manual rules (Rule 80 in Rule Section IV; Rule 77 in Rate Section IV; Rule 120 in Rate Section VII; Rule 123 in Rate Section VII; Rule 129 in Rate Section VII; Rule 132 in Rate Section VII; and Rule 136 in Rate Section VII) are outdated because they rely on the previous PIP and MP rating structure. Staff proposes to amend the outdated Manual rules to conform them to the new rating structure, implemented by the Order.

A copy of the petition, including exhibits with the full text of the proposed amendments to the Manual, is available for review in the Office of the Chief Clerk of the Texas Department of Insurance, 333 Guadalupe Street, Austin, Texas. For further information or to request copies of the petition, please contact Sylvia Gutierrez at (512) 463-6327; refer to (Ref. No. A1000-24-I).

To be considered, written comments on the proposed changes must be submitted no later than November 13, 2000, to the Office of the Chief Clerk, Texas Department of Insurance, P.O. Box 149104, MC 113-2A, Austin, Texas 78714-9104. An additional copy of the comments should be simultaneously submitted to Marilyn Hamilton, Deputy Commissioner, Personal and Commercial Lines Division, Texas Department of Insurance, P.O. Box 149104, MC 104-PC, Austin, Texas 78714-9104.

This notification is made pursuant to the Insurance Code Article 5.96, which exempts it from the requirements of the Government Code, Chapter 2001 (Administrative Procedure Act).

TRD-200006894
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: October 4, 2000

♦ ♦ ♦

Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application for admission to Texas of Harrington Benefit Services, Inc., a foreign third party administrator. The home office is Wilmington, Delaware.

Application for incorporation in Texas of Gulfquest, LLC, a domestic third party administrator. The home office is Houston, Texas.

Any objections must be filed within 20 days after this notice was filed with the Secretary of State, addressed to the attention of Charles M. Waits, MC 107-5A, 333 Guadalupe, Austin, Texas 78714-9104.

TRD-200006881
Judy Woolley
Deputy Chief Clerk
Texas Department of Insurance
Filed: October 3, 2000

♦ ♦ ♦

Texas Natural Resource Conservation Commission

Correction of Error

The Texas Natural Resource Conservation Commission adopted amendments to 30 TAC Chapter 307 which appeared in the August 11, 2000 issue of the *Texas Register* (25 TexReg 7722). The adoption notice contained an error is as submitted by the commission.

In Table 1, on page 7795, 12th row, fourth column, there was a clerical mistake in transmitting the final adopted version of 30 TAC §307.6(c)(1). An exponent for the Freshwater Chronic Criteria for Nickel was inadvertently submitted to the Texas Register as the adopted rule without the appropriate decimal place. The commission adopted the rule as published in the August 11, 2000 issue. Table 1 of the rule as adopted by the commission should read: "(0.8460(ln(hardness)) +1.1645)." The commission will interpret and apply this rule as if the published version contains the appropriate decimal place in the exponent. The commission will correct this error through the rule amendment process.

Due to an error by the Texas Register, the "Correction of Error" notice published in the September 14, 2000, issue of the *Texas Register* (25 TexReg 9278) incorrectly noted the change for Table 1 on page 7795, 13th row, fourth column. The *Texas Register* incorrectly published the following: "(0.8460 (In(hardness)) + 1.145)". Instead, it should read: "(0.8460 (ln(hardness)) + 1.645)". The "In" published with a capital "I" should have been "ln" with a lower case "l".

TRD-200006902

♦ ♦ ♦

Notice of Opportunity to Comment on Settlement Agreements of Administrative Enforcement Actions

The Texas Natural Resource Conservation Commission (TNRCC or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) pursuant to Texas Water Code (the Code), §7.075, which requires that the TNRCC may not approve these AOs unless the public has been provided an opportunity to submit written comments. Section 7.075 requires that notice of the proposed orders and of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 13, 2000.** Section 7.075 also requires that the TNRCC promptly consider any written comments received and that the TNRCC may withhold approval of an AO if a comment discloses facts or considerations that indicate the proposed AO is inappropriate, improper, inadequate, or inconsistent with the requirements of the Code, the Texas Health and Safety Code (THSC), and/or the Texas Clean Air Act (the Act). Additional notice is not required if changes to an AO are made in response to written comments.

A copy of each of the proposed AOs is available for public inspection at both the TNRCC'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 these AOs should be sent to the enforcement coordinator designated for each AO at the TNRCC's Central Office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 13, 2000.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The TNRCC enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs should be submitted to the TNRCC in **writing.**

(1) COMPANY: Air Liquide America Corporation; DOCKET NUMBER: 2000-0565-AIR-E; IDENTIFIER: Air Account Number BL-0626-U; LOCATION: Freeport, Brazoria County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.115(b) and (c), Permit Number 32274, and the Code, §382.085(b), by exceeding nitrogen oxide and ammonia hourly emission rates and exceeding the permitted limits for carbon monoxide from the flare; 30 TAC §122.130(b)(1), §122.121, and the Code, §382.054 and §382.085(b), by failing to submit a timely federal operating permit application; 30 TAC §116.160(a), 40 Code of Federal Regulations (CFR) §52.21, and the Code, §382.085(b), by failing to obtain a federal prevention of significant deterioration permit prior to the construction and operation of a major source; 30 TAC §101.10 and the Code, §382.085(b), by failing to submit emissions inventory; 30 TAC §101.6, §101.7, and the Code, §382.085(b), by failing to submit notification of startup or maintenance activities; 30 TAC §116.116(b)(1) and the Code, §382.085(b), by failing to represent volatile organic compound emissions related to the impurities in the raw hydrogen intake stream; and 30 TAC §101.20(1), §116.115(c), Permit Number 32274, 40 CFR §60.18, and the Code, §382.085(b), by failing to conduct initial compliance testing on flare; PENALTY: $56,700; ENFORCEMENT COORDINATOR: Carl Schnitz, (512) 239-1892; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Bill Brezina and Terry Tackett dba A-OK Septic Service; DOCKET NUMBER: 2000-0552-SLG-E; IDENTIFIER: Sludge Transported Registration Number 22237; LOCATION: Alvord, Wise County, Texas; TYPE OF FACILITY: septic sludge and grease transporting; RULE VIOLATED: 30 TAC §312.143 and the Code, §26.121, Mr. Brezina failed to obtain written authorization prior to receiving waste on his land and Ms. Tackett failed to deposit wastes at a facility

authorized by a permit or registration; PENALTY: $3,250; ENFORCEMENT COORDINATOR: Rebecca Clausewitz, (512) 239-2359; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(3) COMPANY: ARH Enterprises, Incorporated; DOCKET NUMBER: 2000-0647-PST-E; IDENTIFIER: Petroleum Storage Tank (PST) Facility Identification Number 0006209; LOCATION: Irving, Dallas County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2), and (3)(A) and the Act, §382.085(b), by failing to conduct the annual pressure decay test and install a system monitor; and 30 TAC §115.246(1) and the Act, §382.085(b), by failing to maintain the California Air Resource Board executive order; PENALTY: $3,200; ENFORCEMENT COORDINATOR: Jorge Ibarra, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(4) COMPANY: Big Tex Trailer World, Inc.; DOCKET NUMBER: 1999-1535-AIR-E; IDENTIFIER: Air Account Number TF-0071-K; LOCATION: Mt. Pleasant, Titus County, Texas; TYPE OF FACILITY: manufacturing and sales outlet of utility trailers; RULE VIOLATED: 30 TAC §122.130(b)(1) and the Code, §382.054 and §382.085(b), by failing to submit an abbreviated initial application for a Title V permit; 30 TAC §122.121 and the Code, §382.054 and §382.085(b), by failing to obtain permit authority for continued plant operation; and 30 TAC §101.10(a) and the Code, §382.085(b), by failing to submit an emissions inventory; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(5) COMPANY: Mr. Edward Sykora dba Bubba's No. 3; DOCKET NUMBER: 2000-0468-PST-E; IDENTIFIER: PST Facility Identification Number 0044847; LOCATION: Crowley, Tarrant County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.246(6) and the Code, §382.085(b), by failing to maintain a record of daily inspections of the Stage II vapor recovery system (VRS); 30 TAC §115.248(1) and the Code, §382.085(b), by failing to ensure that at least one facility representative received training and instruction in the operation and maintenance of the Stage II VRS; 30 TAC §115.245 and the Code, §382.085(b), by failing to successfully perform the initial compliance testing; 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information; 30 TAC §334.48(c), by failing to conduct inventory volume measurements each operating day and monthly reconciliation of inventory control records; 30 TAC §334.50(b)(1)(A) and the Code, §26.3475(c), by failing to monitor tanks for releases monthly; and 30 TAC §334.93(a) and (b), by failing to demonstrate financial responsibility; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(6) COMPANY: City of Buda; DOCKET NUMBER: 2000-0399-PWS-E; IDENTIFIER: Public Water Supply (PWS) Number 1050012; LOCATION: Buda, Hays County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(b), (f)(2)(A), (j)(1)(A) - (C) and (3), by failing to collect additional monthly bacteriological samples, conduct daily chlorine residual testing, have a certified individual conducting customer service inspections and keep on file customer service inspection certifications for review; 30 TAC §290.44(h), by failing to demonstrate that either backflow prevention devices are present or that a cross-connection control program is in place; 30 TAC §290.41(c)(1)(F) and (3)(N), by failing to obtain sanitary control easements and install flow measuring devices; 30 TAC §290.105(a)(2) and the Code, §341.031(a), by exceeding the microbiological maximum contaminant level for total coliform; and 30 TAC §290.106(a)(2), by failing to conduct monthly routine bacteriological tests; PENALTY: $3,188; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(7) COMPANY: Coastal Bend Youth City, Inc.; DOCKET NUMBER: 2000-0251-MWD-E; IDENTIFIER: Water Quality Permit Number 11689-001; LOCATION: Driscoll, Nueces County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Water Quality Permit Number 11689-001 and the Code, §26.121, by failing to comply with permitted effluent limits for biochemical oxygen demand and total suspended solids daily averages, notify when permitted effluent limits were exceeded by more than 40%, conduct self-monitoring procedures, control the unauthorized discharge of raw sewage, notify the regional office of an unauthorized discharge with 24 hours; PENALTY: $4,375; ENFORCEMENT COORDINATOR: Audra Baumgartner, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(8) COMPANY: Copano Company; DOCKET NUMBER: 2000-0813-AIR-E; IDENTIFIER: Air Account Number RG-0041-G; LOCATION: Refugio, Refugio County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.146(2) and the Act, §382.085(b), by failing to submit the 1998 annual compliance certification; PENALTY: $1,800; ENFORCEMENT COORDINATOR: Gary McDonald, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(9) COMPANY: Ms. Sylvia Hernandez dba Country Store; DOCKET NUMBER: 1999-0995-PST-E; IDENTIFIER: PST Facility Identification Number 47483; LOCATION: Mission, Hidalgo County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A), by failing to have an acceptable method of release detection for the underground storage tank system; and 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information; PENALTY: $2,800; ENFORCEMENT COORDINATOR: Fara O'Neal, (956) 425-6010; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(10) COMPANY: Dogwood Estates Water Company; DOCKET NUMBER: 2000-0582-PWS-E; IDENTIFIER: PWS Number 1070043; LOCATION: Athens, Henderson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(D)(iv) and the Code, §341.0315(c), by failing to provide a minimum pressure tank capacity of 20 gallons per connection; and 30 TAC §290.41(b) and the Code, §341.0315(c), by failing to provide a water supply which is capable of supplying the maximum daily demand during periods of peak usage and critical hydrologic conditions; PENALTY: $188; ENFORCEMENT COORDINATOR: Kimberly McGuire, (512) 239-4761; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(11) COMPANY: Empak, Inc.; DOCKET NUMBER: 2000-0350-IWD-E; IDENTIFIER: Water Quality Permit Number 01731-000 and National Pollutant Discharge Elimination System (NPDES) Permit Number TX0030937; LOCATION: Deer Park, Harris County, Texas; TYPE OF FACILITY: commercial waste disposal; RULE VIOLATED: Water Quality Permit Number 01731-000 and the Code, §26.121, by failing to meet permitted limits for total cyanide; and 30 TAC §305.125(1) and Water Quality Permit Number 01731-000, by failing to notify the Commission of effluent violation greater than 40%; PENALTY: $11,000; ENFORCEMENT COORDINATOR: Sherry Smith, (512) 239-0572; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: Empire Truck Lines, Incorporated; DOCKET NUMBER: 2000-0492-AIR-E; IDENTIFIER: Air Account Number HX-2366-K; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: truck terminal; RULE VIOLATED: 30 TAC §§101.4, 111,147(1), 111.149(a), and the Code, §382.085(b), by alleging to have created nuisance dust conditions by failing to control emissions from unpaved vehicular parking space and from truck traffic; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Equistar Chemicals, L.P.; DOCKET NUMBER: 2000-0519-IHW-E; IDENTIFIER: Solid Waste Registration Number 85436; LOCATION: LaPorte, Harris County, Texas; TYPE OF FACILITY: ethylene and polyethylene manufacturing; RULE VIOLATED: 30 TAC §335.69(a)(1)(B) and 40 CFR §265.193(a)(1), by failing to provide secondary containment for a hazardous waste storage tank; and 30 TAC §290.51(a)(3), by failing to pay public water system fees; PENALTY: $10,800; ENFORCEMENT COORDINATOR: Catherine Sherman, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: Goodyear Tire and Rubber Company; DOCKET NUMBER: 2000-0117-AIR-E; IDENTIFIER: Air Account Number JE-0039-N; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: rubber manufacturing; RULE VIOLATED: 30 TAC §116.115(b)(2)(G) and (c), Permit Number 3522 and 22110, and the Code, §382.085(b), by failing to comply with carbon monoxide permit emissions limits of 5.35 pounds per hour and 23.44 tons per year, sample four heat recovery steam generators, cap five open-ended lines in the alcohol recovery unit, and cap three open-ended lines in Unit 829; 30 TAC §116.110(a) and the Code, §382.085(b), by failing to obtain a permit or exemption for volatile organic constituents (VOC) emissions; 30 TAC §115.121(a)(3)(B), §115.214(a)(1)(A) and (B), and the Code, §382.085(b), by failing to prevent liquid VOC leaks on the shaft meter valve, the threads on a hose connector, a flange running from the meter, and the thread below the wedge connector; 30 TAC §113.130, §116.115(c), Permit Number 9481, and the Code, §382.085(b), by failing to cap two open-ended lines, and one open-ended line in Unit 880; 30 TAC §115.247(2) and the Code, §382.085(b), by failing to submit monthly gasoline throughputs records; and 30 TAC §116.615(2) and the Code, §382.085(b), by failing to submit notice of changes in representations of emissions under a standard permit; PENALTY: $53,100; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(15) COMPANY: City of Granite Shoals; DOCKET NUMBER: 2000-0458-PWS-E; IDENTIFIER: PWS Number 0270107; LOCATION: Granite Shoals, Burnet County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d), (j)(3), (n), and (p), by failing to compile monthly reports of waterworks operations, compile records of the annual inspections of the ground storage tanks, prepare a map of the distribution system, and retain customer service inspection certifications; and 30 TAC §290.41(c)(1)(F), by failing to secure sanitary control easement; PENALTY: $688; ENFORCEMENT COORDINATOR: Larry King, (512) 339-2929; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(16) COMPANY: Grapevine Lake Estates Water Supply Corporation; DOCKET NUMBER: 2000-0207-PWS-E; IDENTIFIER: PWS Number 2200050; LOCATION: Grapevine, Tarrant County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(e)(1), by failing to provide a certified grade "D" waterworks operator; 30 TAC §290.41(c)(3)(B), (J), (O) and (1)(F), by failing to provide an intruder-resistant fence or locked ventilated well house, provide a proper sealing block for the well, provide a sanitary easement for each well location, and provide a well casing 18 inches above the ground; 30 TAC §290.43(e), by failing to provide an intruder-resistant fence with lockable gate for the ground storage tank; and 30 TAC §290.13 and §290.103, by failing to provide adequate chemical quality; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Wendy Penland, (817) 469-6750; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(17) COMPANY: Harris County Municipal Utility District Number 286; DOCKET NUMBER: 2000-0606-MWD-E; IDENTIFIER: Texas Pollutant Discharge Elimination System (TPDES) Permit Number 13020-001; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TPDES Permit Number 13020-001, 30 TAC §305.125(1), and the Code, §26.121, by failing to comply with the permitted limits for total suspended solids and ammonia-nitrogen; PENALTY: $1,200; ENFORCEMENT COORDINATOR: David Van Soest, (512) 239-0468; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Sam Rayburn Water, Inc. dba Hickory Hollow Water Supply; DOCKET NUMBER: 2000-0352-PWS-E; IDENTIFIER: PWS Number 2030005; LOCATION: Broaddus, San Augustine County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(n), by failing to provide an updated distribution system map; 30 TAC §290.39(h) and (j), by failing to obtain approval prior to constructing a 34,000 gallon ground storage tank; 30 TAC §290.45(b)(1)(C)(i), by failing to meet the commission's "Minimum Water System Capacity Requirements" for well production; 30 TAC §290.42(j), by failing to provide a complete plant operations manual; and 30 TAC §290.51(a)(3) and the Code, §341.041, by failing to pay late fees; PENALTY: $438; ENFORCEMENT COORDINATOR: Susan Kelly, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(19) COMPANY: City of Houston; DOCKET NUMBER: 2000-0212-IWD-E; IDENTIFIER: Enforcement Identification Number 14651; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: municipal airport; RULE VIOLATED: the Code, §26.121(a)(3), by allowing a discharge of jet fuel to the receiving stream; and 30 TAC §327.5(a) and the Code, §26.266(a), by failing to immediately undertake all reasonable actions to abate and contain the release of jet fuel; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Ingram Independent School District; DOCKET NUMBER: 2000-0656-PWS-E; IDENTIFIER: PWS Number 1330100; LOCATION: Ingram, Kerr County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.120(e) and the Code, §341.0315(c), by failing to conduct reduced tap monitoring for lead and copper; PENALTY: $313; ENFORCEMENT COORDINATOR: Gloria Stanford, (512) 239-1871; REGIONAL OFFICE: 140 Heimer Road, Suite 360, San Antonio, Texas 78232-5042, (210) 490-3096.

(21) COMPANY: The City of Kennard; DOCKET NUMBER: 1999-1509-MLM-E; IDENTIFIER: PWS Number 1130011 and TPDES Permit Number 11474-001 (formerly Water Quality Permit Number 11474-001 and NPDES Permit Number TX0056596); LOCATION: Kennard, Houston County, Texas; TYPE OF FACILITY:

public water supply and wastewater treatment; RULE VIOLATED: 30 TAC §290.46(i), (m), (p)(3), and (t), by failing to establish a plumbing ordinance, initiate a maintenance program to facilitate cleanliness, improve the general appearance of the facilities and reduce costly repairs, conduct annual inspections of the pressure filter media and internal filter surfaces, and maintain the union at well Number 1 in a watertight condition; 30 TAC §290.43(c)(3), by failing to maintain the integrity of the storage tank overflow valve gasket; 30 TAC §290.41(c)(1)(F), by failing to secure a sanitary easement; TPDES Permit Number 11474-001 and 30 TAC §305.125, by failing to monitor effluent flow rate five times per week and properly maintain units of wastewater treatment plant and collection system; and TPDES Permit Number 11474-001 and the Code, §26.121, by failing to maintain minimum effluent dissolved oxygen concentrations of greater than or equal to four milligrams per liter (mpl); PENALTY: $2,813; ENFORCEMENT COORDINATOR: Jayme Brown, (512) 239-1683; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(22) COMPANY: Inderjit Singh and Mansukh Singh dba Kountry Kwik; DOCKET NUMBER: 2000-0756-PWS-E; IDENTIFIER: PWS Number 1012461; LOCATION: Huffman, Harris County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.106(a), (e)(2), §290.103(5), and the Code, §341.033(d), by failing to collect and submit routine monthly water samples for bacteriological analysis and provide public notice of the failure to collect and submit routine monthly bacteriological samples; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Subhash Jain, (512) 239-5867; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(23) COMPANY: Mrs. Janice Musgrove and the Estate of Mr. Jimmy Musgrove dba Oaks and Elms Mobile Home Park; DOCKET NUMBER: 1999-1552-PWS-E; IDENTIFIER: PWS Number 0190065; LOCATION: Nash, Bowie County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.45(b)(1)(E)(ii), by failing to meet pressure tank capacity requirement of 50 gallons per connection; and 30 TAC §290.46(e)(3) and (d)(2)(A), (formerly 30 TAC §290.46(f)(1)(A)), by failing to operate the public water supply system at all times under the direct supervision of a competent waterworks operator holding a valid Grade "D" or higher ground water operator certification and maintain a minimum free chlorine residual of 0.2 mpl; PENALTY: $700; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(24) COMPANY: City of Palestine; DOCKET NUMBER: 2000-0134-PWS-E; IDENTIFIER: PWS Number 0010001; LOCATION: Palestine, Anderson County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.42(h) and the Code, §26.121, by failing to obtain a permit prior to discharging wastes from water treatment processes; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Carolyn Lind, (903) 535-5100; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(25) COMPANY: City of Pilot Point; DOCKET NUMBER: 2000-0650-MWD-E; IDENTIFIER: TPDES Permit Number 10361-001 (formerly NPDES Permit Number TX0022659 and Water Quality Permit Number 10361-001); LOCATION: Pilot Point, Denton County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: the Code, §26.121, NPDES Permit Number TX0022659, Water Quality Permit Number 10361-001, and 30 TAC §305.125(1), by failing to comply with permit limits for five-day biochemical oxygen demand and total suspended solids; PENALTY: $750; ENFORCEMENT COORDINATOR: Laurie Eaves, (512) 239-4495; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(26) COMPANY: Quality Auto Sales; DOCKET NUMBER: 1999-0044-AIR-E; IDENTIFIER: Air Account Number WF-0158-P; LOCATION: El Campo, Wharton County, Texas; TYPE OF FACILITY: used car lot; RULE VIOLATED: 30 TAC §114.20(c)(1) and (3), and the Act, §382.085(b), by allegedly offering for sale a vehicle with missing or inoperable vehicle emission control devices and failing to display a notice of prohibition sign; PENALTY: $600; ENFORCEMENT COORDINATOR: Faye Liu, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(27) COMPANY: Quintana Petroleum Corporation; DOCKET NUMBER: 2000-0752-AIR-E; IDENTIFIER: Air Account Number RG-0047-R; LOCATION: Refugio, Refugio County, Texas; TYPE OF FACILITY: natural gas compression station; RULE VIOLATED: 30 TAC §122.146(2) and the Act, §382.085(b), by failing to submit the 1998 annual compliance certification; and 30 TAC §116.110(a) and the Act, §382.085 and §382.0518, by failing to obtain authority to operate two glycol dehydration units; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Audra Baumgartner, (361) 825-3100; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(28) COMPANY: Sagar Enterprises, Incorporated, dba Shop 'N' Get; DOCKET NUMBER: 2000-0127-PST-E; IDENTIFIER: PST Facility Identification Number 0056925; LOCATION: Alvin, Brazoria County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (b)(2)(A)(ii), and the Code, §26.3475(c)(1), by failing to monitor underground storage tanks for releases at a frequency of at least once every month, provide proper release detection for the piping, and equip each separate pressurized line with an automatic line leak detector; 30 TAC §334.48(c), by failing to conduct inventory control at a retail facility; 30 TAC §334.7(d)(3), by failing to amend, update, or change registration information; and 30 TAC §115.241 and the Act, §382.085(b), by failing to install a Stage II VRS; PENALTY: $600; ENFORCEMENT COORDINATOR: Trina Lewison, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(29) COMPANY: Rogelio Salazar dba Salazar Custom Paint and Body; DOCKET NUMBER: 2000-0671-AIR-E; IDENTIFIER: Air Account Number AC-0142-U; LOCATION: Diboll, Angelina County, Texas; TYPE OF FACILITY: automotive paint and body shop; RULE VIOLATED: 30 TAC §116.110(a), §106.436, and the Code, §382.085(b), by failing to satisfy the conditions for exempt facilities or obtain a permit prior to constructing and operating an auto body refinishing facility; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Laura Clark, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Suite 110, Beaumont, Texas 77703-1892, (409) 898-3838.

(30) COMPANY: Earl Scheib Paint and Body Productions, Inc., Ralph G. Biondi, President, and Richard J. Surico, Secretary; DOCKET NUMBER: 1999-1388-AIR-E; IDENTIFIER: Air Account Number EE-1473-M; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: auto body paint and repair shop; RULE VIOLATED: 30 TAC §116.110(a) and the Code, §382.085(b), by failing to provide material purchase receipts, keep residual materials in a closed container, and maintain good housekeeping practices; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Cynthia Salas, (915) 834-4949; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(31) COMPANY: Shaheen Grocery, Inc.; DOCKET NUMBER: 2000-0449-PST-E; IDENTIFIER: PST Facility Identification Number

0029846; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.248(1) and the Act, §382.085(b), by failing to provide training and instruction in the operation and maintenance of the Stage II VRS; 30 TAC §115.246(3) and (6), and the Act, §382.085(b), by failing to provide a record of the results of the Stage II VRS inspections and provide a record of maintenance conducted on any part of the Stage II equipment; PENALTY: $1,440; ENFORCEMENT COORDINATOR: Kent Heath, (512) 239-4575; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(32) COMPANY: Shell Western E & P; DOCKET NUMBER: 2000-0848-AIR-E; IDENTIFIER: Air Account Number HN-0294-O; LOCATION: Edinburg, Hidalgo County, Texas; TYPE OF FACILITY: natural gas compressor station; RULE VIOLATED: 30 TAC §122.145(2)(C), §122.146(2), and the Code, §382.085(b), by failing to submit the general operating permit compliance certification and deviation report; PENALTY: $4,000; ENFORCEMENT COORDINATOR: Stacey Young, (512) 239-1899; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(33) COMPANY: Mohinder Pall dba Texaco Food Mart; DOCKET NUMBER: 2000-0589-PST-E; IDENTIFIER: PST Facility Identification Number 0009810; LOCATION: Plano, Collin County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.245(2) and the Code, §382.085(b), by failing to successfully perform the annual pressure decay testing; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Michael De La Cruz, (512) 239-0259; REGIONAL OFFICE: 1101 East Arkansas Lane, Arlington, Texas 76010-6499, (817) 469-6750.

(34) COMPANY: City of Wellman; DOCKET NUMBER: 2000-0522-MWD-E; IDENTIFIER: Water Quality Permit Number 13642-001; LOCATION: Wellman, Terry County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Water Quality Permit Number 13642-001 and 30 TAC §325.2(a) and §305.125(1) and (5), by failing to employ a chief operator or operator in charge who possesses a valid Class "D" or higher wastewater operator certificate of competency and maintain and operate the treatment facility to achieve optimum efficiency of treatment capacity; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Gary Shipp, (806) 796-7092; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

TRD-200006880
Paul Sarahan
Director, Litigation Division
Texas Natural Resource Conservation Commission
Filed: October 3, 2000

♦ ♦ ♦

Notice of Water Rights Applications

ROBERT L. MOSTY, 10515 Sage Willow, Houston, Texas 77089 and Robert L. Mosty, Jr., Route 1, Box 648, Center Point, Texas 78010, applicants, seek an amendment to a Certificate of Adjudication pursuant to §11.122, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§295.1, et seq. Certificate No. 18-2450 authorizes the owners, with a time priority of 1932, to divert and use not to exceed 158 acre-feet of water per annum from a specific point on the Guadalupe River in the John Goodbread Survey 38, Abstract No.150, Kerr County in the Guadalupe River Basin, at a maximum diversion rate of 2.67 cfs (1200 gpm) to irrigate 117 acres out of a 136.67 acre tract in the aforesaid survey. Pursuant to a Grant of Right to Divert, Pump, and Use Water Pursuant to Certification of Adjudication to Appropriate State Water between certificate owner and Buckhorn Golf II, Ltd., applicant seeks to amend the certificate by adding authorization to use 80 acre-feet per year of the water authorized by the certificate at a maximum diversion rate of 1.1 cfs (500 gpm) for direct irrigation of 110 acres of land out of 187.276 acres consisting of three tracts totaling 88.126 acres, a 2.15 acre tract and a 97 acre tract of land out of the Justa Esqueda Survey No. 25, Abstract 157, Kendall County, approximately 14 miles northwest of Boerne, Texas. Applicant also seeks authorization to convey the 80 acre-feet of irrigation water to an off-channel reservoir on land owned by Buckhorn Golf II, Ltd. . and located S 54°E, 4210 feet from the USGS published Benchmark/ Triangulation Station known as "Comfort 2", also being at 29.98°N Latitude and 98.89°W Longitude. The combined maximum diversion rate will not exceed the 2.67 cfs currently authorized by the certificate. Kendall County Water Control and Improvement District No. 1 owns 90.276 acres of the land to be irrigated and Buckhorn Golf II, Ltd owns the other 97 acres of land to be irrigated as evidenced by a deed recorded in Volume 598, Page 514 of the Deed Records of Kendall County. Buckhorn Golf II, Ltd. leases the 90.276 acres owned by the "District" in a lease agreement dated April 13, 1999. Buckhorn Golf II, Ltd. also has easement agreements with Lewis B. Schmitz, et ux and Lion's Lair Limited Liability Company for use of land needed to convey the water to the land to be irrigated. The land to be added and the additional diversion point on the Guadalupe River is approximately 11.5 miles downstream of that currently authorized and this point is S 41.2 E, 8217.92 feet from the USGS published Benchmark/Triangulation Station known as "Comfort 2", also being 29.97 ° N Latitude and 98.88° W. Longitude. This notice is being sent to the fifty one water right owners with a diversion point in the Guadalupe River watershed between the diversion point now authorized under Certificate of Adjudication No. 18-2018 and the requested diversion point. The Executive Director of the Texas Natural Resource Conservation Commission is recommending that any amendment granted for this application include a condition that it maintain its 1932 time priority except it shall be junior in time priority to all of the water rights with diversion points in the Guadalupe River watershed between the existing diversion point and the proposed diversion point.

LEE ANTHONY MOSTY, applicant, 1500 Park Grove Road, Irving, Texas, 78006, seeks an amendment to a Certificate of Adjudication pursuant to §11.122, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§295.1, et seq. Certificate No. 18-2018 authorizes the owner, with a time priority of 1951, to divert and use not to exceed 154 acre-feet of water per annum from a specific point on the north bank of the Guadalupe River, Guadalupe River Basin, at a maximum diversion rate of 2.2 cfs (1000 gpm) to irrigate 94 acres of land in the George W. Harbour Survey No. 39, Abstract No. 394, Kerr County. Pursuant to a Grant of Right to Divert, Pump, and Use Water Pursuant to Certification of Adjudication to Appropriate State Water between certificate owner and Buckhorn Golf II, Ltd., applicant seeks to amend the certificate by adding authorization to use 80 acre-feet per year of the water currently authorized for diversion under the certificate at a maximum rate of 1.1 cfs (500 gpm) for direct irrigation of 110 acres of land out of 187.276 acres consisting of three tracts totaling 88.126 acres, a 2.15 acre tract and a 97 acre tract of land out of the Justa Esqueda Survey No. 25, Abstract 157, Kendall County, approximately 14 miles northwest of Boerne, Texas. Applicant also seeks authorization to convey the 80 acre-feet of irrigation water to an off-channel reservoir on land owned by Buckhorn Golf II, Ltd. . and located S 54°E, 4210 feet from the USGS published Benchmark/ Triangulation Station known as "Comfort 2", also being at 29.98N Latitude and 98.8°W Longitude. The combined maximum diversion rate will not exceed the 2.2 cfs currently authorized by the certificate. Kendall County Water Control and Improvement District No. 1 owns 90.276

acres of the land to be irrigated and Buckhorn Golf II, Ltd owns the other 97 acres of land to be irrigated as evidenced by a deed recorded in Volume 598, Page 514 of the Deed Records of Kendall County. Buckhorn Golf II, Ltd. leases the 90.276 acres owned by the "District" in a lease agreement dated April 13, 1999. Buckhorn Golf II, Ltd. also has easement agreements with Lewis B. Schmitz, et ux and Lion's Lair Limited Liability Company for use of land needed to convey the water to the land to be irrigated. The land to be added and the additional diversion point on the Guadalupe River is approximately 11.5 miles downstream of that currently authorized and this point is S 41.2 °E, 8217.92 feet from the USGS published Benchmark/Triangulation Station known as "Comfort 2", also being 29.97° N Latitude and 98.88° W. Longitude. This notice is being sent to the fifty one water right owners with a diversion point in the Guadalupe River watershed between the diversion point now authorized under Certificate of Adjudication No. 18-2018 and the requested diversion point. The Executive Director of the Texas Natural Resource Conservation Commission is recommending that any amendment granted for this application include a condition that it maintain the 1951 time priority except it shall be junior in time priority to all of the water rights with diversion points in the Guadalupe River watershed between the existing diversion point and the proposed diversion point.

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 October 23, 2000. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC may grant a contested case hearing on this application if a written hearing request is filed by October 23, 2000. The Executive Director can consider an approval of the application unless a written request for a contested case hearing is filed by October 23, 2000. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested amendment which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TNRCC 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 amendment and may forward the application and hearing request to the TNRCC 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, TNRCC, 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 TNRCC can be found at our web site at www.tnrcc.state.tx.us.

GO-CRETE, INC., 1001 E. Centre Park Boulevard, P.O. Box 888, DeSoto, Texas, 75123, applicant, seeks a permit pursuant to §11.121, Texas Water Code, and Texas Natural Resource Conservation Commission Rules 30 TAC §§ 295.1, et seq. The applicant seeks authorization to maintain an excavated off-channel reservoir and to divert an amount not to exceed 1280 acre-feet of water per annum from a point on the Trinity River, Trinity River Basin, Navarro County, to the reservoir for subsequent diversion and use for industrial purposes at a sand and gravel mining plant. The diversion point on the Trinity River is approximately 7.6 miles east of Chatfield, Texas, and is N 10° E, 50 feet from the northeast corner of the Wyser Robert Survey, Abstract No. 715, Navarro County, also being 32.18°N Latitude and 96.18°W Longitude. The maximum diversion rate from the river will be 8.9 cfs (4000 gpm).The off-channel reservoir impounds 480 acre-feet of water with a surface area of 40 acres. The northeast corner of the off-channel reservoir is located S 56°W, approximately 3600 feet from the northeast corner of the aforesaid survey. Water diverted but not consumed will be returned to the Trinity River by sub-surface leakage, or to a delineated wetland area.

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. A public meeting is intended for the taking of public comment, and is not a contested case hearing. A public meeting will be held if the Executive Director determines that there is a significant degree of public interest in the application.

The TNRCC 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. The Executive Director may approve the application unless a written request for a contested case hearing is filed within 30 days after newspaper publication of this 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) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" (4) a brief and specific description of how you would be affected by the application in a way not common to the general public; and (5) the location and distance of your property relative to the proposed activity. You may also submit proposed conditions to the requested permit which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. If a hearing request is filed, the Executive Director will not issue the permit and will forward the application and hearing request to the TNRCC 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, TNRCC, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TNRCC can be found at our web site at www.tnrcc.state.tx.us.

TRD-200006882
LaDonna Castañuela
Chief Clerk
Texas Natural Resource Conservation Commission
Filed: October 3, 2000

♦ ♦ ♦

Public Notice - Registry and Land Use Meeting

The Texas Natural Resource Conservation Commission (TNRCC or commission) is required under the Texas Solid Waste Disposal Act, Health and Safety Code, Chapter 361, as amended (the Act), to annually publish a state registry that identifies facilities that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous

substances into the environment. The most recent registry listing of these facilities was published in the May 26, 2000, issue of the *Texas Register* (25 TexReg 4944).

Pursuant to §361.184(a), the commission must publish a notice of intent to list a facility on the state registry of state Superfund sites in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located. With this publication, the TNRCC hereby gives notice of a facility or area that the executive director has determined eligible for listing, and which the executive director proposes to list on the state registry. By this publication, the TNRCC also gives notice pursuant to the Act, §361.1855, that it proposes a land use other than residential as appropriate for the facility identified below. The TNRCC proposes a commercial/industrial land use designation. Determination of future land use will impact the remedial investigation and remedial action for the site.

This publication also specifies the general nature of the potential endangerment to public health and safety or the environment as determined by information currently available to the executive director. This notice of intent to list this facility will also be published in the October 23, 2000, edition of the *Alvin Sun*.

The facility proposed for listing is the Force Road Oil and Vacuum Truck Company (the site), located at 1722 County Road 573 (Alloy Road), Brazoria County, Texas. This site is approximately 1300 feet east of the Brazoria - Fort Bend County Line. The approximate geographic coordinates of this site is 29§ 28’ 29.51"N and 95§ 26’ 57.39"W.

The facility known as Force Road Oil and Vacuum Truck Company occupies between nine and 12 acres out of a leased 28 acre tract of land. The site is bounded on the north by County Road 573, on the west by an inactive drainage canal, and on the east and south by agricultural land. The site is currently an inactive oily wastewater disposal and oil recovery facility. The structures at the site are one metal pump house/storage shed and three aboveground storage tanks.

Site operations primarily involved the use of five surface impoundments for the separation of waste brought to the site. Groundwater contamination exists and includes trans-1,2 dichloroethylene, vinyl chloride, and 1,1,1, trichloroethane. In October 1997, TNRCC secured the site with a high-level security fence.

A public meeting will be held November 28, 2000, 7:00 p.m., at the Iowa Colony City Hall, located at 12003 County Road 65, Iowa Colony, Texas. The purpose of this meeting is to obtain additional information regarding the site relative to its eligibility for listing on the state registry, identify additional potentially responsible parties, and obtain public input and information regarding the appropriate use of land on which the facility subject of this notice is located. The public meeting will be legislative in nature and not a contested case hearing under the Texas Administrative Procedure Act (Texas Government Code, Chapter 2001).

Written comments may also be submitted to the attention of Alonzo G. Arredondo, Project Manager, Superfund Cleanup Section, Remediation Division, MC-143, P.O. Box 13087, Austin, Texas 78711-3087, telephone number (512) 239-2145. All comments must be received by **5:00 p.m. on November 28, 2000**.

The executive director of the TNRCC prepared a brief summary of the commission’s records regarding this site. This summary and a portion of the records for this site, including documents pertinent to the executive director’s determination of eligibility, are available for review at the Manvel Branch Library, located at 7402 Masters Rd, Manvel, Texas. Hours of operation for the Manvel Branch Library are: Monday and Wednesday, 10:00 a.m. to 6 p.m.; Tuesday and Thursday, 1:00 p.m. to 8 p.m; Saturday, 10:00 a.m. to 5 p.m.; closed Friday and Sunday. Copies of the complete public record file may be obtained during regular business hours at the TNRCC Records Management Center, Building D, Room 190, 12100 Park 35 Circle, Austin, Texas 78753; telephone numbers (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee.

Handicapped parking is available on the east side of TNRCC building D, convenient to access ramps that are between buildings D and E.

TRD-200006891
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Filed: October 4, 2000

♦ ♦ ♦

North Texas Tollway Authority

Electronic Toll Collection (ETC) Systems Maintenance Services

Notice of Invitation. The North Texas Tollway Authority (the NTTA), a regional tollway authority and a political subdivision of the State of Texas, intends to issue a request for competitive sealed proposals to enter into an agreement with a qualified firm for Electronic Toll Collection (ETC) Systems Maintenance Services pursuant to the NTTA’s Policy Regarding Procurement and Disposition of Goods and Services.

To be considered, potential proposers must submit a Letter of Request, requesting a copy of the Request for Competitive Sealed Proposals, which letter must also contain the name of the proposer, a contact person, and an address to which the proposal may be sent. The NTTA will send only one copy of the proposal to each proposer.

Deadline. A Letter of Request notifying the NTTA of a request for a Proposal will be accepted by fax at (214) 528-4826, or by mail or hand delivery to: North Texas Tollway Authority, 5900 W. Plano Parkway, P.O. Box 260729, Plano, Texas 75026, Attn: Ms. Nancy Greer.

Letters of Request will be received until 1:00 p.m. on October 20, 2000.

Agency Contact. Any requests for additional information regarding this notice of invitation should be sent, in writing, to Mr. Rick Herrington, Director of Information Technology, at the above address or fax number.

TRD-200006877
Katharine D. Nees
Deputy Executive Director
North Texas Tollway Authority
Filed: October 3, 2000

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application for Authority to Revise Fuel Factors and Fuel Surcharges

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of an application for authority to revise fuel factors and fuel surcharges of fuel cost under-recoveries on October 2, 2000, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §36.203 (Vernon 1998 & Supplement 2000) and P.U.C. Substantive Rule §25.237.

Docket Style and Number: Petition of Reliant Energy HL&P to Revise Fuel Factors and Implement Surcharge for Prior Undercollected Fuel Costs. Docket Number 23098.

The Application: Reliant Energy HL&P (HL&P) requests authority to revise fuel factors and fuel surcharges pursuant to the requirements of PURA §36.203 and P.U.C. Substantive Rule §25.237. The new fuel factor proposed by HL&P is $0.032091 per Kwh for Residential Service, Miscellaneous General Service - Distribution, Large General Service - Distribution, Street and Protective Lighting Service, Miscellaneous Lighting Service and any other customers receiving service at distribution voltage. The new fuel factor proposed by HL&P is $0.030955 per Kwh for Miscellaneous General Service - Transmission, Large General- Transmission, Large Overhead Service (A) and Large Overhead Service (B) and any other customers receiving service at transmission voltage levels. HL&P proposes that these factors be made effective beginning with the December billing month (which begins on or about November 16, 2000) and will remain effective through December 31, 2001, unless the factors are superceded by a subsequent filing. Through the surcharges, HL&P seeks to recover the negative balance in its eligible fuel cost account. The surcharge in the amount of $465,194,949 is proposed to be implemented in HL&P's December 2000 billing month and recovered over a 13-month period ending December 2001. HL&P) is also requesting the commission to authorize the imposition of the revised fuel factor and proposed fuel surcharge on an interim basis, to allow HL&P to implement the surcharge over a 13-month period, to authorize HL&P to include its estimated fuel cost underrecoveries for the month of September in calculating the surcharge, and to grant any waivers that may be required to permit the proposed fuel factor and surcharge to be implemented as proposed.

Any rate changes granted will be subject to final review by the commission in the utility's fuel reconciliation proceeding for the period beginning August 1, 1997.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or call the commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989.

TRD-200006884
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 3, 2000

♦ ♦ ♦

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 (commission) of an application on September 28, 2000, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Docket Title and Number: Application of Sphera Optical Networks N.A., Inc. for a Service Provider Certificate of Operating Authority, Docket Number 23088 before the Public Utility Commission of Texas.

Applicant intends to provide facilities-based competitive local service and facilities-based interexchange service to business customers and other carriers.

Applicant's requested SPCOA geographic area includes the entire state of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas at P.O. Box 13326, Austin, Texas 78711-3326 or call the commission's Customer Protection Division at (512) 936-7120 no later than October 18, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200006879
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 3, 2000

♦ ♦ ♦

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 August 21, 2000, for expanded local calling service (ELCS), pursuant to Chapter 55, Subchapter C of the Public Utility Regulatory Act (PURA). A summary of the application follows.

Project Title and Number: Petition of the Hart Exchange for Expanded Local Calling Service, Project Number 22936.

The petitioners in the Hart exchange request ELCS to the exchanges of Canyon, Hereford, Olton, Plainview, and Tulia.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 no later than October 25, 2000. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136.

TRD-200006878
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 3, 2000

♦ ♦ ♦

Notice of Petition for Fuel Reconciliation

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) of a petition to reconcile fuel and purchased power costs on June 30, 2000, pursuant to the Public Utility Regulatory Act, Texas Utilities Code Annotated §36.205 (Vernon 1998, Supplement 2000).

Docket Style and Number: Petition of Southwestern Public Service Company for Reconciliation of its Fuel and Purchased Power Costs for 1998 and 1999. Docket Number 22742.

The Application: Southwestern Public Service Company (SPS) seeks to reconcile its fuel and purchased power costs for the period of January 1998 through December 1999. SPS states its under-collection, as of December 31, 1999, was $1,180,369.32. SPS also seeks to reconcile the non-energy expenses collected under its purchased power cost recovery factor (PCRF). As of December 31, 1999, Southwestern has under-collected its PCRF by $210,513.88. All customers in SPS' Texas retail rate classes are affected by this request.

The deadline for intervention is October 20, 2000. Persons who wish to intervene in the proceeding or comment upon the action sought should contact the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or call the commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY)

may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989.

TRD-200006787
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: September 27, 2000

♦ ♦ ♦

Notice of Public Hearing on Lifeline and Link Up Automatic Enrollment Rule

The Public Utility Commission of Texas (commission) will hold a public hearing regarding the proposed rule for automatic enrollment for Lifeline and Link Up telephone service, on Tuesday, October 31, 2000, at 9:00 a.m. in Hearing Room Gee, located on the 7th floor of the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. Project Number 21329, *Rulemaking to Amend §26.412 regarding Automatic Enrollment for Lifeline Telephone Service* has been established for this proceeding. Proposed changes to PUC Substantive Rule §26.412 were published in the September 1, 2000 issue of the *Texas Register* at 25 TexReg 8564. Comments on the proposed changes were due October 2, 2000, and reply comments are due October 16, 2000.

Questions concerning the public hearing or this notice should be referred to Jennifer Fagan, Attorney, Legal Division, (512) 936-7278. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200006885
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 3, 2000

♦ ♦ ♦

Notice of Request for Comments on Procedures and Forms to Implement §25.173 Relating to Goal for Renewable Energy

The Public Utility Commission of Texas (commission) proposes new procedures and forms to implement §25.173, relating to Goal for Renewable Energy. Project Number 22200, *PUC Proceeding to Approve a Program Administrator for the Renewable Energy Trading Program and to Develop Procedures for Registration and Certification Of Renewable Energy Facilities* has been assigned to this proceeding. Two sets of procedures and forms are proposed: one set dealing with the registration of renewable energy credit generators, and another dealing with the nomination of renewable energy credit offsets.

Interested persons may obtain a copy of the proposed procedures and forms from the commission's Central Records under Project Number 22200. Copies also may be obtained from the commission's web site for this project number. Comments on the proposed procedures and forms (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, before 3:00 p.m. on Friday, October 20, 2000. Reply comments may be submitted before 3:00 p.m. on Friday, October 27, 2000. All comments should refer to Project Number 22200.

TRD-200006865
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 2, 2000

♦ ♦ ♦

Public Notice of Intent to File Pursuant to P.U.C. Substantive Rule §26.215

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission), of a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.215.

Docket Title and Number. Verizon Southwest's Application for Approval of LRIC Study for Addition of Optional Multi-Jurisdiction Access to Controlink Digital Channel Service Pursuant to P.U.C. Substantive Rule §26.215 on or after October 6, 2000, Docket Number 23081.

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 23081. Written comments or recommendations should be filed no later than 45 days after the date of sufficiency and should be filed at the Public Utility Commission of Texas, 1701 North Congress Avenue, P. O. Box 13326, Austin, Texas 78711-3326. You may call the commission's Customer Protection Division at (512) 936-7120. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136.

TRD-200006864
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Filed: October 2, 2000

♦ ♦ ♦

Texas Rehabilitation Commission

Solicitation for Impartial Hearing Officers

The Texas Rehabilitation Commission is soliciting for individuals to serve on an independent contract basis as Impartial Hearing Officers for client appeals before the Commission. Qualified individuals should have knowledge of the delivery of vocational rehabilitation services, the Texas Rehabilitation Commission State Plan for provision of rehabilitation services, and federal and state laws, rules, and regulations governing the provision of such services. Applicants who are clients of the Commission will be disqualified from the application process.

Interested persons should contact the Office of Administrative Hearings at (512) 424-4064 to request an application. Please forward your completed application materials to: Texas Rehabilitation Commission, Attn: Office of Administrative Hearings, 4900 North Lamar Boulevard, Suite 7310, Austin, Texas 78751-2399. Completed applications of qualified individuals must be received by 5:00 p.m., Friday, October 20, 2000.

TRD-200006889
Charles Schiesser
Chief of Staff
Texas Rehabilitation Commission
Filed: October 4, 2000

♦ ♦ ♦

San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposal

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to conduct a Traffic Signal Re-timing Study in the San Antonio metropolitan area. The purpose of the study is to perform signal-timing analyses for direct implementation in the field.

A copy of the Request for Proposals (RFP) may be requested by calling Ricardo Gomez, Transportation Planner, at (210) 227-8651. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Friday, October 31, 2000 at the MPO office:

Janet A. Kennison, Administrator

Metropolitan Planning Organization

1021 San Pedro, Suite 2200

San Antonio, Texas 78212

The contract award will be made by the MPO's Transportation Steering Committee based on the recommendation of the study's consultant selection committee. The Traffic Signal Re-timing Study Selection Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this study, in the amount of $190,000, is contingent upon the availability of Federal transportation planning funds.

Issued in San Antonio, Texas on October 2, 2000.

TRD-200006866
Janet A. Kennison
Administrator
San Antonio-Bexar County Metropolitan Planning Organization
Filed: October 2, 2000

♦ ♦ ♦

The Texas A&M University System

Request for Proposals for Actuarial and Benefit Consulting Services

In accordance with Section 2254.028(a)(3) of the Texas Government Code, The Texas A&M University System is soliciting proposals from firms and individuals for actuarial and benefit consulting services to assist with the management of the System's health, WCI and benefit plans. Qualified firms must be able to demonstrate their ability to perform actuarial evaluations of plan changes and reserve levels, set premiums and provide advice on all aspects of health and benefit plans.

Information concerning the Request for Proposals may be obtained by contacting Mr. Steve Hassel, Director of Benefit Programs, The Texas A&M University System, Human Resources, 5th Floor, 301 Tarrow Street, College Station, Texas 77840-7896 or by email at hassel@sago-mail.tamu.edu

Selection criteria will include competence, knowledge and qualifications in the area of actuarial and benefit consulting for large employers, especially in the public sector. Proposals must be submitted on or before 4:00 p.m., November 8, 2000.

TRD-200006900
Vickie Burt Spillers
Executive Secretary to the Board
The Texas A&M University System
Filed: October 4, 2000

♦ ♦ ♦

Texas Water Development Board

Applications Received

Pursuant to the Texas Water Code, Section 6.195, the Texas Water Development Board provides notice of the following applications received by the Board:

Brazos River Authority, P.O. Box 7555, 4400 Cobbs Drive, Waco, Texas, 76714-7555, and the City of Houston, P.O. Box 1562, Houston, Texas, 77251-1562, on behalf of the Allens Creek Reservoir project, received July 31, 2000, application for financial assistance in an amount not to exceed $20,000,000 from the State Participation Account.

City of Venus, 103 West 3rd Street, Venus, Texas, 76084, received August 18, 2000, application for financial assistance in the amount of $650,000 from the Texas Water Development Funds.

City of Sugar Land, 10405 Corporate Drive, Sugar Land, Texas, 77478, received August 31, 2000, application for financial assistance in the amount of $12,280,000 from the Clean Water State Revolving Fund.

Brookeland Fresh Water Supply District, P.O. Box 5350, Sam Rayburn, Texas, 75951-5350 received June 28, 2000, application for financial assistance in the amount of $1,040,000 from the Economically Distressed Areas Account.

Terrell County Water Control and Improvement District No. 1, P.O. Box 569, Sanderson, Texas, 79848-0569, received September 27, 2000, application for financial increase in the amount of $200,000 from the Economically Distressed Areas Account.

Canyon Regional Water Authority, 850 Lakeside Pass Drive, New Braunfels, Texas, 78130, received May 1, 2000, application for financial assistance in the amount of $10,000,000 from the Texas Water Development Funds.

City of Cleveland, 203 East Boothe, Cleveland, Texas, 77327, received September 25, 2000, application for financial assistance in the amount of $1,960,000 from the Clean Water State Revolving Fund.

City of White Oak, P.O. Box 98, White Oak, Texas, 75693, received August 14, 2000, application for financial assistance in the amount of $1,845,000 from the Clean Water State Revolving Fund.

Bright Star-Salem Water Supply Corporation, P.O. Box 620, Alba, Texas, 75410-0620, received August 31, 2000, application for financial assistance in the amount of $825,000 from the Drinking Water State Revolving Fund.

Greater Texoma Utility Authority, on behalf of the City of Howe, City of Pottsboro and Gober Municipal Utility District, 5100 Airport Drive, Denison, Texas, 75020, received August 23, 2000, application for financial assistance in the amount of $1,960,000 from the Texas Water Development Funds.

City of Tioga, P.O. Box 206, Tioga, Texas, 76271-0206, received August 31, 2000, application for financial assistance in the amount of $655,000 from the Drinking Water State Revolving Fund and the Texas Water Development Funds.

Arroyo Water Supply Corporation, 36350 Marshall Hutts Road, Rio Hondo, Texas, 78583-3447, received August 23, 2000, application for financial assistance in the amount of $1,040,000 from the Water Loan Assistance Fund.

City of Missouri City, 1522 Texas Parkway, Missouri City, Texas, 77489, received September 1, 2000, application for financial assistance in the amount of $8,490,000 from the Clean Water State Revolving Fund.

Sunbelt Fresh Water Supply District, 410 West Gulf Bank, Houston, Texas, 77037, received September 1, 2000, application for financial

assistance in the amount of $2,630,000 from the Drinking Water State Revolving Fund.

Burleson County Municipal Utility District No. 1, Route 1, Box 355, Somerville, Texas, 77879, received August 31, 2000, application for financial assistance in the amount of $1,100,000 from the Drinking Water State Revolving Fund and the Texas Water Development Fund II.

TRD-200006892
Gail L. Allan
Director of Project-Related Legal Services
Texas Water Development Board
Filed: October 4, 2000

♦ ♦ ♦

How to Use the Texas Register

Information Available: The 13 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following a 30-day public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Open Meetings - notices of open meetings.

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 24 (1999) is cited as follows: 24 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 "23 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 23 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For subscription information, see the back cover or call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code*** (***TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles (using Arabic numerals) and Parts (using Roman numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), LOIS, Inc. (1-800-364-2512 ext. 152), 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 8, April 9, July 9, and October 8, 1999). 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).

Texas Register
Services

The *Texas Register* offers the following services. Please check the appropriate box (or boxes).

Texas Natural Resource Conservation Commission, Title 30

❑ **Chapter 285** $25 ❑ update service $25/year *(On-Site Wastewater Treatment)*
❑ **Chapter 290** $25 ❑ update service $25/year *(Water Hygiene)*
❑ **Chapter 330** $50 ❑ update service $25/year *(Municipal Solid Waste)*
❑ **Chapter 334** $40 ❑ update service $25/year *(Underground/Aboveground Storage Tanks)*
❑ **Chapter 335** $30 ❑ update service $25/year *(Industrial Solid Waste/Municipal Hazardous Waste)*

Update service should be in ❑ printed format ❑ 3 1/2" diskette

Texas Workers Compensation Commission, Title 28

❑ Update service $25/year

Texas Register Phone Numbers	**(800) 226-7199**
Documents	(512) 463-5561
Circulation	(512) 463-5575
Marketing	(512) 305-9623
Texas Administrative Code	(512) 463-5565

Information For Other Divisions of the Secretary of State's Office

Executive Offices	(512) 463-5701
Corporations/	
Copies and Certifications	(512) 463-5578
Direct Access	(512) 475-2755
Information	(512) 463-5555
Legal Staff	(512) 463-5586
Name Availability	(512) 463-5555
Trademarks	(512) 463-5576
Elections	
Information	(512) 463-5650
Statutory Documents	
Legislation	(512) 463-0872
Notary Public	(512) 463-5705
Uniform Commercial Code	
Information	(512) 475-2700
Financing Statements	(512) 475-2703
Financing Statement Changes	(512) 475-2704
UCC Lien Searches/Certificates	(512) 475-2705

Please use this form to order a subscription to the *Texas Register*, to order a back issue, or to indicate a change of address. Please specify the exact dates and quantities of the back issues required. You may use your VISA or Mastercard. All purchases made by credit card will be subject to an additional 2.1% service charge. Return this form to the Texas Register, P.O. Box 13824, Austin, Texas 78711-3824. For more information, please call (800) 226-7199.

❒ **Change of Address**
(Please fill out information below)

❒ **Paper Subscription**
❒ One Year $150 ❒ Six Months $100 ❒ First Class Mail $250

❒ **Back Issue ($10 per copy)**

_____ Quantity

Volume _____, Issue #_____.
(Prepayment required for back issues)

NAME _____

ORGANIZATION_____

ADDRESS _____

CITY, STATE, ZIP _____

PHONE NUMBER _____

FAX NUMBER _____

Customer ID Number/Subscription Number _____
(Number for change of address only)

❒ **Bill Me** ❒ **Payment Enclosed**

Mastercard/VISA Number _____

Expiration Date _____ Signature _____

Please make checks payable to the Secretary of State. Subscription fees are not refundable.
Do not use this form to renew subscriptions.
Visit our home on the internet at http://www.sos.state.tx.us.

_____
_____
Periodical Postage

PAID

Austin, Texas
and additonal entry offices
_____
_____