

# PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to

submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

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

## TITLE 1. ADMINISTRATION

### PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

##### SUBCHAPTER C. UTILIZATION REVIEW

###### 1 TAC §§371.200, 371.201, 371.203, 371.204, 371.206, 371.210

The Health and Human Services Commission (HHSC) proposes to amend the title and content of the following: §371.200, relating to Inpatient Hospital Utilization Review Program; §371.201, relating to Case Selection Process; §371.203, relating to Texas Medical Review Program (TMRP) Review Process; §371.204, relating to Hospital Screening Criteria for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contract Reviews; §371.206, relating to Denials and Recoupments for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contracted Hospitals; and §371.210, relating to Inpatient Utilization Review for Hospitals Reimbursed under the Tax Equity and Fiscal Responsibility Act (TEFRA) Principles of Reimbursement or LoneSTAR Select II Contracting Program.

HHSC intends that a violation committed before the effective date of the proposal be governed by the prior rules and provisions of §§371.200, 371.201, 371.203, 371.204, 371.206, and 371.210 that were in effect when the violation was committed, and that the amended provisions of §§371.200, 371.201, 371.203, 371.204, 371.206, and 371.210 continue in effect for this purpose. HHSC does not intend for the amendments of the rules to affect the prior operation of the rules; any prior actions taken under the rules; any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under the rules; any violation of the rules; or any penalty, forfeiture, or punishment incurred under the rules before their amendment; or any review, proceeding, or action concerning any privilege, obligation, liability, penalty, forfeiture, or punishment. HHSC additionally intends that any review, proceeding, or action may be instituted, continued, or enforced, and the review or action imposed, as if the rules had not been amended.

HHSC intends that should any sentence, paragraph, subdivision, clause, phrase, or section of the rules be determined, adjudged, or held to be unconstitutional, illegal or invalid, the same shall not

affect the validity of the rules as a whole, or any part or provision hereof other than the part so declared to be unconstitutional, illegal, or invalid, and will not affect the validity of the rules as a whole.

#### BACKGROUND AND JUSTIFICATION

Existing 1 TAC §§371.200, 371.201, 371.203, 371.204, 371.206, and 371.210 describe HHSC Office of Inspector General's (HHSC-OIG) processes for hospital utilization review (HUR) case selection, hospital screening criteria, denials and recoupments, and inpatient utilization review. HHSC-OIG performs retrospective utilization reviews of inpatient hospital admissions to evaluate the medical necessity of the admission, accuracy of the billed diagnosis-related group (DRG) or TEFRA claim, and quality of care. For the purposes of these rules, medical necessity means the patient has a condition requiring treatment that can be safely provided only in the inpatient setting. HHSC-OIG makes decisions based on medical record documentation and may deny the admission for lack of medical necessity or for being provided in an inappropriate setting, such as outpatient observation.

The existing rules are inconsistent with current Texas Medicaid program policy, which extends outpatient observation time from 24 to 48 hours; adds present on admission (POA) reporting requirements, and specifies that a claim for an inpatient admission that lacks medical necessity may be denied. The proposed amendments are necessary to bring the rules into compliance with these policies.

The proposed amendments also delete references to LoneStar Select II, a contracting program that no longer exists.

#### SECTION-BY-SECTION SUMMARY

Section 371.200, relating to Inpatient Hospital Utilization Review (HUR) Program, describes the type of hospital claims reviewed by the Commission and the federal regulations that allow the state to undertake HUR. The proposed amendment deletes obsolete references to the LoneSTAR Select II contracting program and refers to facility specific per diem methodology reviews.

Section 371.201, relating to Case Selection Process, requires HHSC-OIG to use statistically valid random sampling methodology and/or focused case selection for reviews conducted under the Texas Medical Review Program and Tax Equity and Fiscal Responsibility Act. The proposed amendment deletes obsolete references to the LoneSTAR Select II contracting program and specifies that reviews will consider general DRG or claims submission errors.

Section 371.203, relating to the Texas Medical Review Program (TMRP) Review Process, describes HHSC-OIG medical record review process. This proposed amendment includes POA indicators for primary and secondary diagnoses. Under the pro-

posed amendment, HHSC-OIG will revise the POA indicator for the diagnosis code and regroup the DRG if HHSC-OIG determines that a primary or secondary diagnosis was not present at the time the order for inpatient admission occurred. Conditions that develop during an outpatient encounter are considered POA. The amendment also clarifies that HHSC may deny a non-physician, as well as physician, claim associated with an inpatient admission that lacks medical necessity, but HHSC-OIG will notify the provider in writing if the claim is denied. Finally, the amendment expands necessary x-ray documentation to include the process of diagnostic and imaging reports.

Section 371.204, relating to Hospital Screening Criteria for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contract Reviews, requires HHSC-OIG to use recognized evidence-based guidelines for inpatient hospital screening criteria for the initial approval of or referral to a physician consultant of inpatient reviews for medical necessity decisions. The proposed amendment clarifies that HHSC may deny non-physician, as well as physician, claims associated with an inpatient admission that lack medical necessity, but HHSC-OIG will provide written notice to the provider if the claim will be denied. The proposed amendment extends the defined observation period from 24 to 48 hours prior to discharge to be consistent with the Texas Medicaid Provider Procedures Manual (TMPPM). The amendment also deletes obsolete references to the LoneSTAR Select II contracting program and includes references to facility specific per diem methodology reviews.

Section 371.206, relating to Denials and Recoupments for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contracted Hospitals, requires that HHSC-OIG give a hospital written notice of an admission denial. The rule also provides that a physician consultant makes decisions regarding medical necessity, cause of readmission, and appropriateness of setting; describes what constitutes a technical denial, readmission denial, day outlier denial, and cost outlier denial; and provides that the claims administrator recoup monies associated with a denial. The proposed amendment clarifies that HHSC may deny a non-physician, as well as a physician, claim associated with an inpatient admission that lacks medical necessity and specifies that HHSC-OIG will send written notice to any provider whose claim for professional services will be denied. In addition, the proposed amendment allows for additional focused case selection for reviews. Finally, the proposed amendment extends the defined observation period from 24 to 48 hours prior to discharge, consistent with the TMPPM; deletes obsolete references to the LoneSTAR Select II contracting program; and includes references to facility specific per diem methodology reviews.

Section 371.210, relating to Inpatient Utilization Review for Hospitals Reimbursed under TEFRA Principles of Reimbursement or LoneSTAR Select II Contracting Program, describes the HHSC-OIG medical record review process to determine medical necessity for inpatient admissions to hospitals reimbursed under TEFRA, the use of discharge screens and generic quality screens to assess quality of care, and referrals to a physician consultant who will determine possible clinical recommendations or corrective actions. The proposed amendment clarifies that HHSC may deny a non-physician, as well as a physician, claim associated with an inpatient admission that lacks medical necessity, and specifies that HHSC-OIG will notify the provider in writing if the claim will be denied. The proposed amendment also deletes obsolete references to the LoneSTAR Select II

contracting program and updates terminology (1) to reflect that x-ray documentation means diagnostic and imaging reports and (2) to reference facility-specific per diem methodology reviews to reflect existing Medicaid policy.

#### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five years the proposed amendments are in effect there will be no fiscal impact to the state. The rule change will require modification of the Hospital Utilization Review computer application used by nurse reviewers. Hewlett Packard (HP) is contracted to maintain and revise this application. Cost for the application modification will be absorbed within the current HP contract. Local governments will not incur additional costs.

#### SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined that during the first five years the amendments are in effect, there are no anticipated economic costs to persons required to comply with the amendment as proposed. HHSC also has determined that there will be no effect on small businesses or micro-businesses to comply with these amendments as proposed because the amendment merely formalizes current Texas Medicaid policy into rule. There is no anticipated negative impact on local employment.

#### PUBLIC BENEFIT

Mr. Douglas C. Wilson, Inspector General, has determined that for the initial implementation period the amendments are in effect the public benefit resulting from adoption of the amendments is making OIG's retroactive review of inpatient hospital costs consistent with Texas Medicaid policy.

#### REGULATORY ANALYSIS

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

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Judy Knobloch, Director of Quality Review, Office of the Inspector General, Texas Health and Human Services Commission, P.O. Box 85200, MC-1324, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register*.

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code §531.033, which provides the Executive Commissioner

of HHSC with broad rulemaking authority; Human Resources Code §32.021 and Texas Government Code §531.021(a), which provides HHSC with the authority to administer the Texas Medicaid program; and Texas Government Code §531.102(a), which permits HHSC-OIG to obtain any information or technology necessary to enable the office to meet its responsibilities.

The proposed amendments affect Human Resources Code Chapter 32 and the Government Code Chapter 531. The proposed amendments do not affect any other statute, article, or code.

§371.200. *Inpatient Hospital Utilization Review Program.*

(a) The Texas Medical Review Program (TMRP) is the inpatient hospital utilization review process used by the Texas Health and Human Services Commission (Commission) for hospitals reimbursed under the Commission's prospective payment system. The Commission conducts the TMRP in accordance with:

(1) applicable federal regulations at 42 Code of Federal Regulations Part 456, Subparts A, B, and C, which require the Commission to operate a utilization review program that controls the utilization of inpatient hospital services and assesses the appropriateness and quality of those services; and

(2) an approved waiver under the Social Security Act, §1903(i)(4), as it relates to the use of Title XVIII utilization review procedures for Title XIX patients in acute care general hospitals other than hospitals reimbursed under the Tax Equity and Fiscal Responsibility Act (TEFRA) reimbursement principles.

(b) The TEFRA review process relates directly to hospitals reimbursed under the TEFRA reimbursement principles and facility specific per diem methodology [(children's hospitals) or through the LoneSTAR Select II contracting program (freestanding psychiatric hospitals)].

§371.201. *Case Selection Process.*

(a) The Texas Health and Human Services Commission (Commission) selects Texas Medical Review Program (TMRP) cases for review by a statistically valid random sampling methodology and/or focused case selection. Cases will consist of paid inpatient claims for diagnostic related groups (DRGs), which may include:

- (1) Readmissions up to 30 [thirty] days;
- (2) Ambulatory surgical procedures billed on inpatient claims;
- (3) Questionable admissions or claims coding identified by other entities;
- (4) Admissions identified through the Commission's quality review program as potential quality of care concerns;
- (5) DRG payments made to freestanding rehabilitation facilities; and
- (6) Day or cost outlier payments; or;
- (7) Any other DRG or claims submission errors.

(b) The Commission selects Tax Equity and Fiscal Responsibility Act and facility specific per diem methodology [(TEFRA) and LoneSTAR Select II contracting program] cases for review by a statistically valid random sampling methodology and/or focused case selection. Cases will consist of paid inpatient claims for admissions to children's hospitals and freestanding psychiatric facilities.

§371.203. *Texas Medical Review Program (TMRP) Review Process.*

(a) The TMRP review process includes, but is not limited to:

(1) Admission review to evaluate the medical necessity of the admission. For purposes of the TMRP, [Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select II Contract] reviews, medical necessity means the patient has a condition requiring treatment that can be safely provided only in the inpatient setting.

(2) Diagnosis related group (DRG) validation to confirm documentation in the medical record of [that] the critical elements necessary to assign a DRG. The hospital [are present in the medical record. Hospital] staff is [are] responsible and held accountable for the accuracy of the required critical elements. Those elements are age, sex, discharge status, admission date, discharge date, principal diagnosis, principal and secondary procedures, [and] any complications or comorbidities (secondary diagnoses), and Present on Admission (POA) indicators. [This process also determines]

(A) POA review will validate the POA indicator assigned to the principal and secondary diagnoses codes reported on claim forms. If it is determined that the principal and/or secondary diagnoses were not present at the time for inpatient admission occurs, the Commission will revise the POA indicator for the diagnosis code. Conditions that develop during an outpatient encounter, including emergency department, observation, or outpatient surgery are considered POA.

(B) DRG validation confirms that the principal and secondary diagnoses and procedures are sequenced correctly. The principal diagnosis is the diagnosis (condition) established after study to be chiefly responsible for occasioning the admission of the patient to the hospital for care. The secondary diagnoses are conditions that affect the patient care in terms of requiring: clinical evaluation, therapeutic treatment, diagnostic procedures, extended length of hospital stay, increased nursing care and/or monitoring, or in the case of a newborn, conditions the physician deems to have clinically significant implications for future health care needs. If the principal diagnosis, secondary diagnoses, or procedures are not substantiated in the medical record, are not sequenced correctly, or have been omitted, codes may be deleted, changed, or added.

(C) When the correct diagnosis and procedure coding and sequencing have been determined, the information will be entered into the applicable version of the Grouper software for a DRG assignment. The Centers for [For] Medicare and Medicaid Services (CMS) approved DRG Grouper software considers the required critical elements and determines the final DRG assignment. If the DRG validation process results in deletions, changes, or additions to the critical elements and these changes cause the DRG to be reassigned, the Texas Health and Human Services Commission (Commission) will direct the claims administrator to adjust the payment to the hospital accordingly.

(3) Quality of care review to assess whether the [quality of] care provided meets generally accepted standards of medical and hospital care practices or puts the patient at risk of unnecessary injury, disease, or death. Quality of care review includes the use of discharge screens and generic quality screens. If quality of care issues are identified, physician consultants under contract with the Commission, and of the specialty related to the care provided, will determine possible clinical recommendations or corrective actions.

(4) Readmission review to evaluate each admission on its individual merits and determine if the second or subsequent admissions resulted from a premature discharge or were required to provide services that should have been provided in a previous admission.

(5) Day outlier review, which includes DRG validation, verifies [to verify] the medical necessity of each day of the admission [and includes DRG validation].

(6) Cost outlier review to verify that services billed were medically necessary, ordered by a physician or non-physician provider, rendered and billed appropriately, and substantiated in the medical record.

(b) The Commission will review the complete medical record for the requested admission(s) to make decisions on all aspects of this review process. The complete medical record may include: emergency room records, medical/surgical history and physical examination, discharge summary, physicians' progress notes, physicians' orders, lab reports, diagnostic and imaging [x-ray] reports, operative reports, pathology reports, nurses' notes, medication sheets, vital signs sheets, therapy notes, specialty consultation reports, and special diagnostic and treatment records. If the complete medical record is not available during the review, the Commission will issue a preliminary technical denial and notify the facility.

(c) A physician consultant under contract with the Commission will make all decisions concerning medical necessity, cause of readmission, and appropriateness of setting for the service provided. In the event the physician consultant determines the services were not medically necessary, should have been provided in a previous admission, or were not provided in the appropriate setting, the claim will be denied, and the Commission will notify the hospital in writing. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, the Commission will consider for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. Physicians and/or non-physician providers will be notified in writing if the claim for professional services is denied. The written notification will explain the process for appealing the denial.

§371.204. *Hospital Screening Criteria for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and Facility-Specific Per Diem Methodology [LoneSTAR Select H Contract] Reviews.*

(a) The Texas Health and Human Services Commission (Commission) uses recognized evidence-based guidelines for inpatient hospital screening criteria. Non-physician reviewers use the [criteria] as guidelines as criteria for the initial approval or for the referral of inpatient reviews for medical necessity decisions. If the criteria are not met, or if the non-physician reviewer has any questions concerning the appropriateness of coding or quality of care, the non-physician [nonphysician] reviewer will refer the medical record to a physician consultant under contract with the Commission for a decision. Even if the criteria are met, the physician consultant may determine that an inpatient admission was not medically necessary and the Commission will issue an admission denial. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, the Commission will consider for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. A physician consultant may determine that an inpatient admission was not medically necessary if a physician admitted a patient in observation status and the patient was discharged [within twenty-four hours] from the [that] outpatient status within the Texas Medicaid Provider Procedures Manual, or any subsequent provider manuals, defined observation period.

(b) For the purposes of the TMRP, TEFRA[,] facility-specific per diem methodology [and LoneSTAR Select H Contract] reviews, medical necessity means that the patient has a condition requiring treatment that can be safely provided only in the inpatient setting.

§371.206. *Denials and Recoupments for Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA)[; and*

*LoneSTAR Select H Contracted] Hospitals, and Facility-Specific Per Diem Methodology Reviews.*

(a) Reviews conducted under the TMRP, TEFRA and facility-specific per diem methodology, [Texas Medical Review Program (TMRP), Tax Equity and Fiscal Responsibility Act (TEFRA), and LoneSTAR Select H Contracting programs] may result in denials of claims. The Texas Health and Human Services Commission (Commission) will notify the hospital in writing of the denial decision, and instruct the claims administrator to recoup payment. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, the Commission will consider for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. Physicians and/or non-physician providers will be notified in writing if the claim for professional services is denied. The written notification of denial will explain the appeal process. Types of denials are:

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

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

(A) For on-site reviews, if the complete medical record is not made available during the on-site review, the Commission will issue a preliminary technical denial at that time. The hospital is allowed 60 [sixty] calendar days from the date of the exit conference to provide the complete medical record to the Commission. If the complete medical record is not received by the Commission within this time frame, the Commission will issue a final technical denial. If the Commission requests a copy of the medical record in writing, and the copy is not received within the specified time frame, the Commission will issue a preliminary technical denial by certified mail or fax machine. The hospital has 60 [sixty] calendar days from the date of the notice to submit the complete medical record. If the complete medical record is not received by the Commission within this time frame, the Commission will issue a final technical denial.

(B) For mail-in reviews, the Commission will request copies of medical records in writing. If the Commission does not receive the complete medical record within the specified time frame, the Commission will issue a preliminary technical denial by certified mail or fax machine. The hospital has 60 [sixty] calendar days from the date of the notice to submit the complete medical record. If the Commission does not receive the complete medical record within this specified time frame, the Commission will issue a final technical denial.

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

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

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

(b) When an admission denial or day of stay denial is issued, the Commission will direct the claims administrator to recoup payment. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, the Commission will consider for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. The Commission will make an exception in the case of TMRP hospitals if the patient was ~~originally~~ placed in observation, and the Commission ~~hospital has been~~ notified ~~by~~ the hospital ~~Commission~~ that it ~~they~~ may submit a revised outpatient claim solely for medically necessary outpatient services provided during the Texas Medicaid Provider Procedures Manual (TMPPM), or any subsequent provider manuals, defined observation period. A physician's order for observation must be present in the physician's orders to document that the patient was ~~originally~~ placed in outpatient observation. The hospital must submit the revised outpatient claim and a copy of the Commission's notification letter to the claims administrator at the address indicated in the notification letter. The claims administrator must receive the outpatient claim and copy of the notification letter within 120 ~~one hundred twenty~~ calendar days of the date of the notification letter. The claims administrator may consider payment for the medically necessary services provided during the TMPPM-defined ~~twenty-four hour~~ observation period. The hospital may provide observation services in any part of the hospital where a patient can be assessed, monitored, and treated.

*§371.210. Inpatient Utilization Review for Hospitals Reimbursed Under the Tax Equity and Fiscal Responsibility Act (TEFRA) Principles of Reimbursement, and Facility-Specific Per Diem Methodology Reviews [or LoneSTAR Select II Contracting Program].*

(a) The TEFRA and facility-specific per diem methodology reviews ~~[LoneSTAR Select II contract review]~~ process includes the following:

(1) Admission review to evaluate the medical necessity of the admission. For purposes of the Texas Medical Review Program (TMRP), TEFRA~~;~~ and ~~LoneSTAR Select II contract~~ reviews, medical necessity means the patient has a condition requiring treatment that can be safely provided only in the inpatient setting.

(2) Continued stay review to verify the medical necessity of each day of stay.

(3) Quality of care review to assess whether the quality of care provided meets generally accepted standards of medical and hospital care practices or puts the patient at risk of unnecessary injury or death. Quality of care review includes the use of discharge screens and generic quality screens. If quality of care issues are identified, physician consultants under contract with the Texas Health and Human Services Commission (Commission), and of the specialty related to the care provided, will determine possible clinical recommendations or corrective actions.

(b) The Commission will review the complete medical record for the requested admission(s) to make decisions on all aspects of this review process. The complete medical record may include: emergency room records, medical/surgical history and physical examination, discharge summary, physicians' progress notes, physicians' orders, lab reports, diagnostic and imaging ~~x-ray~~ reports, operative reports, pathology reports, nurses' notes, medication sheets, vital signs sheets, therapy notes, specialty consultation reports, and special diagnostic and treatment records. If the complete medical record is not available during the review, the Commission will issue a preliminary technical denial and notify the facility.

(c) A physician consultant under contract with the Commission will make all decisions concerning medical necessity, cause of readmission, and appropriateness of setting for the service provided. In the event the physician consultant determines the services were not medically necessary, should have been provided in a previous admission, or were not provided in the appropriate setting, the claim will be denied, and the Commission will notify the hospital in writing. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, the Commission will consider for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. Physicians and/or non-physician providers will be notified in writing if the claim for professional services is denied. The written notification will explain the process for appealing the denial.

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 23, 2013.

TRD-201304203

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 424-6900



## TITLE 4. AGRICULTURE

### PART 2. TEXAS ANIMAL HEALTH COMMISSION

#### CHAPTER 38. TRICHOMONIASIS

##### 4 TAC §38.2

The Texas Animal Health Commission (commission) proposes amendments to §38.2, concerning General Requirements, in Chapter 38, which is entitled "Trichomoniasis". The purpose of the amendments is to change the testing requirements for bulls.

Bovine Trichomoniasis (Trich) is a venereal disease of cattle caused by the protozoa *Tritrichomonas foetus*. Certain herd management practices such as commingled grazing or fence-line contact with other herds are risk factors for infection. Control of *T. foetus* in an infected herd includes testing bulls and culling those infected.

Representatives of the Bovine Trich Working Group met on May 21, 2013, at the commission's central office in Austin to review and evaluate the effectiveness of current rules. The group recommended allowing untested bulls to be purchased and resold without a test if moved under permit with official permanent identification. After much discussion it was decided that this procedure will be allowed. Commission inspectors will permit untested bulls to be moved to either a feeding facility, another sale barn or to another physical location given by the buyer for the bull to be resold. The permit will expire seven days from the date of issuance and bulls cannot be commingled with female cattle during the seven days.

FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no significant additional fiscal implications for state or local government as a result of enforcing or administering the rule. An Economic Impact Statement (EIS) is required if the proposed rule has an adverse economic effect on small businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact on cattle raisers and breeders and, therefore, there is no need to do an EIS. Implementation of this rule poses no significant fiscal impact on small or micro-businesses.

#### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule is to allow the authorized and controlled movement of untested bulls to either a feeding facility, another sale barn or to another physical location in order for the bull to be sold, which will provide greater accountability in bulls being sold.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rule will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

#### TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. The proposed amendments are an activity related to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

#### REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.texas.gov". Comments on the rule proposal will be accepted until 5:00 p.m. on November 4, 2013.

#### STATUTORY AUTHORITY

The amendments are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized by §161.041(b) to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That authority is found in §161.061.

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another

epidemiologically sound procedure before or after animals are moved. That authority is found in §161.054. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.061 provides that if the commission determines that a disease listed in §161.041 of this code or an agency of transmission of one of those diseases exists in a place in this state or among livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl, or that a place in this state where livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl are exposed to one of those diseases or an agency of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place.

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

#### §38.2. *General Requirements.*

(a) Test Requirements: All Texas origin bulls sold, leased, gifted, exchanged or otherwise change possession for breeding purposes in the State of Texas shall meet the following testing or certification requirements prior to sale or change of ownership in the state:

(1) Be certified as virgin, by the breeder or his representative, on and accompanied by a breeder's certificate of virgin status; or

(2) If from a herd of unknown status (a herd that has not had a whole herd test), be tested negative on three consecutive culture tests conducted not less than seven days apart or one RT-PCR test conducted within 60 days of sale or movement, be held separate from all female cattle since the test sample was collected, and be accompanied by a Trich test record showing the negative test results.

(b) Identification of Bulls: All bulls certified as virgin bulls shall be identified by an official identification device or method on the breeder's certification of virgin status. All bulls tested for Trichomoniasis shall be identified by an official identification device or method at the time the initial test sample is collected. Official identification includes: Official Alpha-numerical USDA metal ear tags (bangs tags), Official 840 RFID tags, Official 840 flap or bangle tags, and Official individual animal breed registry tattoo or breed registry individual animal brands. That identification shall be recorded on the test documents prior to submittal.

(c) Confirmatory Test: The owner of any bull which tests positive for Trichomoniasis may request in writing, within five days of the positive test, that the Commission allow a confirmatory test to be performed on the positive bull. If the confirmatory test is positive the bull will be classified as infected with Trichomoniasis. If the confirmatory test is negative the bull shall be retested in not less than seven days to determine its disease status. If the confirmatory test reveals that the bull is only infected with fecal trichomonads, the test may be considered negative.

(d) Untested Bulls: Bulls presented for sale without a breeder's certification of virgin status or a Trich test record showing negative test results may:

(1) Be sold for movement only directly to slaughter; or

(2) Be sold [Sold] for movement to an approved feedlot and then moved to slaughter or transported back to a livestock market under permit, issued by Commission personnel, to be sold in accordance with this chapter; or

(3) Be sold and moved under a Hold Order to such place as specified by the Commission for testing to change status from a slaughter bull. Such bulls shall be officially individually identified with a permanent form of identification prior to movement, move to the designated location on a movement permit, and be held in isolation from female cattle at the designated location [~~for not less than 21 days~~] where the bull shall undergo three consecutive culture tests at least [~~for not less than~~] seven days apart or [~~where the bull shall undergo~~] one RT-PCR test. If the results of any test are positive, the bull shall be classified as infected and be permitted for movement only directly to slaughter or to a livestock market for sale directly to slaughter; or[-]

(4) Be sold and moved to another physical location under permit issued by Commission personnel, and then to a livestock market or location to be resold within seven days from the date of issuance. The bull cannot be commingled with female cattle during the seven days.

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 23, 2013.

TRD-201304193

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 719-0724



## CHAPTER 41. FEVER TICKS

### 4 TAC §41.1, §41.8

The Texas Animal Health Commission (commission) proposes amendments to §41.1, concerning Definition of Terms, and §41.8, concerning Dipping and Treatment of Livestock, in Chapter 41 entitled "Fever Ticks". The purpose of the amendments is to add a new definition for animals and new treatment standards.

The Texas Cattle Fever Tick Eradication Program (Program) is undergoing some changes in order to make it more effective in the efforts to eradicate the Texas cattle fever tick. The Program has looked at other treatment options, other than dipping, as effective deterrents to the fever tick and the rules are amended to add these options.

During the most recent Texas Legislative Session, House Bill (H.B.) 1807 was enacted into law and it amends the Agriculture Code to broaden the scope of statutory provisions relating to tick eradication by providing for the treatment of animals, rather than just dipping of livestock.

The bill defines animal as any domestic, free-range, or wild animal capable of hosting or transporting ticks capable of carrying Babesia, including livestock; zebras, bison, and giraffes; and deer, elk, and other cervid species. The bill defines treatment as a procedure or management practice used on an animal to prevent the infestation of, control, or eradicate ticks capable of carrying Babesia. H.B. 1807 requires each animal submitted for movement from a quarantined enclosure to be treated as prescribed by commission rules before a certificate or permit for movement is issued if ticks are found on any of the animals, rather than require each head of livestock submitted for such

movement to be dipped at certain intervals and found free from ticks at the last dipping before such a certificate or permit is issued if ticks are found on any of the livestock.

The commission is proposing to authorize treatment requirements using injectable doramectin including a withholding period of 35 days. Section 41.8 is being amended to include treatment as part of the timeframes that have historically been associated with requirements for dipping. Also, the title for the Pasture Vacation Schedule is amended to indicate it as being Pasture Treatment or Vacation Schedule. Also, free-ranging wildlife or exotic livestock that are found infested, or exposed premises which are capable of hosting fever ticks, will be treated by ivermectin medicated corn that may be administered by a representative of the commission following the close of the hunting season, provided that treatment is terminated at least 60 days prior to the beginning of the next hunting season to comply with the required withdrawal period. Also, permethrin impregnated roller devices may be used for topical treatment of free-ranging wildlife or exotic livestock during periods when ivermectin medicated corn is not administered. The commission may specify the use of other pesticides for treatment of wildlife or exotic livestock when deemed necessary to control and eradicate fever ticks.

### FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rules are in effect, there will be no significant additional fiscal implications for state or local government as a result of enforcing or administering the rules. An Economic Impact Statement (EIS) is required if the proposed rule has an adverse economic effect on small businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact and, therefore, there is no need to do an EIS. Implementation of these rules poses no significant fiscal impact on small or micro-businesses.

### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be to have other treatment options available to control and eradicate fever ticks in the state.

### LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rules will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

### TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. The proposed amendments are an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

### REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at

"comments@tahc.texas.gov". Comments on the rule proposal will be accepted until 5:00 p.m. on November 4, 2013.

#### STATUTORY AUTHORITY

House Bill 1807 amended the Texas Agriculture Code, Chapter 167, §167.003, which provides for general powers and duties of the commission to eradicate fever ticks and provides authority for adopting the necessary rules to fulfill those duties. Section 167.004 authorizes the commission by rule to define what animals can be classified as exposed to ticks. Section 167.006 authorizes the commission to designate for tick eradication any county or part of a county that the commission believes contains ticks. Section 167.007 authorizes the commission to conduct tick eradication in the free area. Section 167.021 provides that the commission may establish quarantines on land, premises, and livestock as necessary for tick eradication. Section 167.022 provides the commission authority designating a county or part of a county for tick eradication. Section 167.023 provides the commission authority to establish quarantine in the free area. Section 167.024 provides the requirement to obtain appropriate authorization and compliance with the requirements prior to movement. Section 167.032 provides that the commission may restrict movement of commodities that are carrying ticks.

The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized by §161.041(b) to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That authority is found in §161.054.

Section 161.007 provides that if a veterinarian employed by the commission determines that a communicable disease exists among livestock, domestic animals, or domestic fowl or on certain premises or that livestock, domestic animals, or domestic fowl have been exposed to the agency of transmission of a communicable disease, the exposure or infection is considered to continue until the commission determines that the exposure or infection has been eradicated through methods prescribed by rule of the commission. Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice, signed under that authority has the same force and effect as if signed by the entire commission.

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

#### §41.1. *Definition of Terms.*

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

(1) Adjacent premise--A premise that borders an exposed or infested premise, including premises separated by roads, double fences, or fordable streams. A premise that would normally be classified as adjacent may be exempted from adjacent premise requirements by a State or Federal epidemiologist if the premise is separated from the exposed or infested premise by double fencing, sufficient to prevent the spread of ticks, with one of the fences being game-proof.

(2) Animal--Any domestic, free-range, or wild animal capable of hosting or transporting ticks capable of carrying Babesia, including livestock; zebras, bison, and giraffes; and deer, elk, and other cervid species.

(3) [(2)] Certificate--A document authorizing movement of livestock issued by an authorized representative of the commission after the livestock have been treated in a manner prescribed by the commission for the area and premise from which they originate.

(4) [(3)] Check premise--A premise located in a tick eradication quarantine area, temporary preventative quarantine area, or control purpose quarantine area that is not classified as an infested, exposed, or adjacent premise.

(5) [(4)] Control purpose quarantine area--A premise or property designated by the commission for a systematic inspection of livestock and premises and control of the movement of livestock in order to investigate and control a suspected exposure of animals to ticks outside the tick eradication quarantine area. The boundaries of the area will be determined by evaluation of the barriers to the potential spread of ticks.

(6) [(5)] Designated Fever Tick Epidemiologist (DFTE)--A State or Federal epidemiologist designated to make decisions concerning the use and interpretation of exposure to fever ticks and to manage the Fever Tick program. The DFTE must be selected jointly by the Executive Director of the Commission and the AVIC for Texas. The DFTE has the responsibility to determine the scope of epidemiologic investigations, determine the status of herds, assist in development of individual herd plans, and coordinate fever tick surveillance and eradication programs within his or her geographic area of responsibility. The DFTE has authority to make independent decisions concerning the management of herds and use of property and limiting the impact of wildlife when those decisions are supported by sound fever tick eradication principles.

(7) [(6)] Dipping or treating--If the Commission requires livestock to be dipped, the livestock shall be submerged in a vat. A spray-dip machine may be used in areas where a vat is not reasonably available. Careful hand spraying may be used for easily restrained horses and show cattle, and when specifically authorized, certain zoo or domestic animals. Livestock unable to go through a dipping vat because of size or physical condition may be hand sprayed. The treatment must be paint marked so that it can be identified for at least 17 days. If the Commission determines that free-ranging wildlife and exotic animals, which are capable of hosting fever ticks, require treatment, they shall be treated by methods and for the duration of time approved by the Commission.

(8) [(7)] Exposed livestock--Any of the following factors shall constitute livestock as being exposed:

(A) Livestock that have entered an infested or exposed premise and have not been dipped and removed from the infested or exposed premise within 14 days after entry.

(B) Livestock that have occupied an exposed premise and have not completed treatment required for movement from an exposed premise.

(C) Livestock that have entered Texas from Mexico without a certificate from the United States Department of Agriculture.

(9) [(8)] Exposed premise--A premise shall be considered exposed if systematic treatment has not been completed and if either of the following conditions apply:

(A) Ticks have been found on livestock that have been on the premise for less than 14 days.

(B) A premise that has received exposed livestock, or equipment or material capable of carrying ticks from an infested or exposed premise.

(10) [(9)] Free area--An area designated by the commission as being free of ticks or exposure to ticks. The extent of the area will be determined by the appropriate barriers to the potential spread of ticks.

(11) [(10)] Game proof fence--A fence that has a minimum height of eight feet, consisting of wire mesh of sufficiently small size to prevent or impede the movement of domestic or exotic wildlife over, under, or through the fenced area.

(12) [(11)] Individual herd plan--A written disease management plan that is developed by the herd or land owner(s) and/or their representative(s), and a State or Federal DFTE to eradicate fever ticks or potential exposure to fever ticks from an affected herd or property. The herd plan will include appropriate treatment frequencies, treatments to be employed, and any additional fever tick management or herd management practices deemed necessary to eradicate fever ticks from the herd or on an a infected or exposed premise in an efficient and effective manner. The plan must be approved by the Executive Director of the Commission and AVIC, and have the concurrence of the DFTE.

(13) [(12)] Infested livestock--Livestock shall be considered infested if eradication treatment for movement from an infested premise has not been completed and if either of the following conditions apply:

(A) Ticks have been found on livestock.

(B) Livestock which occupy a premise where ticks have been found on livestock that have been on the premise more than 14 days.

(14) [(13)] Infested premise--A premise where ticks have been found on livestock that have been on the premise for more than 14 days, and systematic treatment has not been completed.

(15) [(14)] Livestock--Any domestic animal or any free ranging animals found on a premise or captured wild animal that is capable of hosting or transporting ticks capable of carrying babesia (the causative agent of cattle tick fever), including, but not limited to, cattle, horses, mules, jacks, jennets, zebras, buffalo, giraffe, and deer.

(16) [(15)] Permit--A document issued by an authorized representative of the commission allowing specified movement of livestock.

(17) [(16)] Premise--An area which can be defined by boundaries of recognizable physical barriers that prevent livestock from crossing the boundaries under ordinary circumstances; or an area that livestock do not ordinarily inhabit that the commission defines by recognizable features.

(18) [(17)] Premise inspection--A routine inspection by an authorized representative of the commission of premise boundaries and the livestock within for the purpose of documenting exposure of the premise.

(19) [(18)] Premise under vacation--A premise from which all livestock have been removed as prescribed by the commission.

(20) [(19)] Range inspection of livestock--An inspection of livestock to see the animal close enough to detect ticks on the animal.

(21) [(20)] Scratch inspection of livestock--An inspection of livestock by an authorized representative of the commission in an approved facility that allows the inspector to touch and see all parts of the livestock.

(22) [(21)] Temporary preventative quarantine area--An area designated by the commission for systematic inspection and treatment of livestock and premises, and control of movement of livestock, in order to detect and eradicate infestation and exposure from infested or exposed premises outside the tick eradication quarantine area. The extent of the area will be determined by evaluating the barriers to the potential spread of ticks. This is also designated as a "Blanket Disease Quarantine."

(23) [(22)] The commission--The Texas Animal Health Commission.

(24) [(23)] Tick--Any tick capable of transmitting bovine Babesiosis (cattle tick fever or bovine piroplasmosis).

(25) [(24)] Tick eradication quarantine area--An area designated by the commission for systematic inspection and treatment of livestock and premises, and control of movement of livestock, in order to detect and eradicate infestation from infested or exposed premises. The extent of the area will be determined by evaluating the barriers to the potential spread of ticks. This is the permanent quarantine area which is designated in §§41.14 - 41.22 of this chapter (relating to Quarantine Line; Defining and Establishing Tick Eradication Areas), and in the United States Department of Agriculture Code of Federal Regulations Part 72.5, parallel to the Rio Grande River, commonly known as the buffer zone or systematic area.

(26) Treatment--A procedure or management practice used on an animal to prevent the infestation of, control or eradicate ticks capable of carrying Babesia.

§41.8. *Dipping and Treatment of Livestock.*

(a) Dipping and treatment of livestock; general. All dipping and treatment prescribed in this section must be done under the supervision of a representative authorized by the commission. The commission will authorize for use in dipping only those dips that have been approved by the Animal and Plant Health Inspection Service of the United States Department of Agriculture and the Texas Animal Health Commission for use in official dipping to rid animals of the tick. The concentration of the dipping chemical used must be maintained in the percentage specified for official use by means of the approved vat management techniques established for the use of the agent; or, if applicable, by an officially approved vat side test or field test of the commission. The owner or caretaker of the livestock is responsible for presenting the livestock to the dipping vat, dipping the livestock, and removing the livestock, and will provide such labor as is necessary to perform all required functions. If the commission requires livestock to be dipped, the livestock shall be submerged in a vat. A spray-dip machine may be used in areas where a vat is not reasonably available. Careful hand spraying may be used for easily restrained horses and show cattle, and when specifically authorized, certain zoo or domestic animals. Livestock unable to go through a dipping vat because of size or physical condition may be hand sprayed. The treatment must be paint marked so that it can be identified for at least 17 days. The commission may specifically authorize other treatment methods for free-ranging wildlife or exotic species.

(b) Required Dipping or treatment of Livestock.

(1) Dipping Requirements:

(A) [(4)] The owner or caretaker of livestock on infested or exposed premises in the tick eradication quarantine area, or infested or exposed premises in the temporary preventative quarantined area must present them to be scratch inspected and dipped with subsequent dipping every seven to 14 days until the livestock are moved from the premise in accordance with these regulations, except as provided in paragraph (3)(B) [(5)] of this subsection.

(B) [(2)] The 14-day interval may be extended due to circumstances beyond the control of the owner upon approval by an authorized representative of the commission. In no event will the extension be more than three days. If the extension is granted, no certificate for movement will be issued after the 14th day, and the next dip must be on the original 14-day schedule.

[(3) All scratch inspection and dipping must be done under instructions by the commission. All requirements will be in written form directed to the owner or caretaker. An inspector for the Commission will deliver the instructions in person along with a copy of these regulations. All premise boundaries will be listed in the instructions.]

(C) [(4)] The scratch inspection and first dip must be within 14 days from the date infestation or exposure is discovered unless otherwise approved by the commission.

[(5) The starting date for infested premises for Table I (Pasture Vacation Schedule, South of Highway 90) and Table II (Pasture Vacation Schedule, North of Highway 90), is the date of the first clean dipping of 100% of the livestock. The starting date for exposed premises for Table I (Pasture Vacation Schedule, South of Highway 90) and Table II (Pasture Vacation Schedule, North of Highway 90) may be obtained from the Texas Animal Health Commission, P.O. Box 12966, Austin, Texas 78711.]  
[Figure: 4 TAC §41.8(b)(5)]

(2) Authorized Treatment Requirements:

(A) Following the first clean dipping of 100% of the livestock, the cattle may be treated with injectable doramectin in lieu of systematic dipping. The owner or caretaker of cattle on an infested or exposed premise must present them to be scratch inspected and treated with injectable doramectin every 25-28 days until the livestock are moved from the premises in accordance with these regulations, except as provided in paragraph (3)(B) of this subsection.

(B) Treatment of doramectin shall be administered by subcutaneous injection by a representative of the commission.

(C) The owner or caretaker must comply with the slaughter withholding period (35 days) of doramectin by holding cattle at the premise of origin until the withdrawal period has been completed.

(3) Requirements for Dipping and Treatment:

(A) All scratch inspection and dipping or treatment must be done under instructions issued by the commission. All requirements will be in written form directed to the owner or caretaker. An inspector for the commission will deliver the instructions in person along with a copy of these regulations. All premise boundaries will be listed in the instructions.

(B) The starting date for infested premises for Table I (Pasture Treatment or Vacation Schedule, South of Highway 90) and Table II (Pasture Treatment or Vacation Schedule, North of Highway 90), is the date of the first clean dipping of 100% of the livestock. The starting date for exposed premises for Table I and Table II is when 100%

of the livestock on the premise have been dipped. Copies of Table I (Pasture Treatment or Vacation Schedule, South of Highway 90) and Table II (Pasture Treatment or Vacation Schedule, North of Highway 90) may be obtained from the Texas Animal Health Commission, P.O. Box 12966, Austin, Texas 78711.  
Figure: 4 TAC §41.8(b)(3)(B)

(C) [(6)] A dip or treatment is not official unless 100% of the livestock within the premise affected are dipped or treated on schedule.

(D) [(7)] Free-ranging wildlife or exotic livestock [exotics] that are found on infested[.] or exposed [or vacated] premises, and which are capable of hosting fever ticks will be treated by methods approved by the commission and for the length of time specified by the commission.

(i) Ivermectin medicated corn may be administered to free-ranging wildlife or exotic livestock by a representative of the commission following the close of the hunting season, provided that treatment is terminated at least 60 days prior to the beginning of the next hunting season to comply with the required withdrawal period.

(ii) Permethrin impregnated roller devices may be used for topical treatment of free-ranging wildlife or exotic livestock during periods when ivermectin medicated corn is not administered. The commission may specify the use of other pesticides for treatment of wildlife or exotic livestock when deemed necessary to control and eradicate fever ticks.

(c) Each premise within a tick eradication quarantine area, temporary preventative quarantine area, or control purpose quarantine area will be classified by the commission as an infested, exposed, adjacent, or check premise and is required to execute a herd management plan and remain under restrictions until the no evidence of fever ticks is disclosed or a complete epidemiologic investigation fails to disclose evidence of exposure to fever ticks, with the concurrence of the DFTE. A person may protest an initial test or a herd plan for each premise classified as increased risk for fever ticks. [Fever Ticks:]

(1) To protest, the responsible person must request a meeting, in writing, with the Executive Director of the commission within 15 days of receipt of the herd plan or notice of an initial test and set forth a short, plain statement of the issues that shall be the subject of the protest, after which:

(A) the meeting will be set by the Executive Director no later than 21 days from receipt of the request for a meeting;

(B) the meeting or meetings shall be held in Austin; and

(C) the Executive Director shall render his decision in writing within 14 days from date of the meeting.

(2) Upon receipt of a decision or order by the executive director which the herd owner wishes to appeal, the herd owner may file an appeal within 15 days in writing with the Chairman of the commission and set forth a short, plain statement of the issues that shall be the subject of the appeal.

(3) The subsequent hearing will be conducted pursuant to the provisions of the Administrative Procedure and Texas Register Act, and Chapter 32 of this title (relating to Hearing and Appeal Procedures).

(4) If the Executive Director determines, based on epidemiological principles, that immediate action is necessary, the Executive Director may shorten the time limits to not less than five days. The herd owner must be provided with written notice of any time limits so shortened.

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 23, 2013.

TRD-201304194

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 719-0724



## CHAPTER 47. APPROVED PERSONNEL

### 4 TAC §§47.1 - 47.6

*(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 Animal Health Commission or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The Texas Animal Health Commission (commission) proposes the repeal of Chapter 47, §§47.1 - 47.6, concerning Approved Personnel.

Elsewhere in this issue of the *Texas Register*, the commission proposes new Chapter 47, which is entitled "Authorized Personnel", and replaces the repealed chapter in its entirety.

#### FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined there will no significant additional fiscal implications for local or state government as a result of repealing the rules.

#### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that the public benefit anticipated as a result of repealing the rules will be that the new proposed chapter will be better organized to incorporate all of the changes needed as a result of the passage of House Bill 3569 during the 83rd Texas Legislative Session, which amended the Texas Agriculture Code.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with the Texas Government Code §2001.022, this agency has determined that the proposed repeal will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

#### TAKINGS ASSESSMENT

The agency has determined that the proposed repeal will not affect private real property and is, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

#### REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by email at "comments@tahc.texas.gov". Comments on the rule proposal will be accepted until 5:00 p.m. on December 3, 2013.

## STATUTORY AUTHORITY

The repeal is authorized by the Texas Agriculture Code §161.046, which provides the commission with authority to adopt rules relating to the protection of livestock, exotic livestock, domestic fowl or exotic fowl, as well as Texas Government Code §2001.039, which authorizes a state agency to repeal a rule.

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

§47.1. *Definitions.*

§47.2. *General Requirements.*

§47.3. *Requirements for Brucellosis Testing.*

§47.4. *Brucellosis Calhhood Vaccination Requirements.*

§47.5. *Suspension or Revocation of Approved Personnel Status.*

§47.6. *Restoration of Approved Personnel Status.*

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 23, 2013.

TRD-201304195

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 719-0724



## CHAPTER 47. AUTHORIZED PERSONNEL

The Texas Animal Health Commission (commission) proposes a new Chapter 47, §§47.1 - 47.9 and §§47.11 - 47.15, concerning Authorized Personnel.

Elsewhere in this issue of the *Texas Register*, the commission contemporaneously proposes the repeal of the existing Chapter 47, concerning Approved Personnel. The purpose of the new chapter is to make substantial changes to the requirements of persons authorized to perform certain activities related to disease control, in response to the passage of House Bill (H.B.) 3569 during the 83rd Texas Legislative Session.

H.B. 3569 amended the Texas Agriculture Code to require a person, including a veterinarian, to be authorized by the commission in order to engage in an activity that is part of a state or federal disease control or eradication program for animals. In addition to the brucellosis program, existing disease control or eradication programs include, but are not limited to, tuberculosis, trichomoniasis, piroplasmosis, equine infectious anemia, chronic wasting disease, pseudorabies, and scrapie.

New Chapter 47 includes two subchapters. Subchapter A, which is entitled "General Provisions," includes provisions for all persons authorized by the commission to perform activities as part of a disease control or eradication program. The provisions include minimum standards for authorized personnel and establish application, training, and recordkeeping requirements. Subchapter A also includes grounds for suspending or revoking an authorized person's status and the procedures that must be followed to proceed with such action.

Subchapter B, which is entitled "Brucellosis Program," includes the existing standards and requirements for authorized personnel performing activities that are part of the brucellosis control

program. In addition, the commission proposes to amend the general requirements concerning adult cattle vaccination for brucellosis. As a result of the severe drought, a number of Texas cattle are moving or have been moved to other states. Some western states require brucellosis vaccination of cattle prior to entry. To assist producers in meeting those states' entry requirements, §47.12 allows authorized veterinarians to adult vaccinate cattle for brucellosis if commission protocols are followed. Previously, commission veterinarians and inspectors and USDA veterinary medical officers and animal health technicians were the only persons authorized to vaccinate adult cattle.

The commission also proposes to revise the brucellosis calfhood vaccination requirements by removing the reference and tattoo requirements for *Brucella abortus* strain 19 vaccines in proposed §47.14. This is a conforming program change as *Brucella abortus* strain 19 is no longer authorized for routine use in the brucellosis control program.

#### FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rules are in effect, there will be no significant fiscal implications for state or local government as a result of enforcing or administering the rules. An Economic Impact Statement (EIS) is required if the proposed rules have an adverse economic effect on small businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact and, therefore, there is no need to do an EIS. Implementation of these rules poses no significant fiscal impact on small or micro-businesses.

#### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be uniformity in the state's animal disease control activities.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rules will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

#### TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. The proposed rules are an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Texas Government Code, Chapter 2007.

#### REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.texas.gov". Comments on the rule proposal will be accepted until 5:00 p.m. on December 3, 2013.

## SUBCHAPTER A. GENERAL PROVISIONS

### 4 TAC §§47.1 - 47.9

#### STATUTORY AUTHORITY

H.B. 3569 amended the Texas Agriculture Code, Chapter 161, by adding §161.0417, which requires a person, including a veterinarian, to be authorized by the commission in order to engage in an activity that is part of a state or federal disease control or eradication program for animals. H.B. 3569 authorizes the commission to adopt necessary rules for the authorization of such persons and, after reasonable notice, to suspend or revoke a person's authorization if the commission determines that the person has substantially failed to comply with Chapter 161 or rules adopted under that chapter. The bill entitles a person to a hearing before the commission or a hearing examiner appointed by the commission before the commission may revoke the person's authorization. The bill requires the commission to make all final decisions to suspend or revoke an authorization. The bill establishes that its provisions relating to authorized personnel for disease control do not affect the requirement for a license or an exemption under the Veterinary Licensing Act to practice veterinary medicine. H.B. 3569 also amended §161.0601(a) to clarify that the commission is authorized to charge a fee and provide for the issuance of electronic certificates of veterinary inspection by veterinarians.

The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized by §161.041(b) to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. Section 163.064 provides that only a person approved by the commission may perform testing and vaccinating for brucellosis, regardless of whether the person is a veterinarian.

As a control measure under §161.054, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission through §161.048 may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Under §161.081, the commission by rule may regulate the movement of livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl into this state from another state, territory, or country. Also, under that section the commission by rule may provide the method for inspecting and testing animals before and after entry into this state. The commission by rule may provide for the issuance and form of health certificates and entry permits. The rules may include standards for determining which veterinarians of this state, other states, and departments of the federal government are authorized to issue the certificates or permits.

Section 161.101 requires a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal to report the existence of the certain diseases among livestock, exotic livestock, bison, domestic fowl, or exotic fowl to the commission within 24 hours after diagnosis of the disease.

Under §161.112, the commission may adopt rules relating to the movement of livestock, exotic livestock, and exotic fowl from livestock markets and shall require tests, immunization, and dipping of those livestock as necessary to protect against the spread of

communicable diseases. Section 161.113 provides that if the commission requires testing or vaccinations at a market, the testing or vaccination must be performed by an accredited veterinarian or qualified person authorized by the commission. The commission may adopt rules requiring permits for moving exotic livestock and exotic fowl from livestock markets as necessary to protect against the spread of communicable diseases.

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

§47.1. Definitions.

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

(1) Accredited veterinarian--A veterinarian approved by USDA under the provisions of Title 9, Part 161, Code of Federal Regulations, to perform specified functions required by cooperative state-federal disease control eradication programs.

(2) Authorized personnel--

(A) Veterinarians and inspectors employed by the commission;

(B) USDA-APHIS, VS veterinary medical officers and animal health technicians;

(C) Veterinarians who:

(i) are licensed to practice veterinary medicine in Texas; and

(ii) are accredited by USDA-APHIS, VS for the State of Texas; and

(iii) have satisfactorily completed Texas Animal Health Commission disease control or eradication program training or provide documentation to the executive director that they have satisfactorily completed substantially similar disease control or eradication program training;

(D) Veterinarians' technicians and/or employees who have satisfactorily completed the Texas Animal Health Commission disease control or eradication program training or provide documentation to the Executive Director that they have satisfactorily completed substantially similar disease control or eradication program training; and

(E) For the Chronic Wasting Disease (CWD) program, individuals who have satisfactorily completed Texas Animal Health Commission CWD disease control or eradication program training or provide documentation to the executive director that they have satisfactorily completed substantially similar CWD disease control or eradication program training.

(3) APHIS--The Animal and Plant Health Inspection Service of the United States Department of Agriculture.

(4) Commission--The Texas Animal Health Commission.

(5) Disease control or eradication program--Any state or federal disease control or eradication program for animals.

(6) Executive Director--The Executive Director of the Texas Animal Health Commission or any individual authorized to act for the Executive Director.

(7) False sample--An adulterated sample or a sample that was collected from an animal other than the animal indicated on the test document.

(8) Issue--The distribution, including electronic transmission, of an official document that has been signed.

(9) Official document--Any certificate, form, record, report, chart, tag, band, or other identification, required by the commission or USDA for use by an authorized person performing authorized functions under this chapter. This includes, but is not limited to a certificate of veterinary inspection, vaccination charts and test documents.

(10) Sign--For an authorized person to put his or her signature in his or her own hand, or by means of an approved digital signature, on an official document. No official document is signed if:

(A) Someone other than the authorized person has signed it on behalf or in the name of the authorized person, regardless of the authority granted them by the authorized person; or

(B) If any mechanical device, other than an approved digital signature, has been used to affix the signature.

(11) Veterinarian-in-Charge--The veterinary official of APHIS who is assigned by the USDA Administrator to supervise and perform the official work of APHIS in a State or group of States.

(12) VS--The Veterinary Services of the United States Department of Agriculture.

(13) Veterinarian's technician or employee--An authorized person who works under the supervision of an authorized veterinarian unless specifically exempted under these rules, or rules of the Texas Board of Veterinary Medical Examiners as provided in the Texas Administrative Code, Title 22, Part 24, Chapter 573, entitled Supervision of Personnel, to perform certain procedures under general supervision.

§47.2. Requirements and Application Procedures.

(a) Authorized Personnel:

(1) An individual shall be authorized by the commission to perform certain activities, as designated by the commission, for disease control or eradication programs.

(2) An individual shall be authorized by the commission in order to receive, complete and issue official documents.

(3) An authorized person shall receive commission approval and certification for each disease control or eradication program the authorized person will perform program activities.

(4) Except as provided by subsection (c) of this section, an authorized person shall not perform program activities in disease control or eradication program until the person receives written authorization from the commission.

(b) Application for authorized personnel status:

(1) An individual shall apply for authorized personnel status by completing an application and submitting it to the commission. In completing the application, the individual shall designate the disease control or eradication program(s) for which the individual will perform program activities.

(2) Applicants shall certify, on the application, that the applicant is able to perform all program activities and has received commission training for each disease control or eradication program the individual designates.

(3) Application for authorized personnel status shall be made on a form provided by the commission.

(4) An authorized person shall notify the commission within 30 days of any change in the information provided as part of the application.

(c) Approved personnel requirements and application procedure:

(1) An individual with approved personnel status for brucellosis, tuberculosis, trichomoniasis or chronic wasting disease shall apply for authorized personnel status by completing an application and submitting it to the commission.

(2) Upon submitting an application for authorized personnel status to the commission, an individual with approved personnel status shall have authorized personnel status for the specific disease control or eradication program(s) for which the person received approved personnel status.

(3) The commission shall notify approved personnel of the requirement to submit an application for authorized personnel status.

(4) An individual with approved personnel status as of March 1, 2014, may perform program activities in the specific disease control or eradication program for which the individual received approved personnel status until September 1, 2014, or until such time the individual is notified of the requirement to submit an application for authorized personnel status, whichever is later.

(5) An individual with approved personnel status shall apply for authorized personnel status, as provided by subsection (b) of this section, for any disease control or eradication program for which the individual has not received approved personnel status.

#### §47.3. Duration and Additional Training Requirements.

(a) Authorized personnel status shall be valid until such time that the authorization is suspended or revoked, contingent upon the authorized person completing all additional training required by the commission.

(b) In determining whether additional training shall be required, the Executive Director may consider changes in technology, treatments, procedures and programs.

(c) If additional training is required for authorized personnel in a particular disease control or eradication program, the commission will provide notice to affected authorized personnel of the additional training requirement.

#### §47.4. Standards for Authorized Personnel.

This rule sets the minimum standards for personnel who perform certain activities that are part of a disease control or eradication program pursuant to Texas Agriculture Code §161.0417.

(1) Authorized personnel shall:

(A) Recognize all commission required animal identification systems applicable to the disease control or eradication programs for which the authorized person performs activities;

(B) Apply all animal identification for commission required animal identification systems applicable to the disease control or eradication programs for which the authorized person performs activities;

(C) Properly complete official documents;

(D) Submit official documents to the commission in a timely manner as prescribed by commission or USDA rule;

(E) Recognize and report clinical signs and lesions of diseases applicable to the disease control or eradication program for which the authorized person performs activities;

(F) Properly collect and ship sample specimens, as prescribed by the commission, to an appropriate laboratory for testing with complete and accurate paperwork;

(G) Properly perform testing for the disease control or eradication program for which the authorized person performs activities;

(H) Perform official tests, inspections, treatments, and vaccinations and shall submit specimens to designated laboratories as prescribed by the commission;

(I) Immediately report to the commission diagnosed or suspected cases of a communicable animal disease for which the commission has a disease control or eradication program;

(J) Immediately report to the commission the existence of a disease listed in §45.2 of this title (relating to Duty to Report);

(K) Take such measures of sanitation as are necessary to prevent the spread of communicable diseases of animals by the authorized person while performing program activities;

(L) Keep him or herself currently informed on state rules governing the movement of animals and on procedures applicable to disease control and eradication programs for which the authorized person performs activities;

(M) Secure and properly use all official documents and approved digital signature capabilities used in his or her work and take reasonable care to prevent the misuse thereof; and

(N) Immediately report to the commission the loss, theft, or deliberate or accidental misuse of an official document or digital signature used in the authorized person's work.

(2) An authorized person shall not issue, or allow to be used, any official document, until, and unless, it has been accurately and fully completed, clearly identifying the animals to which it applies, and showing the dates and results of any inspection, test, vaccination, or treatment the authorized person has conducted and the dates of issuance and expiration of the document.

#### §47.5. Recordkeeping.

(a) An authorized person shall maintain official documents at the authorized person's place of business.

(b) Official documents shall be complete and legible.

(c) Official documents shall be maintained for a minimum of five years from the original date of the document.

(d) The commission may inspect and copy official documents maintained by an authorized person.

#### §47.6. Grounds for Suspension or Revocation.

(a) Automatic termination of authorized personnel status occurs with any one of the following events:

(1) the authorized person is separated from employment with the commission or Veterinary Services when such person's authorized personnel status is contingent upon employment with the commission or Veterinary Services;

(2) the authorized person is a veterinarian's technician or employee who is separated from employment with an accredited veterinarian;

(3) the license of an authorized veterinarian issued by the Texas State Board of Veterinary Medical Examiners is revoked or suspended by that board; or

(4) an authorized veterinarian's accreditation is revoked by Veterinary Services.

(b) Suspension of an authorized veterinarian's accreditation by Veterinary Services will result in suspension or revocation of authorized personnel status.

(c) Suspension or revocation of authorized personnel status may be made upon a determination that one or more of the following violations have occurred:

- (1) submitting false samples;
- (2) collecting a sample in a manner that contravenes a commission rule;
- (3) failing to report test results;
- (4) distributing vaccine to persons or entities not authorized by the commission;
- (5) using out of date vaccine;
- (6) failing to identify animals as required by commission rule;
- (7) failing to submit official documents within the time prescribed by a commission or USDA rule;
- (8) falsely reporting that animals have been vaccinated or tested;
- (9) submitting samples that are adulterated or that have insufficient quantity to conduct confirmation testing;
- (10) falsifying official documents;
- (11) performing work in a commission disease control or eradication program for which the person is not authorized to perform program activities;
- (12) failing to maintain official documents as required by commission rule;
- (13) failing to pay an obligation owed to the commission;
- (14) submitting false reimbursement claims for testing or vaccinating;
- (15) failing to comply with the "Standards for Authorized Personnel" as set forth in §47.4 of this subchapter;
- (16) failing to comply with a rule promulgated under this chapter relating to standards for authorized personnel; or
- (17) violating a rule of the commission.

§47.7. Procedure for Suspension or Revocation.

(a) Upon completion of the investigation of an alleged violation, the commission shall notify the authorized person by certified mail of the facts or conduct alleged that may warrant commission action regarding the person's authorized personnel status and invite the authorized person to an informal conference.

(b) An authorized person shall have 20 days from the date of receipt of the notice to respond to the commission or waive his or her attendance at the informal conference. If an authorized person fails to respond to the commission's notice an informal conference will be scheduled. The authorized person must receive notice of the conference at least seven days prior to the conference. The conference will be held at the Texas Animal Health Commission office in Austin.

(c) At the conclusion of the informal conference, the Executive Director shall determine whether a violation occurred and take appropriate action. Such action may include no action, warning, suspension, or revocation. The Executive Director shall notify the authorized person by certified mail of his or her decision within 15 days after the informal conference.

(d) If the Executive Director determines that a violation has occurred and that disciplinary action and/or a penalty is warranted, the Executive Director will advise the licensee of the alleged violations and offer the person a settlement in the form of an agreed order that specifies the disciplinary action and/or penalty. A suspension may be in effect for a period of up to one year. An order of suspension shall identify specific conditions or prohibitions relative to the suspension. A revocation may be in effect for a period of up to two years.

(e) An authorized person shall have 20 days from the date of the receipt of the decision to submit a written response accepting the settlement offer or requesting a hearing. The administrative hearing for the appeal will be held in Austin, pursuant to Chapter 32 of this title (relating to Hearing and Appeal Procedures).

(f) If the authorized person accepts the settlement offer by signing the agreed order, the agreed order will be docketed for commission action at the next regularly scheduled commission meeting.

(g) The Executive Director may, upon written notice and pending final determination by the commission, summarily suspend a person's authorized personnel status when it is deemed necessary to protect the safety, health, and interest of the public. The Executive Director shall hold an informal conference within 14 days of the date of the suspension to determine if formal action should be initiated against the authorized person. The authorized person must receive notice of the conference at least 72 hours prior to the conference.

§47.8. Restoration of Authorized Personnel Status.

(a) Authorized personnel status will be automatically restored after a period of suspension contingent upon the person complying with all conditions or prohibitions relative to the suspension.

(b) Application for authorized status may be made at the expiration of a period of revocation. The applicant must meet all prerequisites for initial authorization.

§47.9. Settlement of Contested Case.

(a) A contested case settlement is an agreement between the commission and the respondent in a contested case which provides for a resolution different from the sanction originally proposed in the commission's notice.

(b) Contested case settlement negotiations may be in person, by phone, or through written communication, at the commission's discretion, as necessary to resolve issues related to a particular contested case.

(c) Contested case settlement may incorporate any combination of authorized sanctions, additional training, or remedial actions as an alternative to the originally proposed sanction.

(d) All contested case settlements are subject to approval by the Executive Director and the commission. The Executive Director and the commission shall state in writing the reasons for rejecting a proposed settlement.

(e) A contested case settlement is final and binding upon a respondent at the time the respondent or respondent's authorized agent signs the settlement agreement, and upon the commission when approved by the commission through a signed order.

(f) If a contested case settlement is rejected by the Executive Director or the commission, the contested case will be resolved through additional settlement negotiations consistent with the reasons for the rejection, by stipulation to the commission's originally proposed sanction or combination of sanction, or through a contested case hearing.

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

Filed with the Office of the Secretary of State on September 23, 2013.

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Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 719-0724



## SUBCHAPTER B. BRUCELLOSIS PROGRAM

### 4 TAC §§47.11 - 47.15

#### STATUTORY AUTHORITY

H.B. 3569 amended the Texas Agriculture Code, Chapter 161, by adding §161.0417, which requires a person, including a veterinarian, to be authorized by the commission in order to engage in an activity that is part of a state or federal disease control or eradication program for animals. H.B. 3569 authorizes the commission to adopt necessary rules for the authorization of such persons and, after reasonable notice, to suspend or revoke a person's authorization if the commission determines that the person has substantially failed to comply with Chapter 161 or rules adopted under that chapter. The bill entitles a person to a hearing before the commission or a hearing examiner appointed by the commission before the commission may revoke the person's authorization. The bill requires the commission to make all final decisions to suspend or revoke an authorization. The bill establishes that its provisions relating to authorized personnel for disease control do not affect the requirement for a license or an exemption under the Veterinary Licensing Act to practice veterinary medicine. H.B. 3569 also amended §161.0601(a) to clarify that the commission is authorized to charge a fee and provide for the issuance of electronic certificates of veterinary inspection by veterinarians.

The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized by §161.041(b) to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. Section 163.064 provides that only a person approved by the commission may perform testing and vaccinating for brucellosis, regardless of whether the person is a veterinarian.

As a control measure under §161.054, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission through §161.048 may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Under §161.081, the commission by rule may regulate the movement of livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl into this state from another state, territory, or country. Also, under that section the commission by rule may provide the method for inspecting and testing animals before and after entry into this state. The commission by rule may provide for the issuance and form of health certificates and entry permits. The rules may include standards for determining which veterinarians of this state, other states, and departments of the federal government are authorized to issue the certificates or permits.

Section 161.101 requires a veterinarian, a veterinary diagnostic laboratory, or a person having care, custody, or control of an animal to report the existence of the certain diseases among livestock, exotic livestock, bison, domestic fowl, or exotic fowl to the commission within 24 hours after diagnosis of the disease.

Under §161.112, the commission may adopt rules relating to the movement of livestock, exotic livestock, and exotic fowl from livestock markets and shall require tests, immunization, and dipping of those livestock as necessary to protect against the spread of communicable diseases. Section 161.113 provides that if the commission requires testing or vaccinations at a market, the testing or vaccination must be performed by an accredited veterinarian or qualified person authorized by the commission. The commission may adopt rules requiring permits for moving exotic livestock and exotic fowl from livestock markets as necessary to protect against the spread of communicable diseases.

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

#### §47.11. Definitions.

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

(1) Calfhood Vaccination--Vaccination of female cattle between four and twelve months of age with an approved *Brucella* vaccine at the appropriate dosage.

(2) Card test permit--A permit issued by USDA-APHIS, VS to an authorized person certifying that card test training has been satisfactorily completed at a state-federal laboratory and that the individual is authorized to conduct the card test according to the requirements and standards for authorized personnel and the brucellosis laws and regulations.

(3) Discrepancy--Differing result between the card test performed by an authorized person and the card test performed by the state-federal laboratory.

(4) Official eartag--A Veterinary Services approved identification eartag that conforms to the nine-character alphanumeric national uniform eartagging system. It uniquely identifies each individual animal. The term includes the orange-colored eartag series used to identify calfhood vaccinates.

#### §47.12. General Requirements.

This regulation sets the standards for personnel who perform work in the brucellosis control program pursuant to the Texas Agriculture Code, §161.0417 and §163.064. Personnel may perform bovine brucellosis work in Texas as follows:

(1) Collecting and submitting blood samples. Only authorized personnel may collect and submit blood samples. Authorized personnel and employees of authorized veterinarians may apply official eartags and backtags and record individual identification on the test record.

(2) Performing the card test. Only authorized personnel who hold valid card test permits may conduct the card test.

(3) Vaccinating.

(A) Only authorized personnel may calfhood vaccinate eligible heifers for brucellosis. Authorized personnel employees of authorized veterinarians may affix vaccination eartags and record vaccinations on the vaccination certificate.

(B) Only commission veterinarians and inspectors, USDA veterinary medical officers and animal health technicians, and authorized veterinarians may adult vaccinate cattle for brucellosis. Authorized veterinarians who vaccinate adult cattle shall follow commission protocols for adult vaccination.

(4) An authorized veterinarian's technician or other employee must work under the direct supervision of an authorized veterinarian while performing brucellosis work as permitted herein except an authorized employee who is only collecting blood samples on animals to be consigned directly from the ranch to slaughter and submitting them to the state/federal laboratory for testing may do so under general supervision. An authorized veterinarian's technician or other authorized employee may operate under the general supervision of an authorized veterinarian and may perform testing for brucellosis at a livestock market. The authorized veterinarian is responsible for assuring that authorized veterinarian's technicians and other employees working under his/her supervision comply with all commission regulations.

§47.13. Requirements for Brucellosis Testing.

(a) Collecting samples.

(1) Individual blood collection devices shall be used for each animal.

(2) Each animal shall be individually identified by official eartag or backtag or individual registration tattoo or brand. The individual identification must be recorded on the test record to identify the corresponding blood sample.

(3) Tubes containing blood samples will be numbered in sequence. There will be a gap of one or more numbers between the last number assigned to a herd or unit and the first number assigned to the next her or unit.

(b) Performing the card test.

(1) A clean pipette and stirrer shall be used for each sample tested.

(2) Positive and negative check samples will be kept available at all times to check antigen being used.

(3) Antigen will be kept refrigerated.

(4) Antigen will not be used past the expiration date shown on the bottle.

(5) Mechanical rockers will be used to rotate the card. Timers will be used to read results of the card test at four-minute intervals.

(6) The card test will be run in an area where the sample is protected from wind and blowing dust.

(7) The authorized person who ran the card test will record the results of the card test on the appropriate test document (4-54, 4-33, or Texas Animal Health Commission Certificate of Veterinary Inspection). Actual test results for all cattle tested will be recorded at the time of the test.

(c) Market testing.

(1) Each animal tested at a livestock market will be identified with an official eartag and official backtag at the time of blood

collection. At the time of test, each official eartag and backtag number will be recorded on the 4-54 market test record.

(2) The authorized person will not conduct the card test at a livestock market until complete ownership information and backtag identification have been provided by the market.

(3) Livestock market card tests will be conducted in a designated area with sufficient lighting.

(4) The authorized person interpreting the card test will immediately report all positive test results to the state-federal market inspector by means of the completed 4-54 market test record.

(d) Submission of samples.

(1) Blood samples may be submitted to a state-federal laboratory without prior field card testing.

(2) All blood samples and corresponding test records will be mailed or delivered to a state-federal laboratory within 48 hours after collection. Blood samples may be placed in a mail depository Monday through Saturday. Samples that would normally be mailed on weekends in which a federal holiday is on Friday or Monday shall be refrigerated and mailed the following work day.

(3) The number of samples submitted for confirmation testing which are untestable because of adulteration, hemolysis or insufficient serum must not exceed 5.0% of samples submitted during the previous six-month period nor more than 30% in any one submission.

(4) There must be no more than three discrepancies in confirmation test results disclosed over a six-month period where the laboratory results are positive for samples that were reported negative by the individual conducting the test.

§47.14. Brucellosis Calfhood Vaccination Requirements.

(a) Brucellosis vaccine will be refrigerated until administered in accordance with the label directions. Vaccine will not be used beyond the expiration date shown on the bottle.

(b) Each calfhood-vaccinated animal must be permanently identified as vaccinates by tattoo and by official vaccination eartag. If the animal is already identified with an official eartag before vaccination, an additional official eartag is not required. Vaccination tattoos must be applied to the right ear. For Brucella abortus strain RB 51 vaccinates the tattoo will include the United States Registered Shield and "V" which will be preceded by a letter "R" and followed by a number corresponding to the last digit of the year in which the vaccination was done. Official vaccination (orange) eartags must be applied to the right ear. Individual animal registration tattoos or individual animal registration brands may be used for identifying animals in place of official eartags if the cattle and/or bison are registered by breed associations recognized by VS. Official calfhood vaccinates are allowed to be retattooed by an authorized veterinarian designated by the State Veterinarian, or by a Federal or State representative, provided that:

(1) The identification of the vaccinated animal(s) is verified by official records maintained in State or Federal offices;

(2) Prior approval for re-tattooing is obtained from the State Veterinarian; and

(3) The re-tattooing produces the original tattoo given at the time of vaccination.

(c) Vaccinations will be immediately recorded on a properly completed vaccination certificate. Completed vaccination certificates must be submitted to the commission within 14 days following vaccination.

§47.15. Suspension or Revocation of Brucellosis Authorized Personnel Status.

Suspension or revocation of brucellosis authorized personnel status may be made upon a determination that violations including, but not limited to, the following have occurred:

- (1) providing card test kits or antigen to persons or entities not authorized by the commission;
- (2) knowingly performing calfhood vaccination on over-age heifers;
- (3) failing to identify vaccinated heifers as required by regulation;
- (4) failing to submit vaccination charts within 14 days following vaccination;
- (5) failing to submit test documents within seven days following testing;
- (6) submitting blood samples that are adulterated or hemolyzed or that have insufficient serum to conduct confirmation testing where the number of such samples exceeds 5.0% of samples submitted during the previous six-month period or 30% in any one submission;
- (7) having more than three discrepancies in confirmation test results over a six-month period;
- (8) submitting false claims for reimbursement for testing or vaccinating for brucellosis;
- (9) conducting the card test at a livestock market prior to receiving complete ownership information or backtag identification;
- (10) a violation listed in §47.6 of this chapter (relating to Grounds for Suspension or Revocation); or
- (11) violating a rule of the commission.

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

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Gene Snelson

General Counsel

Texas Animal Health Commission

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For further information, please call: (512) 719-0724



## CHAPTER 50. ANIMAL DISEASE TRACEABILITY

### 4 TAC §50.3

The Texas Animal Health Commission (commission) proposes new §50.3, Cattle Identification, in Chapter 50, which is entitled "Animal Disease Traceability" (ADT). The purpose of the new section is to establish identification requirements for cattle.

The United States Department of Agriculture (USDA) has amended its regulations and established minimum national official identification and documentation requirements for the traceability of livestock moving interstate. Under USDA's rule-

making, unless specifically exempted, livestock belonging to species covered by the regulations must be officially identified and accompanied by an interstate certificate of veterinary inspection or other documentation. These regulations specify approved forms of official identification for each species, but allow the livestock covered under this rulemaking to be moved interstate with another form of identification, as agreed upon by animal health officials in the shipping and receiving States or Tribes. The federal rule provides for an approved tagging site, which is a premise where livestock moving interstate may be officially identified on behalf of their owner or the person in possession. Under the federal rule they must be officially approved by the state where located. The effective date of the USDA rule is March 11, 2013, and it is found in 9 CFR Part 86.

The commission believes that it is in the best interest of the state's cattle industry to develop and implement a minimal identification requirement in order to maintain a surveillance standard that supports the full completion of the Brucellosis eradication program as well as other ongoing disease eradication or surveillance efforts. This is being proposed as part of the Brucellosis eradication program in order to achieve complete eradication of the disease. Identification helps the commission personnel to quickly locate at-risk cattle and also rule out herds that do not have the cattle in question. Quickly locating animals of interest can be critical to an effective disease response. For example, the first 24 hours of response when faced with a highly contagious disease such as Foot and Mouth disease has been proven to be the key in quickly allowing normal trade and marketability to resume. An efficient and accurate animal disease traceability system also helps reduce the number of animals potentially involved in an investigation. The mandatory identification system already in place in 2009 in the Texas dairy industry allowed the commission to only test a portion of the state's dairy cattle instead of all of them, when faced with a complex disease investigation resulting from a tuberculosis infected dairy in west Texas.

The USDA recently released a 130-page report entitled "Assessment of Pathways for the Introduction and Spread of *Mycobacterium bovis* in the United States." The report indicates that a lack of a national animal identification program leaves the U.S. vulnerable to containing disease outbreaks and puts the U.S. at risk of shutting down commerce if there is a significant disease outbreak. Texas has historically been considered to have one of the best traceability systems to date due to the application of permanent official identification (eartags) of adult cattle at markets prior to August 1, 2011. The vulnerability increases daily with the cessation of the brucellosis identification process in conjunction with the stoppage of brucellosis testing.

Although Texas has been considered brucellosis free since 2008, two infected herds were disclosed in 2011. Texas is still considered at risk for more detection of the disease, as well as at risk for disclosing brucellosis test reactions in cattle due to swine brucellosis in the feral population. The presence of eartags on adult cattle will ensure that if a herd does need to be evaluated it can be done so quickly.

H.B. 2311 amends the current law relating to an animal identification program. Over the last three years, the Texas cattle industry has placed a renewed emphasis on controlling foreign animal diseases of concern. Intrastate and interstate animal identification plans have recently been developed and implemented at the federal and state levels for the purpose of establishing a means to enable the cattle industry and state and federal animal health

officials to more rapidly and effectively respond to animal health emergencies.

H.B. 2311 clarifies that any state animal disease traceability program cannot be more stringent than any federal animal disease traceability program; repeals the penalty provisions that gave the commission the Class C misdemeanor authority for violations relating to animal identification; and repeals the subsection that references the use of specific identification numbers that the commission may consider in implementing an animal identification program. Additionally, the bill requires a two-thirds vote of the Commissioners to adopt any program more stringent than federal law.

The requirement as proposed is based on a change of ownership within Texas. Under the rule all cattle that are parturient or post parturient or 18 months of age and older, except steers and spayed heifers changing ownership within Texas, shall be officially identified with an official eartag or other form of official permanent identification as approved by the commission. That requirement does create an exception for movement to slaughter within seven days of the change of ownership. Cattle that are sold or consigned to move to a state or federally approved slaughter establishment within seven days of the change of ownership, where they are harvested within three days of arrival at the establishment, are exempt from the requirement.

#### FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no significant additional fiscal implications for local government as a result of enforcing or administering the rule. An Economic Impact Statement (EIS) is required if the proposed rule has an adverse economic effect on small businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact and, therefore, there is no need to do an EIS. Implementation of this rule poses no significant fiscal impact on small or micro-businesses. The identification tags are available to producers and other parties who will apply official ID. The necessity of official ID for specific animals to move interstate also creates an opportunity for provision of ID application by a third party for a nominal fee. The actual cost of tagging will vary some depending on the situation, but the federal requirement allows for untagged animals to enter the state as an exception to the federal identification requirement which has afforded the cattle producer some reduced cost by not having them identified prior to movement.

#### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to have authorized tagging sites located in Texas and operating under the federal animal disease traceability system, which will provide sustained disease surveillance, control, enhanced marketability, quality assurance, and the related relative freedoms of commerce both intra and interstate

#### LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rule will not impact local economies.

#### TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. The proposed rule is an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and is, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

#### REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.texas.gov". Comments on the rule proposal will be accepted until 5:00 p.m. on November 4, 2013.

#### STATUTORY AUTHORITY

The new section is proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That authority is found in §161.061.

House Bill (H.B.) 2311 was passed during the 83rd Texas Legislative Session and clarifies that any state animal disease traceability program cannot be more stringent than any federal animal disease traceability program; the bill requires a two-thirds vote of the commission's board to adopt any program more stringent than federal law.

As a control measure under §161.054, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is under §161.048

Under §161.081, the commission by rule may regulate the movement of livestock, exotic livestock, domestic animals, domestic fowl, or exotic fowl into this state from another state, territory, or country. Also, under that section the commission by rule may provide the method for inspecting and testing animals before and after entry into this state. The commission by rule may provide for the issuance and form of health certificates and entry permits. The rules may include standards for determining which veterinarians of this state, other states, and departments of the federal government are authorized to issue the certificates or permits.

Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instru-

ments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission. Under §161.112, the commission may adopt rules relating to the movement of livestock, exotic livestock, and exotic fowl from livestock markets and shall require tests, immunization, and dipping of those livestock as necessary to protect against the spread of communicable diseases. Also, the commission may adopt rules requiring permits for moving exotic livestock and exotic fowl from livestock markets as necessary to protect against the spread of communicable diseases.

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

§50.3. Cattle Identification.

(a) Change of ownership within Texas. All cattle that are parturient or post parturient or 18 months of age and older, except steers and spayed heifers changing ownership within Texas, shall be officially identified with an official eartag or other form of official permanent identification as approved by the Commission within seven days of the change of ownership.

(b) Cattle that are sold or consigned to move to a state or federally approved slaughter establishment within seven days of the change of ownership, where they are harvested within three days of arrival at the establishment, are exempt from the requirement of subsection (a) 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 September 23, 2013.

TRD-201304198

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 719-0724



## CHAPTER 51. ENTRY REQUIREMENTS

### 4 TAC §51.8

The Texas Animal Health Commission (commission) proposes amendments to §51.8, concerning Cattle, in Chapter 51, which is entitled "Entry Requirements". The purpose of the amendments is to change the Bovine Trichomoniasis (Trich) entry requirements.

The Trich control program is an industry driven initiative that was implemented in 2009. The concept included an annual review by commission staff and interested stakeholder organizations of the program's rules and policies and to subsequently suggest non-binding recommendations to the commission. The Trich Working Group met on May 15, 2013, to evaluate the Trich program. The group discussed the program overview to date, the management of infected herds, entry requirements, and ultimately discussed the need for possible revisions to the program by recommending a change regarding interstate movement of breeding bulls into Texas.

FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no significant additional fiscal implications for state or local government as a result of enforcing or administering the rule. An Economic Impact Statement (EIS) is required if the proposed rule has an adverse economic effect on small businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact and, therefore, there is no need to do an EIS. Implementation of this rule poses no significant fiscal impact on small or micro-businesses.

### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to conform commission entry requirements to the standards accepted and utilized by other states and USDA.

### LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rule will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

### TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. The proposed rule is an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and is, therefore, compliant with the Private Real Property Preservation Act in Texas Government Code, Chapter 2007.

### REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.texas.gov". Comments on the rule proposal will be accepted until 5:00 p.m. on November 4, 2013.

### STATUTORY AUTHORITY

The amendments are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized by §161.041(b) to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That authority is found in §161.061.

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That authority is found in §161.054. An agent of the

commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048.

Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission.

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

#### §51.8. Cattle.

(a) Brucellosis requirements. All cattle must meet the requirements contained in §35.4 of this title (relating to Entry, Movement, and Change of Ownership). Cattle<sup>[,]</sup> which are parturient, postparturient<sup>[,]</sup> or 18 months of age and over (as evidenced by the loss of the first pair of temporary incisor teeth), except steers and spayed heifers<sup>[,]</sup> being shipped to a feedyard prior to slaughter, shall be officially individually identified with a permanent identification device prior to leaving the state of origin.

#### (b) Tuberculosis requirements.

(1) All beef cattle, bison and sexually neutered dairy cattle originating from a federally recognized accredited tuberculosis free state, or zone, as provided by Title 9 of the Code of Federal Regulations, Part 77, Section 77.8, or from a tuberculosis accredited herd are exempt from tuberculosis testing requirements.

(2) All beef cattle, bison and sexually neutered dairy cattle originating from a state or zone with anything less than a tuberculosis free state status and having an identified wildlife reservoir for tuberculosis or that have never been declared free from tuberculosis shall be tested negative for tuberculosis in accordance with the appropriate status requirements as contained in Title 9 of the Code of Federal Regulations, Part 77, Sections 77.10 through 77.19, prior to entry with results of this test recorded on the certificate of veterinary inspection. All beef cattle, bison and sexually neutered dairy cattle originating from any other states or zones with anything less than free from tuberculosis shall be accompanied by a certificate of veterinary inspection.

(3) All dairy breed animals, including steers and spayed heifers, shall be officially identified prior to entry into the state. All sexually intact dairy cattle, that are two [(2)] months of age or older may enter provided that they are officially identified, and are accompanied by a certificate of veterinary inspection stating that they were negative to an official tuberculosis test conducted within 60 days prior to the date of entry. All sexually intact dairy cattle that are less than two [(2)] months of age must obtain an [a] entry permit from the Commission, as provided in §51.2(a) of this chapter (relating to General Requirements), to a designated facility where the animals will be held until they are tested negative at the age of two [(2)] months. Animals which originate from a tuberculosis accredited herd, and/or animals moving directly to an approved slaughtering establishment are exempt from the test requirement. Dairy cattle delivered to an approved feedlot for feeding for slaughter by the owner or consigned there and accompanied by certificate of veterinary inspection with an [a] entry permit issued by the commission are exempt from testing unless from a restricted herd. In addition, all sexually intact dairy cattle originating from a state or area with anything less than a tuberculosis free state status shall be tested negative for tuberculosis in accordance with the appropriate requirements for states or zones with a status as provided by Title 9 of the

Code of Federal Regulations, Part 77, Sections 77.10 through 77.19, for that status, prior to entry with results of the test recorded on the certificate of veterinary inspection.

(4) All "M" brand steers, which are recognized as potential rodeo and/or roping stock, being imported into Texas from another state shall obtain a permit, prior to entry into the state, in accordance with §51.2(a) of this chapter and be accompanied by a certificate of veterinary inspection which indicates that the animal(s) were tested negative for tuberculosis within 12 [twelve] months prior to entry into the state.

(5) All other cattle from foreign countries, foreign states, or areas within foreign countries defined by the Commission, with comparable tuberculosis status, would enter by meeting the requirements for a state with similar status as stated in paragraphs (1), (2) and (3) of this subsection.

(6) All sexually intact cattle, from any foreign country or part thereof with no recognized comparable Tuberculosis status.

(A) To be held for purposes other than for immediate slaughter or feeding for slaughter in an approved feedyard or approved pen, must be tested at the port of entry into Texas under the supervision of the port veterinarian, and shall be under quarantine on the first premise of destination in Texas pending a negative tuberculosis test no earlier than 120 days and no later than 180 days after arrival. The test will be performed by a veterinarian employed by the TAHC or APHIS/VS.

(B) When destined for feeding for slaughter in an approved feedyard, cattle must be tested at the port-of-entry into Texas under the supervision of the port veterinarian; moved directly to the approved feedyard only in sealed trucks; accompanied with a VS 1-27 permit issued by TAHC or USDA personnel; and "S" branded prior to or upon arrival at the feedlot.

(7) Cattle originating from Mexico.

(A) All sexually intact cattle shall meet the requirements provided for in paragraph (6) of this subsection.

(B) Steers and spayed heifers from Mexico shall meet the federal importation requirements as provided in Title 9 of the Code of Federal Regulations, Part 93, Section 93.427, regarding importation of cattle from Mexico. In addition to the federal requirements, steers and spayed heifers must be moved under permit to an approved pasture, approved feedlot, or approved pens.

(C) Cattle utilized as rodeo and/or roping stock shall meet the requirements set out in paragraph (6)(A) of this subsection and the applicable requirement listed in clauses (i) and (ii) of this subparagraph:

(i) All sexually intact cattle shall be retested annually for tuberculosis at the owner's expense and the test records shall be maintained with the animal and available for review.

(ii) All sexually neutered horned cattle imported from Mexico are recognized as potential rodeo and/or roping stock and must:

(I) be tested for tuberculosis at the port of entry under the supervision of the USDA port veterinarian;

(II) be moved by permit to a premise of destination and remain under Hold[-]Order, which restricts movement, until permanently identified by methods approved by the commission, and retested for tuberculosis between 60 and 120 days after entry at the owner's expense. The cattle may be allowed movement to and from events/activities in which commingling with other cattle will not occur

and with specific permission by the TAHC until confirmation of the negative post entry retest for tuberculosis can be conducted; and

(III) be retested for tuberculosis annually at the owner's expense and the test records shall be maintained with the animal and available for review.

(D) Regardless of reproductive status, test history, or Mexican State of origin, Holstein and Holstein cross cattle are prohibited from entering Texas.

(E) All cattle moved into Texas from Mexico shall be identified with an "M" brand prior to moving to a destination in Texas.

(F) A copy of the certificate issued by an authorized inspector of the United States Department of Agriculture, Animal and Plant Health Inspection Service, for the movement of Mexico cattle into Texas must accompany such animals to their final destination in Texas, or so long as they are moving through Texas.

(c) Trichomoniasis Requirements:

(1) All breeding bulls entering the state more than 12 months of age shall be tested negative for Trichomoniasis with an official Polymerase Chain Reaction (PCR) test within 60 days prior to entry. Trichomoniasis samples pooled at the laboratory may qualify as the official test if no more than five total samples are pooled. Breeding bulls shall be individually identified by an official identification device and be accompanied with a certificate of veterinary inspection, indicating the age. The official identification number shall be written on the certificate of veterinary inspection. Official identification includes: Official Alpha-numeric USDA metal eartags (bangs tags), Official 840 RFID tags, Official 840 flap or bangle tags, and Official individual animal breed registry tattoo or breed registry individual animal brands, or official state of origin Trichomoniasis tags. Bulls older than 12 months of age shall be tested one time by an official PCR test prior to entry into Texas. Breeding bulls, entering Texas as a recent resident, enrolled at a CSS certified artificial insemination facility where the bull(s) was isolated from female cattle and accompanied by documents with an original signature by the veterinarian or manager of the facility, are exempt from the test requirements. Untested bulls from out of state can enter Texas directly to a feedyard that has executed a Trichomoniasis Certified Facility Agreement, and are on a VS 1-27 permit and accompanied with an entry permit number issued by the Commission. Texas bulls participating in out of state "bull station trials" may return to their Texas farm of origin without a Trichomoniasis test if maintained in a controlled environment out of state without any contact with female cattle, which needs to be indicated on the health certificate issued for the bull(s).

(2) All bulls entering Texas for the purpose of participating at fairs, shows, exhibitions and/or rodeos, which are 12 months of age or older and capable of breeding may enter the state without testing for Trichomoniasis, but shall obtain a permit, in accordance with §51.2(a) of this chapter, prior to entry. Bulls permitted for entry into the State of Texas under the provisions of this subsection shall not be commingled with female cattle or used for breeding. Bulls that stay in the state more than 60 days must be tested negative for Trichomoniasis with an official PCR test.

(3) All breeding bulls entering from Mexico or from any country that does not have an established Trichomoniasis testing program, shall enter on and be moved by a permit, issued prior to entry, from the commission, in accordance with §51.2(a) of this chapter, to a premises of destination in Texas and remain under Hold Order until tested negative for Trichomoniasis with not less than three official culture tests conducted not less than seven days apart, or an official PCR test, within 30 days after entry into the state. All bulls shall be main-

tained separate from female cattle until tested negative for Trichomoniasis. The Hold Order shall not be released until all other post entry disease testing requirements have been completed. All bulls tested for Trichomoniasis shall be identified by an official identification device or method at the time the initial test sample is collected. The identification shall be recorded on the test documents.

(4) All breeding bulls entering from Canada or from any country that has an established Trichomoniasis testing program but for which the animals are not tested to meet the certification and testing requirements of paragraph (1) of this subsection, shall enter on and be moved by a permit, issued prior to entry, from the commission, in accordance with §51.2(a) of this chapter, to a premises of destination in Texas and remain under Hold Order until tested negative for Trichomoniasis with not less than three official culture tests conducted not less than seven days apart, or an official PCR test within 30 days of entry into the state. All bulls shall be maintained separate from female cattle until tested negative for Trichomoniasis. All bulls tested for Trichomoniasis shall be identified by an official identification device or method at the time the initial test sample is collected. The identification shall be recorded on the test documents.

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

Filed with the Office of the Secretary of State on September 23, 2013.

TRD-201304199

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 719-0724



## CHAPTER 57. POULTRY

### 4 TAC §57.13

The Texas Animal Health Commission (commission) proposes new §57.13, concerning Indemnification, in Chapter 57, which is entitled "Poultry". The new section is for the purpose of providing indemnification requirements for poultry.

During the 83rd Texas Legislative Session, House Bill (H.B.) 1521 was passed, which amended the Texas Agriculture Code to extend the commission's authority to require the slaughter or sale for immediate slaughter of domestic or exposed fowl, if the fowl is exposed to or infected with certain diseases, and compensate domestic and exotic fowl owners. The fowl industry would benefit from similar provisions currently in place for livestock owners. These provisions and measures will also avoid risks to human health due to the exposure to diseased fowl. An outbreak of low path avian influenza causes the commission concern for the potential exposure for the Texas poultry industry if the agency is not able to effectively and efficiently remove exposed or infected poultry. Low pathogenic avian influenza is an infectious and contagious disease that has previously been detected in several states including Texas. H.B. 1521 establishes indemnity provisions for domestic and exotic fowl owners, provided state funding is available.

FISCAL NOTE

Ms. Larissa Schmidt, Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no significant additional fiscal implications for local government as a result of enforcing or administering the rule. An Economic Impact Statement (EIS) is required if the proposed rule has an adverse economic effect on small businesses. The agency has evaluated the requirements and determined that there is not an adverse economic impact and, therefore, there is no need to do an EIS. Implementation of this rule poses no significant fiscal impact on small or micro-business.

#### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to have an avenue for handling the disposal of flocks which are either positive or exposed to a poultry disease, which poses a risk to the Texas poultry industry.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Texas Government Code §2001.022, this agency has determined that the proposed rule will not impact local economies.

#### TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. The proposed rule is an activity related to the handling of animals, including requirements for testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and is, therefore, compliant with the Private Real Property Preservation Act in Texas Government Code, Chapter 2007.

#### REQUEST FOR COMMENT

Comments regarding the proposal may be submitted to Carol Pivonka, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.texas.gov". Comments on the rule proposal will be accepted until 5:00 p.m. on November 4, 2013.

#### STATUTORY AUTHORITY

The new section is proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. H.B. 1521 amends §161.0415(a) and (b) and §161.058(a) and (c) of the Texas Agriculture Code. Section 161.0415 now authorizes the commission by order to require the slaughter of livestock, domestic fowl or exotic fowl, under the direction of the commission, or the sale of livestock, domestic fowl or exotic fowl for immediate slaughter at a public slaughtering establishment maintaining federal or state inspection if the livestock, domestic fowl or exotic fowl is exposed to or infected with certain disease. Section 161.058 now authorizes the commission to pay an indemnity to the owner of livestock, domestic fowl or exotic fowl exposed to or infected with a disease if the commission considers it necessary to eradicate the disease and to dispose of the exposed or diseased livestock, domestic fowl or exotic fowl. It also authorizes the commission to spend funds appropriated for the purpose of this section only for direct payment to owners of exposed or infected livestock, domestic fowl or exotic fowl.

The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized by §161.041(b) to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the

commission determines that a disease listed in §161.041 of the code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061.

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

#### §57.13. Indemnification.

(a) Indemnification to poultry owners. Poultry that are slaughtered in compliance with the disease program standards or as a result of a response on an official test may be indemnified. The commission may pay the owner the unreimbursed amount determined by deducting the salvage value and any other indemnity from the appraised value, subject to the availability of funds.

(b) Flock eligibility for payment of indemnity funds:

(1) The entire flock shall all be under common ownership or management;

(2) An indemnity agreement must be signed and approved for payment by the Executive Director of the commission; and

(3) The flock owner must comply with each indemnity agreement requirement including, but not limited to, those provisions pertaining to flock depopulation and disposal, cleaning, and disinfecting premises and materials, and payment for indemnity.

(c) Criteria for selection of flocks for indemnity payment:

(1) The flock must have a professional diagnosis supported by culture or significant serology and compatible history;

(2) The flock must be recommended for indemnity by the state epidemiologist;

(3) All selections of flocks or poultry for indemnity payment are subject to the availability of funds; and

(4) The commission, through its Executive Director, will determine the amount and number of poultry for which indemnity will be paid.

(d) Poultry infected with or exposed to a disease that are required to be destroyed shall be appraised by an authorized agent of the commission, or, if the Executive Director approves, by a USDA-APHIS representative.

(e) The appraisal of poultry shall be based on the fair market value and shall be determined by the meat, egg production or breeding value of such poultry. Poultry may be appraised in groups providing they are the same species and type. When appraisal is by the head, poultry in the group is the same value per head or when appraisal is by the pound, poultry in the group is the same value per pound.

(f) Appraisals of poultry shall be reported on forms furnished by the commission. Reports of appraisals shall show the number of fowl of each species and the value per head or the weight and value by pound.

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 23, 2013.

TRD-201304200



**TITLE 7. BANKING AND SECURITIES**  
**PART 7. STATE SECURITIES BOARD**  
**CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION**

**7 TAC §109.6**

The Texas State Securities Board proposes an amendment to §109.6, concerning investment adviser registration exemption for investment advice to financial institutions and certain institutional investors. The amendment would coordinate with new §139.23, a registration exemption for investment advisers to private funds, which is being concurrently proposed. The exclusion from the exemption in subsection (c) for advisers to "private funds" would be removed and language would be added to reference the new §139.23 exemption for private fund advisers. A grandfathering provision would be added as new subsection (e) to allow an investment adviser currently relying on §109.6 as it now exists for advisory services rendered to a "private fund" (as defined in new §139.23) to continue using the exemption in certain circumstances--if the private fund was in existence when §139.23 is adopted and the private fund ceases to accept new beneficial owners. The text in subsection (e), referencing an effective date for §139.23, would be replaced by a date certain at the time the amendment is adopted and these changes and §139.23 become effective.

This is a new version of the rule that was published in November 2012 and withdrawn at the January 2013 Board meeting. Unlike the previous proposal, subsection (a) now specifies that the "private fund" reference in §109.6(a) ties to the definition in new §139.23. The change in the prior proposal to the "accredited investor" definition is not included in the new proposal. Finally, the word "new" has been added before "beneficial owners" in the grandfather provision located in subsection (e) to acknowledge that certain transfers would not be considered to be a change in beneficial ownership. For example, the following would not be considered "new beneficial owners": donees of gifts (where the donor is a natural person, and the donee is either a natural person family member of donor (or an entity composed only of such family members, i.e., trusts, etc.) or is an IRC 501(c)(3) charitable organization); a successor who received the interest due to an involuntary transfer (examples would be legal separation, divorce, death, devise, bankruptcy, or receivership); or a "knowledgeable employee" of the issuer or adviser who replaces a departing knowledgeable employee.

Ronak V. Patel, Deputy Securities Commissioner, Tommy Green, Director, Inspections and Compliance Division, and Patricia Louterback, Director, Registration Division, have determined that there will be fiscal implications as a result of enforcing or administering the rule on state, but not local government.

The effect on state government for the first five-year period the rule will be in effect would be increased revenue in the form of

fees paid by the small number of investment advisers who are unable to continue to utilize the exemption pursuant to the grandfather provision in subsection (e) or the new exemption provided by proposed §139.23 and will be required to register or notice file in Texas. The increase in state revenue from each adviser in this small group would be \$275 for the firm and \$285 for each officer or investment adviser representative that is registered or notice filed in Texas and thereafter would be \$270 and \$275, respectively, for each annual renewal.

Mr. Patel, Mr. Green, and Ms. Louterback also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to preserve the exemption for investment advisers who currently come within its provisions.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO-BUSINESS**

The Agency estimates that there are approximately 1,660 investment adviser firms registered and approximately 4,559 notice filed in Texas. Among the total of 6,219 firms, approximately 89% are small businesses and 75% are micro-businesses, although among those registered, approximately 99% are small businesses and 95% are micro-businesses. Many of the notice-filed firms are located outside of Texas. The projected economic impact of the proposed amendment is expected to affect only a few investment advisers. Investment advisers who will not incur any additional costs are those who meet the grandfather provisions in subsection (e) because they can continue to claim the exemption as it existed prior to the amendment. Many investment advisers that can no longer claim the exemption in §109.6 after the rule is amended would be able to claim the new exemption provided in §139.23 and may incur the costs, if any, associated with that rule.

A small number of investment advisers will be required to register or notice file because they will not be grandfathered into §109.6 or able to transition to the exemption in new §139.23. Examples of investment advisers in this group are those who are "bad actors" or who have associated persons who are "bad actors," and advisers who have assets under management of \$150 million or more. An investment adviser who registers or makes a notice filing in Texas will incur filing fees for the firm and for each officer or investment adviser representative that is registered or notice filed in Texas and thereafter would also pay fees for each annual renewal. Registering and notice-filing advisers also will be required to complete the Form ADV and would incur the expense of preparing that form. However, notice-filing advisers who are registered with the Securities and Exchange Commission have already prepared Form ADV in connection with their federal registration and therefore would incur no additional preparation cost for the submission in Texas as a result of this proposed rule. There will also be filing fees imposed by third parties for investment advisers and their representatives submitting the initial and annual filings through the Investment Adviser Registration Depository ("IARD").

Investment advisers who must register in Texas, rather than notice-file, would also face costs to bring their business operations into compliance with the Texas Securities Act and the Board rules. However, these costs are expected to vary significantly depending on the adviser's size, the scope and nature of its business, and the sophistication of its compliance infrastructure. Some advisers, whether registered or not, may have already established compliance infrastructures to fulfill their fiduciary duties towards their clients. Costs will likely be less for new registrants

that have already established sound compliance practices and more for new registrants that have not yet established such practices. Costs will likely be lower for small or micro-businesses whose business models are generally less complex.

In preparing the proposal, the Agency considered several alternative methods for achieving the purposes of the amendment. One, the Agency considered repealing the provisions in the existing rule relating to private fund advisers, but determined that continuing to maintain the exemption for certain investment advisers would substantially reduce the number of small businesses having to pay new or increased compliance costs. Two, the Agency considered allowing additional private fund advisers to be grandfathered in, but decided that the investing public would benefit substantially from the protections provided by the amendment. Finally, the Agency considered not adopting the proposed amendment, but determined that in light of the approach adopted in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, and by other state securities regulators, enhancing oversight of private funds and their managers by affording a greater degree of transparency would be consistent with protecting the health, safety and economic welfare of the state and the investing public.

Mr. Patel, Mr. Green, and Ms. Louterback also have determined that, except for the costs discussed above, there are no additional anticipated economic costs to persons required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167 or sent by facsimile to (512) 305-8336.

The amendment is proposed under Texas Civil Statutes, Articles 581-5.T, 581-12.C, and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-5, 581-12, 581-12-1, and 581-18.

*§109.6. Investment Adviser Registration Exemption for Investment Advice to Financial Institutions and Certain Institutional Investors.*

(a) Availability. The exemption from investment adviser and investment adviser representative registration provided by the Texas Securities Act, §5.H, or this section is not available if the financial institution or other institutional investor named therein is in fact acting only as agent for another purchaser that is not a financial institution or other institutional investor listed in §5.H or this section. These exemptions are available only if the financial institution or other institutional investor named therein is acting for its own account or as a bona fide trustee of a trust organized and existing other than for the purpose of acquiring the investment advisory services for which the investment adviser or investment adviser representative is claiming the exemption. For purposes of this section, an investment adviser or investment ad-

viser representative that is providing investment advisory services to a corporation, general partnership, limited partnership, limited liability company, trust or other legal entity, other than a private fund (as that term is defined in §139.23 of this title (relating to Registration Exemption for Investment Advisers to Private Funds)), is not providing investment advisory services to a shareholder, general partner, member, other security holder, beneficiary or other beneficial owner of the legal entity unless the investment adviser provides investment advisory services to such owner separate and apart from the investment advisory services provided to the legal entity.

(b) (No change.)

(c) Exclusions from exemption. [Investment advice rendered to natural persons and private funds.] There is no exemption under this section for an investment adviser providing investment advisory services to a natural person. A private fund adviser, as that term is defined in §139.23 of this title (relating to Registration Exemption for Investment Advisers to Private Funds), may not rely on this exemption except as provided in subsection (e) of this section. [or to a private fund, such as a hedge fund, that is composed partially or entirely of natural persons: A "private fund" is an entity that:]

{(1) would be subject to regulation under the federal Investment Company Act of 1940 but for the exceptions from the definition of "investment company" provided for:}

{(A) a fund that has no more than 100 beneficial owners, or}

{(B) a fund that is owned exclusively by qualified purchasers who acquired ownership through a non-public offering;}

{(2) permits investors who are natural persons to redeem their interests in the fund within two years of purchasing them; and}

{(3) offers interests in the entity based on the investment advisory skills, ability or expertise of the investment adviser.}

(d) (No change.)

(e) Grandfathering. An investment adviser to a private fund, as that term is defined in §139.23 of this title (relating to Registration Exemption for Investment Advisers to Private Funds), may nonetheless qualify for the exemption described in subsection (b) of this section if:

(1) the private fund existed prior to the effective date of §139.23 of this title;

(2) the investment adviser qualified for the exemption in subsection (b) as modified by subsection (c) as both subsections of this section existed prior to the effective date of §139.23 of this title; and

(3) as of the effective date of §139.23 of this title, the private fund ceases to accept new beneficial owners.

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 19, 2013.

TRD-201304111  
John Morgan  
Securities Commissioner  
State Securities Board

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 305-8303

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## 7 TAC §109.13

The Texas State Securities Board proposes an amendment to §109.13, concerning limited offering exemptions. The amendment would incorporate changes to Regulation D, Rule 506, that were recently adopted by the Securities and Exchange Commission ("SEC"). The Dodd-Frank Wall Street Reform and Consumer Protection Act required the adoption of bad actor rules "substantially similar" to the disqualifications in Rule 262 of Regulation A. In Release No. 33-9414, the SEC adopted final rules disqualifying felons and other bad actors from participating in offerings that rely on the exemption in Rule 506. In Release No. 33-9415, the SEC followed the Congressional directive in the Jumpstart Our Business Startups Act ("JOBS Act") to eliminate the prohibition against general solicitation and general advertising in Rule 506 offerings. As amended, Rule 506 would permit an issuer to engage in general solicitation or general advertising in offering and selling securities pursuant to Rule 506, provided that all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that such purchasers are accredited investors.

Patricia Louterback, Director, Registration Division, has determined that for the first five-year period the rule is in effect there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Louterback also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be that the provisions will coordinate with federal standards and requirements. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167 or sent by facsimile to (512) 305-8336.

The amendment is proposed under Texas Civil Statutes, Articles 581-5.T and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-5 and 581-7.

### §109.13. *Limited Offering Exemptions.*

(a) - (j) (No change.)

(k) Uniform limited offering exemption. In addition to sales made under the Texas Securities Act, §5.I, the State Securities Board, pursuant to the Act, §5.T, exempts from the registration requirements of the Act, §7, any offer or sale of securities offered or sold in compliance with the Securities Act of 1933, Regulation D, Rules 230.505 and/or 230.506, including any offer or sale made exempt by application of Rule 508(a), as made effective in United States Securities and Exchange Commission Release Number 33-6389 and as amended in Release Numbers 33-6437, 33-6663, 33-6758, 33-6825, 33-6863,

33-6902, 33-6949, 33-6996, 33-7470, 33-8876, [and] 33-8891, 33-9414, and 33-9415, and as adjusted by The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, and which satisfies the following further conditions and limitations.

(1) - (17) (No change.)

(l) (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 19, 2013.

TRD-201304112

John Morgan

Securities Commissioner

State Securities Board

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 305-8303



## CHAPTER 115. SECURITIES DEALERS AND AGENTS

### 7 TAC §115.18

The Texas State Securities Board proposes an amendment to §115.18, concerning special application provisions available to a military spouse, military service member, or military veteran. The proposal is required by Senate Bill ("SB") 162, passed by the 83rd Texas Legislature. SB 162 requires licensing agencies to provide an additional alternative licensing procedure for military spouses and new alternative procedures for military service members and veterans seeking a registration or license in Texas. A related form is being concurrently proposed as is a comparable amendment for investment adviser and investment adviser representative applications.

Subsection (a) would be changed to add definitions for "military service member" and "military veteran" and amend the definition for "military spouse" to comport with the definitions added by SB 162.

The procedure in the current rule is preserved in subsection (b). It allows a military spouse to request special consideration of his or her application if the application is not processed within five calendar days of submission. Applicants going forward under this procedure would have to meet all the requirements to obtain a registration; they would "jump to the head of the line" in the review process so deficiencies would be identified earlier and addressed. A change is being made to give the staff five business days, rather than five calendar days, to respond to the applicant.

Subsection (c) addresses the new procedure, added by SB 162, that would also be applicable to military spouses. It would apply to a military spouse licensed in another jurisdiction or through a branch of the armed forces as long as the requirements for that license are substantially equivalent to the Texas requirements. An applicant who qualifies for special consideration under this provision would be registered despite having deficiencies that would hold up a regular registration. Staff will notify the military spouse of all deficiencies within five business days from approval of the registration. The applicant then has a 12-month "grace period"

to remedy the deficiencies. The registration of an applicant who has failed to resolve the deficiencies at the end of the 12-month period will be automatically terminated.

Staff does not anticipate many applicants will use this procedure. The most common deficiency seen at registration is a lack of required examinations. Since most other states require the same examinations for dealer/agent registration as Texas, the prerequisite that the applicant be licensed in another state will mean that they will likely already have taken and passed the examinations required for Texas registration.

Subsection (d) sets out the new procedure, added by SB 162, for military service members and military veterans. The new procedure allows comparable military service, training, or education to be credited towards the registration requirements, except for an examination requirement. Staff is not currently aware of any military experience that would be eligible for such credit. This procedure would not be available to military service members or veterans whose registration in another state is not in good standing or who have been convicted of a crime that could be the grounds for denial of registration under §14.A of the Texas Securities Act.

The provisions in subsection (e) are relocated from other provisions in the existing rule and made applicable to all of the special circumstances addressed in subsections (b) through (d).

Subsection (f) allows for additional information requests for applicants receiving special consideration. Although not exhaustive, an applicant may be required to provide documentation to demonstrate his or her military status that qualifies the applicant for special consideration under the rule, information on training or other competency that would substitute for an application requirement, or information to assist staff in determining financial responsibility, business repute, or qualifications.

The requests for special consideration under this section would be made on new Form 133.4, Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran, which would replace the current Form 133.4, Military Spouse Request for Expedited Review.

Patricia Louterback, Director, Registration Division, and Tommy Green, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Louterback and Mr. Green also have determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that a military spouse already licensed in another jurisdiction can request special consideration when applying for registration in Texas and a military service member or veteran can receive credit for comparable military service, training or education when applying for a Texas registration. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167 or sent by facsimile to (512) 305-8336.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1 and Chapter 55 of the Texas Occupations Code. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Chapter 55 of the Texas Occupations Code authorizes the agency to adopt rules for licensure or registration for a person who is a military spouse, military service member, or military veteran who meets certain criteria.

The proposal affects Texas Civil Statutes, Articles 581-12, 581-13, 581-14, 581-15, and 581-18.

§115.18. *Special Application Provisions Available to a [Qualified] Military Spouse, Military Service Member, or Military Veteran [Request for Expedited Review of an Application for Registration].*

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

(1) Current registration--A registration or license that is:

(A) issued by another state, the District of Columbia, or a territory of the United States that has registration requirements that are substantially equivalent to the requirements for a Texas registration in the same capacity;

(B) - (C) (No change.)

(2) (No change.)

(3) [Qualified] Military spouse--An applicant who is married to a military service member who is currently [the spouse of an individual serving] on active duty. [as a member of the armed forces of the United States assigned to a military unit headquartered in Texas, and who:]

~~[(A) holds a current registration in another state, the District of Columbia, or a territory of the United States, that has registration requirements that are substantially equivalent to the requirements for a Texas registration in the same capacity; or]~~

~~[(B) has been registered in Texas in the same capacity within the five years preceding the date of the application for registration, but whose registration in Texas expired while the applicant lived in another state for at least six months.]~~

(4) Military service member--A person who is currently serving in the armed forces of the United States, in a reserve component of the armed forces of the United States, including the National Guard, or in the state military service of any state.

(5) Military veteran--A person who has served in the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, or in the auxiliary service of one of those branches of the armed forces.

(b) Alternative procedure for a military spouse as authorized by Occupations Code, §55.004 [Request for expedited review].

(1) An applicant who is a [A qualified] military spouse may use the procedure set out in this subsection if:

(A) the applicant holds a current registration in another jurisdiction; or

(B) has been registered in Texas in the same capacity within the five years preceding the date of the application for registration, but whose registration in Texas expired while the applicant lived in another state for at least six months.

(2) If the applicant [who] is not registered within five days of submitting an application, the applicant may request special consideration [expedited review] of his or her application for registration by filing Form 133.4, [Military Spouse] Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran [Expedited Review], with the Securities Commissioner ("Commissioner"). Within five business days of [An application for registration from an applicant qualifying under this section shall be expedited by the Registration Division. Upon] receipt of the completed Form 133.4, the [Commissioner will notify the] applicant will be notified in writing [within five days that the applicant is entitled to an expedited review] of the [application and will advise the applicant the] reason(s) for the pending or deficient status assigned to the application.

(3) In addition to the waivers of examination requirements set out in §115.3 of this title (relating to Examination), the Commissioner in his or her discretion is authorized by the Board to grant full or partial waivers of the examination requirements of the Texas Securities Act, §13.D, on a showing of alternative demonstrations of competency to meet the requirements for obtaining the registration sought.

(c) Expedited review of an application submitted by a military spouse as authorized by Occupations Code, §55.005 and §55.006.

(1) An applicant who is a military spouse may use the procedure set out in this subsection if the applicant holds a current registration in another jurisdiction.

(2) If the applicant is not registered within five days of submitting an application, the applicant may request special consideration of his or her application for registration by filing Form 133.4, Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran, with the Commissioner.

(3) An applicant proceeding under this subsection may be registered despite having pending and/or deficient items ("deficiencies"). The deficiencies will be communicated to the applicant in writing or by electronic means within five business days from approval of the registration.

(4) The deficiencies noted at the time the registration is granted must be resolved by the applicant within a 12 month period. Failure to resolve outstanding deficiencies will cause the registration granted under this subsection or any renewal of such registration to automatically terminate 12 months after the date the registration was initially granted pursuant to this subsection.

(d) Registration of persons with military experience as authorized by Occupations Code, §55.007.

(1) An applicant who is a military service member or military veteran may request special consideration of verified military service, training, or education towards registration requirements, other than an examination requirement, for the registration sought by submitting Form 133.4, Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran, with the applicant's registration application.

(2) The procedure authorized by this subsection is not available to a military service member or military veteran who:

(A) is registered in another jurisdiction but such registration is not in good standing; or

(B) has been convicted of a crime that could be the basis for denial of the registration pursuant to the Texas Securities Act, §14.A.

(e) ~~[(e)]~~ Other provisions in this chapter.

(1) ~~[Applicability.]~~ Unless specifically allowed in this section, an applicant must meet the requirements for registration or renewal specified in this chapter. This includes the requirement that certain filings be made electronically through the CRD.

~~[(2) Exceptions.]~~

(2) ~~[(A)]~~ A one-year period, instead of the 90-day period contained in §115.2 of this title (relating to Application Requirements), will apply to the automatic withdrawal of an application for which a Form 133.4 is properly filed.

~~[(B)]~~ In addition to the waivers of examination requirements set out in §115.3 of this title (relating to Examination), the Commissioner in his or her discretion is authorized by the Board to grant full or partial waivers of the examination requirements of the Texas Securities Act, §13.D, on a showing of alternative demonstrations of competency to meet the requirements for obtaining the registration sought.]

(f) ~~[(d)]~~ Additional information. An applicant receiving special consideration pursuant to this section in connection with a registration application [requesting expedited review] shall provide any other information deemed necessary by the Commissioner. Such information may include, but is not limited to documentation:

(1) demonstrating status as a military spouse, service member, or military veteran;

(2) to determine whether the applicant meets licensing requirements through some alternative method;

(3) relating to prior military service, training, or education that may be credited towards a registration requirement; or

(4) to determine a dealer's financial responsibility or a dealer's or agent's business repute or qualifications.

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 19, 2013.

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John Morgan  
Securities Commissioner  
State Securities Board

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For further information, please call: (512) 305-8303



## CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

### 7 TAC §116.18

The Texas State Securities Board proposes an amendment to §116.18, concerning special application provisions available to a military spouse, military service member, or military veteran. The proposal is required by Senate Bill ("SB") 162, passed by the 83rd Texas Legislature. SB 162 requires licensing agencies to provide an additional alternative licensing procedure for military spouses and new alternative procedures for military service members and veterans seeking a registration or license in Texas.

A related form is being concurrently proposed as is a comparable amendment for dealer and agent applications.

Subsection (a) would be changed to add definitions for "military service member" and "military veteran" and amend the definition for "military spouse" to comport with the definitions added by SB 162.

The procedure in the current rule is preserved in subsection (b). It allows a military spouse to request special consideration of his or her application if the application is not processed within five calendar days of submission. Applicants going forward under this procedure would have to meet all the requirements to obtain a registration; they would "jump to the head of the line" in the review process so deficiencies would be identified earlier and addressed. A change is being made to give the staff five business days, rather than five calendar days, to respond to the applicant.

Subsection (c) addresses the new procedure, added by SB 162, that would also be applicable to military spouses. It would apply to a military spouse licensed in another jurisdiction or through a branch of the armed forces as long as the requirements for that license are substantially equivalent to the Texas requirements. An applicant who qualifies for special consideration under this provision would be registered despite having deficiencies that would hold up a regular registration. Staff will notify the military spouse of all deficiencies within five business days from approval of the registration. The applicant then has a 12-month "grace period" to remedy the deficiencies. The registration of an applicant who has failed to resolve the deficiencies at the end of the 12-month period will be automatically terminated.

Staff does not anticipate many applicants will use this procedure. The most common deficiency seen at registration is a lack of required examinations. Since most other states require the same examinations for investment adviser/investment adviser representative registration as Texas, the prerequisite that the applicant be licensed in another state will mean that they will likely already have taken and passed the examinations required for Texas registration.

Subsection (d) sets out the new procedure, added by SB 162, for military service members and military veterans. The new procedure allows comparable military service, training, or education to be credited towards the registration requirements, except for an examination requirement. Staff is not currently aware of any military experience that would be eligible for such credit. This procedure would not be available to military service members or veterans whose registration in another state is not in good standing or who have been convicted of a crime that could be the grounds for denial of registration under §14.A of the Texas Securities Act.

The provisions in subsection (e) are relocated from other provisions in the existing rule and made applicable to all of the special circumstances addressed in subsections (b) through (d).

Subsection (f) allows for additional information requests for applicants receiving special consideration. Although not exhaustive, an applicant may be required to provide documentation to demonstrate his or her military status that qualifies the applicant for special consideration under the rule, information on training or other competency that would substitute for an application requirement, or information to assist staff in determining financial responsibility, business repute, or qualifications.

The requests for special consideration under this section would be made on new Form 133.4, Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran, which would replace the current Form 133.4, Military Spouse Request for Expedited Review.

Patricia Louterback, Director, Registration Division, and Tommy Green, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Louterback and Mr. Green also have determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that a military spouse already licensed in another jurisdiction can receive special consideration when applying for registration in Texas and a military service member or veteran can receive credit for comparable military service, training or education when applying for Texas registration. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167 or sent by facsimile to (512) 305-8336.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1 and Chapter 55 of the Texas Occupations Code. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Chapter 55 of the Texas Occupations Code authorizes the agency to adopt rules for licensure or registration of a person who is a military spouse, military service member, or military veteran who meets certain criteria.

The proposal affects Texas Civil Statutes, Articles 581-12, 581-13, 581-14, 581-15, and 581-18.

*§116.18. Special Application Provisions Available to a [Qualified] Military Spouse, Military Service Member, or Military Veteran [Request for Expedited Review of an Application for Registration].*

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

(1) Current registration--A registration or license that is:

(A) issued by another state, the District of Columbia, or a territory of the United States that has registration requirements that are substantially equivalent to the requirements for a Texas registration in the same capacity;

(B) - (C) (No change.)

(2) (No change.)

(3) [Qualified] Military spouse--An applicant who is married to a military service member who is currently [the spouse of an individual serving] on active duty. [as a member of the armed

forces of the United States assigned to a military unit headquartered in Texas, and who:]

~~[(A) holds a current registration in another state, the District of Columbia, or a territory of the United States, that has registration requirements that are substantially equivalent to the requirements for a Texas registration in the same capacity; or]~~

~~[(B) has been registered in Texas in the same capacity within the five years preceding the date of the application for registration, but whose registration in Texas expired while the applicant lived in another state for at least six months.]~~

(4) Military service member--A person who is currently serving in the armed forces of the United States, in a reserve component of the armed forces of the United States, including the National Guard, or in the state military service of any state.

(5) Military veteran--A person who has served in the Army, Navy, Air Force, Marine Corps, or Coast Guard of the United States, or in the auxiliary service of one of those branches of the armed forces.

(b) Alternative procedure for a military spouse as authorized by Occupations Code, §55.004 [Request for expedited review].

(1) An applicant who is a [A qualified] military spouse may use the procedure set out in this subsection if:

(A) the applicant holds a current registration in another jurisdiction; or

(B) has been registered in Texas in the same capacity within the five years preceding the date of the application for registration, but whose registration in Texas expired while the applicant lived in another state for at least six months.

(2) If the applicant [who] is not registered within five days of submitting an application, the applicant may request special consideration [expedited review] of his or her application for registration by filing Form 133.4, [Military Spouse] Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran [Expedited Review], with the Securities Commissioner ("Commissioner"). Within five business days of [An application for registration from an applicant qualifying under this section shall be expedited by the Registration Division. Upon] receipt of the completed Form 133.4, the [Commissioner will notify the] applicant will be notified in writing [within five days that the applicant is entitled to an expedited review] of the [application and will advise the applicant the] reason(s) for the pending or deficient status assigned to the application.

(3) In addition to the waivers of examination requirements set out in §115.3 of this title (relating to Examination), the Commissioner in his or her discretion is authorized by the Board to grant full or partial waivers of the examination requirements of the Texas Securities Act, §13.D, on a showing of alternative demonstrations of competency to meet the requirements for obtaining the registration sought.

(c) Expedited review of an application submitted by a military spouse as authorized by Occupations Code, §55.005 and §55.006.

(1) An applicant who is a military spouse may use the procedure set out in this subsection if the applicant holds a current registration in another jurisdiction.

(2) If the applicant is not registered within five days of submitting an application, the applicant may request special consideration of his or her application for registration by filing Form 133.4, Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran, with the Commissioner.

(3) An applicant proceeding under this subsection may be registered despite having pending and/or deficient items ("deficiencies"). The deficiencies will be communicated to the applicant in writing or by electronic means within five business days from approval of the registration.

(4) The deficiencies noted at the time the registration is granted must be resolved by the applicant within a 12 month period. Failure to resolve outstanding deficiencies will cause the registration granted under this subsection or any renewal of such registration to automatically terminate 12 months after the date the registration was initially granted pursuant to this subsection.

(d) Registration of persons with military experience as authorized by Occupations Code, §55.007.

(1) An applicant who is a military service member or military veteran may request special consideration of verified military service, training, or education towards registration requirements, other than an examination requirement, for the registration sought by submitting Form 133.4, Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran, with the applicant's registration application.

(2) The procedure authorized by this subsection is not available to a military service member or military veteran who:

(A) is registered in another jurisdiction but such registration is not in good standing; or

(B) has been convicted of a crime that could be the basis for denial of the registration pursuant to the Texas Securities Act, §14.A.

(e) [(e)] Other provisions in this chapter.

(1) [Applicability:] Unless specifically allowed in this section, an applicant must meet the requirements for registration or renewal specified in this chapter. This includes the requirement that certain filings be made electronically through the IARD.

[(2) Exceptions.]

(2) [(A)] A one-year period, instead of the 90-day period contained in §116.2 of this title (relating to Application Requirements), will apply to the automatic withdrawal of an application for which a Form 133.4 is properly filed.

[(B) In addition to the waivers of examination requirements set out in §116.3 of this title (relating to Examination), the Commissioner in his or her discretion is authorized by the Board to grant full or partial waivers of the examination requirements of the Texas Securities Act, §13.D, on a showing of alternative demonstrations of competency to meet the requirements for obtaining the registration sought.]

(f) [(d)] Additional information. An applicant receiving special consideration pursuant to this section in connection with a registration application [requesting expedited review] shall provide any other information deemed necessary by the Commissioner. Such information may include, but is not limited to documentation:

(1) demonstrating status as a military spouse, service member, or military veteran;

(2) to determine whether the applicant meets licensing requirements through some alternative method;

(3) relating to prior military service, training, or education that may be credited towards a registration requirement; or

(4) to determine an investment adviser's financial responsibility or an investment adviser's or investment adviser representative's business repute or qualifications.

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

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John Morgan

Securities Commissioner

State Securities Board

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For further information, please call: (512) 305-8303



## CHAPTER 133. FORMS

### 7 TAC §133.4

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

The Texas State Securities Board proposes the repeal of §133.4, which adopts by reference a form concerning military spouse request for expedited review. Repeal of the existing form would allow for the simultaneous adoption of a new form, which is being concurrently proposed

Patricia Louthback, Director, Registration Division, and Tommy Green, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Louthback and Mr. Green also have determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that a military spouse already licensed in another jurisdiction and a military service member or veteran can complete the form to request special consideration or credit pursuant to §115.18 or §116.18. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

The repeal is proposed under Texas Civil Statutes, Article 581-28-1 and Chapter 55 of the Texas Occupations Code. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Chapter 55 of the Texas Occupations Code authorizes

the agency to adopt rules for licensure or registration for a person who is a military spouse, military service member, or military veteran who meets certain criteria.

The proposal affects Texas Civil Statutes, Articles 581-12, 581-13, 581-14, 581-15, and 581-18.

§133.4. *Military Spouse Request for Expedited Review.*

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

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John Morgan

Securities Commissioner

State Securities Board

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For further information, please call: (512) 305-8303



### 7 TAC §133.4

The Texas State Securities Board proposes new §133.4, which adopts by reference a form concerning request for special consideration of a registration application by a military spouse, military service member, or military veteran. The form will allow a military spouse already licensed in another jurisdiction and a military service member or veteran to request special consideration or credit for comparable military service, training or education pursuant to §115.18 or §116.18, which are being concurrently amended. Existing form §133.4 is being concurrently proposed for repeal.

Patricia Louthback, Director, Registration Division, and Tommy Green, Director, Inspections and Compliance Division, have determined that for the first five-year period the rule is in effect, there will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Louthback and Mr. Green also have determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that a military spouse already licensed in another jurisdiction and a military service member or veteran can complete the form to request special consideration or credit pursuant to §115.18 or §116.18. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to (512) 305-8336.

The new section is proposed under Texas Civil Statutes, Article 581-28-1 and Chapter 55 of the Texas Occupations Code. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its

jurisdiction; and prescribing different requirements for different classes. Chapter 55 of the Texas Occupations Code authorizes the agency to adopt rules for licensure or registration of a person who is a military spouse, military service member, or military veteran who meets certain criteria.

The proposal affects Texas Civil Statutes, Articles 581-12, 581-13, 581-14, 581-15, and 581-18.

§133.4. Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran.

The State Securities Board adopts by reference Form 133.4, Request for Special Consideration of a Registration Application by a Military Spouse, Military Service Member, or Military Veteran. This form is available from the State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

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

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John Morgan

Securities Commissioner

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## CHAPTER 139. EXEMPTIONS BY RULE OR ORDER

### 7 TAC §139.23

The Texas State Securities Board proposes new §139.23, concerning registration exemption for investment advisers to private funds. The new rule would provide a registration exemption for investment advisers to private funds and was developed through negotiations between the Agency Staff and a subcommittee of the Securities Law Committee of the State Bar of Texas. A related amendment is being concurrently proposed to §109.6, concerning investment adviser registration exemption for investment advice to financial institutions and certain institutional investors.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203 ("Dodd-Frank") made substantial changes to the regulation of private funds. Dodd-Frank mandated Securities and Exchange Commission ("SEC") registration for investment advisers to private funds if they have assets under management of at least \$150 million and subjected them to recordkeeping and disclosure requirements.

In general, private funds include, but are not limited to, hedge funds, private equity funds, and venture capital funds, and are considered to be professionally managed pools of assets that are not subject to regulation under the Investment Company Act of 1940. Private funds seek to qualify for one of two exceptions from regulation under the Investment Company Act by either limiting themselves to 100 total investors (3(c)(1) funds) or by permitting only "qualified purchasers" to invest (3(c)(7) funds).

The SEC provides an exemption from the registration requirements under the Investment Advisers Act of 1940 for an invest-

ment adviser that acts solely as an adviser to private funds and has assets under management of less than \$150 million. Although exempt from federal registration, these advisers must file reports with the SEC and are called "exempt reporting advisers." The proposed exemption would extend this filing requirement to private fund investment advisers who utilize the exemption so that the Agency would have comparable information on advisers using the exemption. Alternatively, some investment advisers to private funds with assets under management of more than \$100 million can opt to register with the SEC.

The proposed exemption would cease to be available for an investment adviser once the adviser becomes registered with the SEC. At that point, the adviser would then make a notice filing in Texas. As with other investment adviser exemptions, the adviser's representatives whose activities are similarly limited are covered by the adviser's exemption from registration. Although the proposed exemption does not specifically address the disclosures that must be made by the exempt investment adviser, the general antifraud provisions of the Texas Securities Act would apply.

Subsection (b)(2) of the proposal contains bad-actor disqualifications applicable to the investment adviser and to its advisory affiliates. Subsection (b)(3) automatically waives the disqualifications if the party is licensed or registered to conduct securities or investment advisory business in the state where the disqualification was created. It also provides for waiver of the disqualification at the discretion of the Securities Commissioner upon a showing of good cause.

Subsection (c) of the proposal imposes additional restrictions on 3(c)(1) funds. If the 3(c)(1) fund is not a private equity fund, real estate fund, or venture capital fund, it must be beneficially owned by persons who meet the definition of qualified client. "Qualified client" is a higher standard than that of accredited investor.

The proposed rule provides if a qualified client is an entity that was organized for the purpose of acquiring an interest in the 3(c)(1) fund, all of the beneficial owners of the entity must also be qualified clients. Under this provision, each "tier" of beneficial ownership must be examined in a like manner. Thus, the adviser must look through each such entity to determine that all beneficial owners at each level are qualified clients.

Conversely, a 3(c)(1) fund that is a private equity fund, real estate fund, or venture capital fund can be owned by persons that are not qualified clients and who could be accredited or nonaccredited investors. Additionally, an adviser who has any 3(c)(1) fund customers who are not a private equity fund, real estate fund, or venture capital fund must comply with §116.17, relating to custody of funds or securities of clients by registered investment advisers, with respect to all the funds it advises.

Since an exempt investment adviser is no longer subject to unannounced inspection pursuant to §13-1 of the Texas Securities Act, subsection (f) adds a requirement whereby the Securities Commissioner can make a written request for the investment adviser's records that relate to the providing of investment advisory services to a private fund.

This is a new version of the rule that was published in November 2012 and withdrawn at the January 2013 Board meeting. Unlike the previous proposal, the definition of "private fund" in subsection (a)(2) of the new rule proposal has been amended to use "but for" language. Accordingly, a fund would not be considered to be a "private fund" if it qualifies for an exclusion from the defini-

tion of an investment company in the Investment Company Act, §3, other than, or in addition to, 3(c)(1) or 3(c)(7).

Subsection (b) has also been revised from the prior proposal based on new information we have received concerning how an adviser will be able to file the Form ADV electronically with the state and elect exempt reporting adviser status. Private fund advisers with less than \$25 million in assets under management will be able to electronically file their Form ADV as exempt reporting advisers without filing as such with the SEC. Accordingly, subsection (b) requires all private fund advisers filing pursuant to §139.23 to do so electronically through the Investment Adviser Registration Depository ("IARD") system. Also, a new disqualification provision has been added concerning bars.

Ronak V. Patel, Deputy Securities Commissioner, Tommy Green, Director, Inspections and Compliance Division, and Patricia Louterback, Director, Registration Division, have determined that there will be fiscal implications as a result of enforcing or administering the rule on state, but not local government.

The effect on state government for the first five-year period the rule will be in effect is loss of revenue. Certain investment advisors previously registered with the Agency may now be able to claim this exemption and thereby avoid paying registration fees. However, this may be offset to some extent by the registration or notice filing fees paid by investment advisers that are ineligible for this proposed exemption and are unable to fit within the grandfathering provisions in the §109.6 exemption, which is proposed to be amended in conjunction with this proposal. The annual loss in state revenue from each adviser in this small group would be \$270 for the firm and \$275 for each officer or investment adviser representative that no longer files for renewal of its registration or notice filing.

Mr. Patel, Mr. Green, and Ms. Louterback also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to enhance transparency regarding investment advisers who no longer qualify for the exemption contained in §109.6.

#### ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO-BUSINESS

The Agency estimates that there are approximately 1,660 investment adviser firms registered and approximately 4,559 notice filed in Texas. Among the total of 6,219 firms, approximately 89% are small businesses and 75% are micro-businesses, although among those registered, approximately 99% are small businesses and 95% are micro-businesses. Many of the notice-filed firms are located outside of Texas. The projected economic impact of this proposed rule will be increased costs of compliance for a small number of investment advisers claiming the exemption. However, the amount of those costs will vary based on the complexity of their operations.

Investment advisers with less than \$25 million in assets under management who claim the exemption contained in the proposed rule would incur costs to complete and update related reports on Form ADV. Larger investment advisers using the exemption, those with assets under management of between \$25 million and \$150 million, are exempt reporting advisers and would already be required under the SEC rules to make the filing the proposed rule requires in subsection (b)(1). Therefore, they would not incur any additional preparation cost as a result of this proposed rule.

The proposed rule does not impose any filing fee upon either the investment advisers or their representatives who qualify for the exemption.

Some subset of advisers that use the exemption will be required to comply with the annual surprise audit requirement in §116.17, relating to custody of funds or securities of clients. A "surprise audit" is one pursuant to a written agreement between the investment adviser and the accountant that is conducted at a time chosen by the accountant without prior notice or announcement to the investment adviser and that is irregular from year to year. There will be an economic cost to those private fund advisers that are required to comply with the surprise audit requirement of §116.17, although the cost is expected to vary depending on the size of the firm. However, it is anticipated that many investment advisers will fall within one of the six exceptions to the surprise audit requirement that appear in §116.17(c), including the two discussed above.

However, advisers with "indirect" custody solely as a result of the investment adviser's authority to withdraw its fees from the client's account have an exception from §116.17. Additionally, advisers of limited partnerships or pooled investment vehicles (i.e., hedge funds) would also have an exception from the annual surprise audit requirement if the pooled investment vehicle is subject to an annual audit by a Public Company Accounting Oversight Board ("PCAOB") Registered Accountant and the adviser distributes copies of the audited financials to each investor within 120 days of the pool's fiscal year end.

There may be additional costs for those investment advisers who have not previously retained a PCAOB Registered Accountant and those costs per annual audit would depend on the size of the firm and the number of clients for which it has custody of funds or securities.

The cost to prepare an internal control report relating to custody will vary based on the size and services offered by the qualified custodian.

In preparing the proposal, the Agency considered several alternative methods for achieving the purposes of the new rule. One, the Agency considered not requiring small investment advisers claiming the exemption to complete and update related reports on Form ADV, but determined that the investing public would benefit from this reporting requirement. Two, the Agency considered not requiring private fund advisers to comply with the "surprise audit" requirement of §116.17, but decided that the investing public would benefit from the protections provided by this requirement. Finally, the Agency considered not adopting the proposed amendment, but determined that in light of the approach adopted in Dodd-Frank and by other state securities regulators, enhancing oversight of private funds and their managers by affording a greater degree of transparency would be consistent with protecting the health, safety and economic welfare of the state and the investing public.

Mr. Patel, Mr. Green, and Ms. Louterback also have determined that, except for the costs discussed above, there are no additional anticipated economic costs to persons required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Marlene K. Sparkman, General Counsel, State Securities

Board, P.O. Box 13167, Austin, Texas 78711-3167 or sent by facsimile to (512) 305-8336.

The new rule is proposed under Texas Civil Statutes, Articles 581-5.T, 581-12.C, and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-5, 581-7, 581-12, 581-12-1, and 581-18.

§139.23. Registration Exemption for Investment Advisers to Private Funds.

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

(1) Private Fund Adviser--An investment adviser who provides advice:

(A) solely to one or more Private Funds; or

(B) solely to one or more Private Funds and other clients, who are not Private Funds, to whom advice may be provided pursuant to another exemption from investment adviser registration provided under the Texas Securities Act or Board rules.

(2) Private Fund--An issuer that would be an investment company as defined in the Investment Company Act of 1940, §3, but for an exclusion from the definition of an investment company in §3(c)(1) or §3(c)(7) of that Act, 15 U.S.C. §80a.

(3) 3(c)(1) Fund--A Private Fund that relies solely on the exclusion from the definition of an investment company under §3(c)(1) of the Investment Company Act of 1940, 15 U.S.C. §80a-3(c)(1).

(4) Private Equity Fund--A Private Fund that meets the definition of a private equity fund in the Instructions to Part IA of Form ADV.

(5) Real Estate Fund--A Private Fund that meets the definition of a real estate fund in the Instructions to Part IA of Form ADV.

(6) Venture Capital Fund A Private Fund that meets the definition of a venture capital fund in SEC Rule 203(l)-1, 17 CFR §275.203(l)-1.

(b) Exemption for Private Fund Advisers. Subject to the additional requirements of this section, the State Securities Board, pursuant to the Texas Securities Act, §5.T and §12.C, exempts from the investment adviser registration requirements of the Texas Securities Act, §12, a Private Fund Adviser satisfying each of the following conditions and limitations:

(1) The Private Fund Adviser files with the Securities Commissioner each report and amendment thereto that an exempt reporting adviser is required to file with the Securities and Exchange Commission pursuant to SEC Rule 204-4, 17 CFR §275.204-4. These filings are to be made electronically through the Investment Adviser Registration Depository (IARD). A report shall be deemed filed when the report required by subsection (b) of this section is filed and accepted by the IARD on the state's behalf.

(2) Except as provided in paragraph (3) of this subsection, neither the Private Fund Adviser, nor any of its advisory affiliates, as that term is defined in the Instructions to Part IA of Form ADV, are subject to the following disqualifications:

(A) any of those described in Rule 262 of SEC Regulation A, 17 CFR §230.262;

(B) has been convicted within five years prior to the filing of the notice required under this exemption of any felony or misdemeanor involving the offer, purchase, or sale of any security or the rendering of investment advice, or any felony involving embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud;

(C) is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminarily, or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of a security or the rendering of investment advice;

(D) is the subject of a United States Postal Service fraud order that is currently effective and was issued within the last five years;

(E) is currently subject to any state or federal administrative enforcement order or judgment, entered within the last five years, finding fraud or deceit in connection with the purchase or sale of a security or the rendering of investment advice;

(F) is subject to an order issued by a state or federal authority that bars the person from association with an entity regulated by the authority that issued the order, or from engaging in the business of securities, insurance, or banking, or savings association or credit union activities; or

(G) is the subject of a suspension or expulsion from membership in or association with a member of a self-regulatory organization that is currently effective and was issued within the last five years.

(3) Exceptions from disqualifications. The prohibitions of paragraph (2) of this subsection shall not apply if:

(A) the party subject to the disqualification is duly licensed or registered to conduct securities related business or render investment advisory services in the state in which the order, judgment, or decree creating the disqualification was entered against such party; or

(B) before investment advisory services are rendered under this section, the Securities Commissioner, or the court or regulatory authority that entered the order, judgment, or decree, waives the disqualification upon a showing of good cause.

(c) Additional requirements for Private Fund Advisers to certain 3(c)(1) Funds. In order to qualify for an exemption pursuant to this section, a Private Fund Adviser who advises at least one 3(c)(1) Fund that is not a Private Equity Fund, Real Estate Fund, or Venture Capital Fund shall comply with the following additional requirements:

(1) the Private Fund Adviser shall advise only those 3(c)(1) Funds (other than Private Equity Funds, Real Estate Funds, and Venture Capital Funds) whose outstanding securities (other than short-term paper) are beneficially owned entirely by persons who would each meet the definition of a qualified client in SEC Rule 205-3, 17 CFR §275.205-3, at the time the securities are purchased from the issuer; provided that if an entity was organized and exists only for the purpose of acquiring an interest in the 3(c)(1) Fund, each beneficial owner of such entity must be a qualified client; and

(2) the Private Fund Adviser shall comply with §116.17 of this title (relating to Custody of Funds or Securities of Clients by Registered Investment Advisers) as if registered.

(d) Federal covered investment advisers. If a Private Fund Adviser is registered with the Securities and Exchange Commission, the adviser shall not be eligible for this exemption and shall comply with the state notice filing requirements applicable to federal covered investment advisers in the Texas Securities Act, §12-1.

(e) Investment adviser representatives. An investment adviser representative is exempt from the registration requirements of the Texas Securities Act, §12, if he or she is employed by or associated with an investment adviser that is exempt from investment adviser registration in this state pursuant to this section and does not otherwise act as an investment adviser representative.

(f) Requests for records.

(1) Upon a written request from the Securities Commissioner or the Commissioner's authorized representative, an investment adviser relying on an exemption provided by this section shall make available to the Commissioner all records subject to the custody or control of the investment adviser related to any private fund to which the investment adviser provides investment advice.

(2) Failure to comply with this subsection will result in the loss of the exemption provided by this section.

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

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John Morgan

Securities Commissioner

State Securities Board

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For further information, please call: (512) 305-8303



## 7 TAC §139.24

The Texas State Securities Board proposes new §139.24, concerning charitable organizations assisting economically disadvantaged clients with Texas qualified tuition program plans. The new rule would provide a registration exemption for a charitable organization and its financial coaches or counselors when they assist economically disadvantaged clients with Texas qualified tuition program plans. This draft rule proposal was developed in response to testimony presented during a hearing in the last legislative session regarding House Bill 3486, relating to the removal of certain barriers to saving for economically disadvantaged persons, and with the input of several of the community groups who provided that testimony.

As long as the financial coach or counselor's activities are limited as provided for in subsections (b) and (c), the financial coach or counselor would not be required to register with the Agency to provide that assistance. A financial coach or counselor would not be considered to be making a sale of a prepaid tuition contract if the activities are restricted to those permitted by the section.

Patricia Louterback, Director, Registration Division, has determined that for the first five-year period the rule is in effect, there

will be no foreseeable fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. Louterback also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that charitable organizations and their financial coaches or counselors can assist economically disadvantaged clients with Texas qualified tuition plans without registering as dealers, agents, investment advisers, or investment adviser representatives. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

Comments on the proposal to be considered by the Board should be submitted in writing within 30 days after publication of the proposed section in the *Texas Register*. Comments should be sent to Marlene K. Sparkman, General Counsel, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167 or sent by facsimile to (512) 305-8336.

The new rule is proposed under Texas Civil Statutes, Articles 581-5.T, 581-12.C, and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Articles 581-12 and 581-18.

§139.24. Charitable Organizations Assisting Economically Disadvantaged Clients with Texas Qualified Tuition Program Plans.

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

(1) Charitable organization--A 501(c)(3) nonprofit organization located in Texas that provides services to economically disadvantaged individuals and families.

(2) Client--An individual receiving services from a financial coach or counselor of a charitable organization relating to a Texas qualified tuition program plan.

(3) Economically disadvantaged--Eligible for services based on criteria established by a charitable organization and poverty guidelines updated periodically in the *Federal Register* by the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).

(4) Financial coach or counselor--An individual acting on behalf of a charitable organization in counseling economically disadvantaged clients of the charitable organization.

(5) Texas qualified tuition program plan--A fund or plan established under the Texas Education Code, Chapter 54, Subchapter G, H, or I, as amended.

(b) Exemption from dealer, agent, investment adviser, and investment adviser representative registration. The State Securities Board, pursuant to the Texas Securities Act, §12.C, exempts a charitable organization and its financial coaches and counselors from the dealer, agent, investment adviser, and investment adviser representa-

tive registration requirements of the Texas Securities Act, when their securities-related activities are limited to:

(1) assisting economically disadvantaged clients with completing documentation necessary to enroll or make a contribution to a Texas qualified tuition program plan; and

(2) providing materials relating to a Texas qualified tuition program plan that have been prepared on behalf of or approved by the plan manager or administrator of a Texas qualified tuition program plan, Texas Prepaid Higher Education Tuition Board, Office of the Comptroller of Public Accounts, Texas State Securities Board, Texas Match the Promise Foundation, or a tax-exempt charitable organization established by law to implement the Texas Save and Match Program.

(c) Prohibited activities. A charitable organization and its financial coaches and counselors are prohibited from the following activities in connection with a client's enrollment in or contribution to a Texas qualified tuition program plan:

(1) selecting or recommending a particular investment option; or

(2) receiving a commission or other remuneration.

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

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For further information, please call: (512) 305-8303



## TITLE 10. COMMUNITY DEVELOPMENT

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

#### CHAPTER 1. ADMINISTRATION

##### SUBCHAPTER A. GENERAL POLICIES AND PROCEDURES

###### 10 TAC §1.22

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

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 1, Subchapter A, §1.22, concerning Providing Contact Information to the Department. The purpose of the proposed repeal is to establish a new rule to set forth policies and procedures governing the provision of providing contact information to the Department. The proposed new 10 TAC §1.22 is published concurrently with this repeal in this issue of the *Texas Register*.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal will be in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal will be in effect, the public benefit anticipated as a result of the repeal, is to establish a proposed new rule which will increase efficiency and consistency among the Department's Single Family Programs. There will be no economic cost to any individuals required to comply with the repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Elizabeth Yevich, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-0070. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed repeal affects no other code, article, or statute.

§1.22. *Providing Contact Information to the Department.*

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 23, 2013.

TRD-201304184

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 475-3974



###### 10 TAC §1.22

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 1, Subchapter A, §1.22, concerning Providing Contact Information to the Department. The purpose of this proposed new section is to ensure that contact information is provided to the Department for all business matters.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section will be in effect, enforcing or administering the proposed new section does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new section will be in effect, the public benefit anticipated as a result of the new section will be greater efficiency for the Department when contacting the entities or individuals when conducting business.

ADVERSE IMPACT ON SMALL AND MICRO BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 4, 2013 to November 4, 2013 to receive input on the new section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Elizabeth Yevich, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-0070. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

STATUTORY AUTHORITY. The new section is proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules governing the administration of the Department and its programs.

CROSS REFERENCE TO STATUTE. The proposed new section affects no other code, article, or statute.

*§1.22. Providing Contact Information to the Department.*

(a) Any person or entities doing business with the Department shall notify the Department of any change in contact information, including names, addresses, telephone numbers, electronic mail addresses and fax numbers. In addition, the notification shall include all Department's contract numbers, project numbers or property names of any type. The notification shall be made as described in paragraphs (1) and (2) of this subsection:

(1) by mail: Texas Department of Housing and Community Affairs, Contact Information Update, P.O. Box 13941, Austin, Texas 78711-3941; or

(2) by electronic mail: [contactinformationupdate@tdhca.state.tx.us](mailto:contactinformationupdate@tdhca.state.tx.us).

(b) All persons or entities doing business with the Department are responsible for keeping their contact information current pursuant to subsection (a) of this section and as required by other Department rules. The Department is entitled to rely solely on the most recent contact information on file with the Department at the time any notice or other communication is sent.

(c) The notification requirements of this section are in addition to any other change of contact information notification requirements of the Department.

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

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Timothy K. Irvine  
Executive Director  
Texas Department of Housing and Community Affairs  
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For further information, please call: (512) 475-3974



CHAPTER 5. COMMUNITY AFFAIRS  
PROGRAMS  
SUBCHAPTER D. COMPREHENSIVE  
ENERGY ASSISTANCE PROGRAM

**10 TAC §5.430**

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

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 5, Subchapter D, §5.430, concerning Allowable Subrecipient Administrative and Assurance 16 Activities Expenditures. The purpose of the repeal is to remove references to Assurance 16 activities within program rules to clarify allowable costs under the program budget line items. The proposed new 10 TAC §5.430 is published concurrently with this repeal in this issue of the *Texas Register*.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed repeal will be in effect, enforcing or administering the proposed repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the repeal will be in effect, the public benefit anticipated as a result of the repeal will be clarification of program services costs within program rules. There will not be any economic cost to any individuals required to comply with the repeal.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. Written comments on the proposed repeal may be submitted to the Texas Department of Housing and Community Affairs, Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to [cadrulecomments@tdhca.state.tx.us](mailto:cadrulecomments@tdhca.state.tx.us) or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. OCTOBER 28, 2013.

STATUTORY AUTHORITY. The repeal is proposed pursuant to Texas Government Code §2306.053, which generally authorizes the Department to adopt rules, and more specifically Texas Government Code §2306.092, which authorizes the Department to promulgate rules regarding its community affairs and community development programs.

The proposed repeal affects no other code, article, or statute.

*§5.430. Allowable Subrecipient Administrative and Assurance 16 Activities Expenditures.*

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

Filed with the Office of the Secretary of State on September 23, 2013.

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Timothy K. Irvine  
Executive Director  
Texas Department of Housing and Community Affairs  
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For further information, please call: (512) 475-3974



## 10 TAC §5.430

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 5, Subchapter D, §5.430, concerning Allowable Subrecipient Administrative and Program Services Costs. The purpose of the new section is to clarify allowable uses of CEAP funds and to allow greater flexibility for Subrecipients within program rules. The proposed rule identifies allowable administrative costs and program services costs, provides that the calculation will be based upon a percentage of direct services costs, and requires that any excess be paid from non-federal funds.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the proposed new section will be in effect, enforcing or administering the proposed new section does not have any foreseeable implications related to new costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new section will be in effect, the public benefit anticipated as a result of the new section will be greater and more efficient use of funds and greater flexibility for Subrecipients within program rules. There will not be any new economic cost to any individuals required to comply with the new section.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. Written comments on the proposed new section may be submitted to the Texas Department of Housing and Community Affairs, Annette Cornier, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by email to [cadrulecomments@tdhca.state.tx.us](mailto:cadrulecomments@tdhca.state.tx.us) or by fax to (512) 475-3935. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. OCTOBER 28, 2013.

STATUTORY AUTHORITY. The new section is proposed pursuant to Texas Government Code §2306.053, which generally authorizes the Department to adopt rules, and more specifically Texas Government Code §2306.092, which authorizes the Department to promulgate rules regarding its community affairs and community development programs.

The proposed new section affects no other code, article, or statute.

§5.430. Allowable Subrecipient Administrative and Program Services Costs.

(a) Allowable administrative costs for administrative activities includes costs for general administration and coordination of CEAP, including contract costs and all indirect (or overhead) cost, and activities as described in paragraphs (1) - (13) of this subsection:

- (1) salaries and benefits of staff performing administrative and coordination functions;
- (2) activities related to eligibility determinations;
- (3) preparations of program plans, budgets and schedules;
- (4) monitoring of program and projects;
- (5) fraud and abuse units;
- (6) procurement activities;
- (7) public relations;

(8) services related to accounting, litigation, audits, management of property, payroll and personnel;

(9) costs of goods and services required for administration of the program such as the costs for supplies, equipment, travel, postage, utilities and rental of office space and maintenance of office space, provided that such costs are not excluded as direct administrative costs providing program services;

(10) travel costs incurred for official business and not excluded as a direct administrative cost for providing programs services (as described in Program Services cost in subsection (d) of this section);

(11) preparing reports and other documents;

(12) management information systems not related to tracking and monitoring of CEAP requirements; and

(13) cost of administering Assurance 16 activities.

(b) The Department calculates funds available for Subrecipient administrative activities as a percentage of Direct Services expenditures.

(c) Any cost in excess of the maximum allowable by the CEAP contract must be paid from non-federal funds.

(d) Program services costs may include providing program information to clients, screening and assessments, salaries and benefits for staff providing program services and the direct administrative costs associated with providing the services, such as the costs for supplies, equipment, travel, postage, utilities, rental of office space and maintenance of office space. Other program services costs may include outreach activities and expenditures on the information technology and computerization needed for tracking or monitoring required by CEAP.

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

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Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-3974



## SUBCHAPTER L. COMPLIANCE MONITORING

### 10 TAC §5.2101

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 5, Subchapter L, §5.2101, concerning the purpose and overview of Compliance Monitoring. The purpose of the proposed new section is to set forth a procedure for monitoring the Department's Community Affairs programs. This section establishes the scope and nature of monitoring the Compliance Division will conduct for Subrecipients of community affairs programs.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new section is in effect, enforcing or administering the new section does not

have any foreseeable implications related to new costs or revenues of the state or local governments.

**PUBLIC BENEFIT/COST NOTE.** Mr. Irvine also has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated, as a result of the new rule, will be improved compliance with Department programs. There will not be any increased economic cost to any individuals required to comply with the new section.

**ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES.** The Department has determined that there will not be an economic effect on small or micro-businesses.

**REQUEST FOR PUBLIC COMMENT.** The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the proposed new section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Patricia Murphy, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3140. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

**STATUTORY AUTHORITY.** The new section is proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed new section affects no other code, article, or statute.

*§5.2101. Purpose and Overview.*

(a) This subchapter provides the procedures that will be followed for monitoring for compliance with the community affairs programs administered by the Texas Department of Housing and Community Affairs (the "Department"). As of the date of the adoption of this subchapter, those programs include the Community Services Block Grant program (CSBG), the Low Income Home Energy Assistance Program (LIHEAP) (including the two (2) programs utilizing this funding source: the LIHEAP Weatherization Assistance Program (LIHEAP WAP) and the Comprehensive Energy Assistance Program (CEAP)), the Department of Energy Weatherization Assistance Program (DOE WAP), the Emergency Solutions Grant (ESG), and the Homeless Housing and Services Program (HHSP).

(b) Any entity administering any or all of the programs enumerated in subsection (a) of this section is a Subrecipient. A Subrecipient may also administer other programs, including programs administered by other state or federal agencies and privately funded programs. If the Subrecipient has contracts for other programs through the Department, including but not limited to the HOME Partnerships Program, the Neighborhood Stabilization Program, or the Housing Trust Fund, the Department may, but is not required to and does not commit to, coordinate monitoring of those programs with monitoring of community affairs programs under this subchapter.

(c) Frequency of reviews, information collection. In general, Subrecipients will be scheduled for monitoring based on federal monitoring requirements and/or a risk assessment. Factors to be included in the risk assessment include but are not limited to: the number of contracts administered by the Subrecipient, the amount of funds awarded and expended, the length of time since the last monitoring, findings identified during previous monitoring, issues identified through the submission or lack of submission of a single audit, complaints, and reports of fraud, waste and/or abuse. The risk assessment will also be used to determine which Subrecipients will have an onsite review and which may have a desk review.

(d) The Department will provide a Subrecipient with written notice of any upcoming onsite or desk monitoring review, and such

notice will be given to the Subrecipient by email to the Subrecipient's chief executive officer at the email address most recently provided to the Department by the Subrecipient. In general, a thirty (30) day notice will be provided. However, if a credible complaint of fraud or other egregious noncompliance is received the Department reserves the right to conduct unannounced monitoring visits. It is the responsibility of the Subrecipient to provide to the Department the current contact information for the organization and the Board in accordance with §5.21 of this chapter (relating to Subrecipient Contact Information) and §1.22 of this title (relating to Providing Contact Information to the Department).

(e) Upon request, Subrecipients must make available to the Department all books and records that the Department determines are reasonably relevant to the scope of the Department's review. Typically, these records may include:

(1) Minutes of the governing board and any committees thereof, together with all supporting materials;

(2) Copies of all internal operating procedures or other documents governing the Subrecipient's operations;

(3) Procurement documentation;

(4) The Subrecipient's Board approved operating budget;

(5) The Subrecipient's strategic plan or comparable document if applicable;

(6) Correspondence to or from any independent auditor;

(7) Contracts with any third party Subrecipients of goods or services and files documenting compliance with any applicable procurement and property disposition requirements;

(8) All general ledgers and other records of financial operations (including copies of checks and other supporting documents);

(9) Applicable client files with all required documentation;

(10) Applicable human resources records;

(11) Monitoring reports from other funding entities;

(12) Client files regarding complaints, appeals and termination of services; and

(13) Documentation to substantiate compliance with any other applicable state or federal requirements including, but not limited to, the Davis-Bacon Act, United States Department of Housing and Urban Development (HUD) requirements for environmental clearance, Lead Based Paint, the Personal Responsibility and Work Opportunity Act, HUD limited English proficiency requirements, requirements imposed by Section 3 of the Housing and Urban Development Act of 1968.

(f) Post Monitoring Procedures. After the monitoring review is completed, the Subrecipient will be briefed on the initial findings and/or observations through an exit briefing, which may be in person or through a conference call. The Subrecipient will be notified via conference call or email of any finding(s) and/or observation(s) not discussed during the exit briefing. In general, within thirty (30) days of the last day of the monitoring visit, a written monitoring report will be prepared for the Subrecipient describing the monitoring assessment and any corrective actions, if applicable. The monitoring report will be emailed and sent through the U.S. Postal Service to the Board Chair and the Subrecipient's Executive Director. Issues of concern over which there is uncertainty or ambiguity may be discussed by the Department with the staff of cognizant agencies overseeing federal funding.

(g) Subrecipient Response. If there are any findings of non-compliance requiring corrective action, the Subrecipient will be pro-

vided thirty (30) days, from the date of the email, to respond which may be extended for good cause. In order to receive an extension, the Subrecipient must submit a written request to the Chief of Compliance within the corrective action period, stating the basis for good cause that the Subrecipient believes justifies the extension. The Department will approve or deny the extension request within three (3) business days.

(h) Monitoring Close Out. Within forty-five (45) days after the end of the corrective action period, a close out letter will be issued to the Subrecipient. If the Subrecipient supplies evidence establishing continual compliance that negates the finding of noncompliance, the issue of noncompliance will be rescinded. If the Subrecipient's response satisfies all findings and concerns noted in the monitoring letter, the issue of noncompliance will be noted as resolved. In some circumstances, the Subrecipient may be unable to secure documentation to resolve a finding. In those instances, if there are mitigating circumstances, the Department may note the finding is not resolved but close the issue with no further action required. If the Subrecipient's response does not correct all findings noted, the close out letter will identify the documentation that must be submitted to correct the issue.

(i) Options for Review. If, following the submission of corrective action documentation, Compliance staff continues to find the Subrecipient in noncompliance, the Subrecipient may request or initiate review of the matter using the following options, where applicable:

(1) If the issue is related to a program requirement or prohibition Subrecipients may contact the applicable federal program officer for guidance or request that the Department contact applicable federal program officer for guidance without identifying the Subrecipient.

(2) If the issue is related to application of a provision of the contract or a requirement of the Texas Administrative Code, or the application of a provision of an OMB Circular, the Subrecipient may request review by the Department's Compliance Committee, as set out in subsection (j) of this section.

(3) Subrecipients may request Alternative Dispute Resolution (ADR). A Subrecipient may send a proposal to the Department's Dispute Resolution Coordinator to initiate ADR pursuant to §1.17 of this title.

(j) Compliance Committee.

(1) The Compliance Committee is a committee of three (3) to five (5) persons appointed by the Executive Director. The Compliance Committee is established to provide independent review of certain compliance issues as provided by this section. Staff from the Legal and the Compliance Division will not be appointed to the committee but will be available to provide guidance to Department staff.

(2) Informal discussion with Compliance Monitoring staff. If the Subrecipient has questions or disagreements regarding any compliance issues, they should first try to resolve them by discussing them with the Compliance Monitoring staff, including, as needed, the Chief of Compliance.

(3) Informal discussion with the Compliance Committee. A Subrecipient may request an informal meeting with the Compliance Committee if the informal discussion with the Compliance Monitoring staff did not resolve the issue.

(4) Compliance Committee Process and Timeline:

(A) At any time, the Subrecipient may call or request an informal conference with the Compliance Monitoring staff and/or the Chief of Compliance.

(B) If a call or an informal conference with the Compliance Monitoring staff does not result in a resolution of the issue, the

Subrecipient may, within thirty (30) days of the call or informal conference with Compliance Monitoring staff, request a meeting with the Compliance Committee.

(C) If timely requested in accordance with this section, the Compliance Committee will hold an informal conference with the Subrecipient. A Subrecipient should not offer evidence, documentation, or information to the Committee that was not presented to Compliance Monitoring staff during the informal staff conference. If additional information is offered, the Committee may disallow the information or refer the matter back to Compliance Monitoring staff to allow review of the additional information prior to any consideration by the Committee.

(D) If a meeting with the Compliance Committee does not result in a resolution, matters related to a compliance requirement, other than those required by federal regulation, may be appealed directly to the Board.

(k) If Subrecipients do not respond to a monitoring letter or fail to provide acceptable evidence of compliance within six (6) months of notification of an issue, the matter will be reported to the Department's Enforcement Committee for consideration of administrative penalties, review for a third party review, full or partial cost reimbursement, or contract suspension.

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 23, 2013.

TRD-201304211

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-3974



## CHAPTER 10. UNIFORM MULTIFAMILY RULES

### SUBCHAPTER H. INCOME AND RENT LIMITS

#### 10 TAC §10.1003

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 10, Subchapter H, §10.1003, concerning Tax Exempt Bond Properties. The proposed amendments detail the calculation used for determining the income limits for the Tax Exempt Bond program based on the data released by HUD.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated, as a result of the amendments, will be improved compliance and clarity regarding re-

quirements. There will not be any additional economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 4, 2013, through November 4, 2013, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Patricia Murphy, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3359. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

*§10.1003. Tax Exempt Bond Developments [Properties].*

(a) Tax Exempt Bond Developments must use the Multifamily Tax Subsidy Program (MTSP) income limits released by HUD, generally, on an annual basis. The MTSP limit tables include:

(1) The 50 percent and 60 percent Area Median Gross Income (AMGI) by household size.

(2) In areas where the income limits did not decrease in 2007 and 2008 because of HUD's hold harmless policy, a HERA Special 50 percent and HERA Special 60 percent income limit by household size. These higher limits can only be used if at least one building in the Project was placed in service on or before December 31, 2008.

(b) If HUD releases a 30 percent, 40 percent, 60 percent or 80 percent income limit in the MTSP charts the Department will make that data available without any calculations. Otherwise, the following calculation will be used, without rounding, to determine additional income limits:

(1) To calculate the 30 percent AMGI, the 50 percent AMGI limit will be multiplied by .60 or 60 percent.

(2) To calculate the 40 percent AMGI, the 50 percent AMGI limit will be multiplied by .80 or 80 percent.

(3) To calculate the 60 percent AMGI, the 50 percent AMGI limit will be multiplied by 1.2 or 120 percent.

(4) To calculate the 80 percent AMGI, the 50 percent AMGI limit will be multiplied by 1.6 or 160 percent.

(c) [(a)] The Land Use Restriction Agreement (LURA) for some, but not all, Tax Exempt Bond properties restricts the amount of rent the Development Owner is permitted to charge. If the LURA restricts rents, rent limits will be calculated in accordance with §10.1004(d) of this subchapter (relating to Housing Tax Credit Properties, TCAP, Exchange and HTF). [rent limits, rents will be calculated as 30 percent of the applicable Multifamily Tax Subsidy Program Imputed Income Limit, but never less than the limit taking into consideration the gross rent floor provided in accordance with Revenue Procedure 94-57.]

(d) [(b)] Tax Exempt Bond LURAs are hereby amended to be consistent with this section.

(e) [(e)] The Department will make available a memorandum in a recordable form reflecting the applicable rent limits in accordance with this section and the legal description of the affected property. The

owner of the property will bear any costs associated with recording such memorandum in the real property records for the county in which the property is located.

(f) [(d)] Nothing in this section prevents a Development Owner from pursuing a Material Amendment to their LURA in accordance with the procedures found in §10.405 of this chapter (relating to Amendments and Extensions).

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

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TRD-201304213

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-3974



## 10 TAC §10.1004, §10.1005

The Texas Department of Housing and Community Affairs (the "Department") proposes new 10 TAC Chapter 10, Subchapter H, §10.1004 and §10.1005, concerning the Housing Tax Credit, TCAP, Exchange, HTF, HOME and NSP programs. The proposed new sections codify which properties can use the rural income limits and details the calculation used for determining the income and rent limits for the Housing Tax Credit, TCAP, Exchange, HTF, HOME and NSP Developments administered by the Department.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the new sections are in effect, enforcing or administering the new sections does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated, as a result of the new sections, will be improved compliance and clarity regarding requirements. There will not be any additional economic cost to any individuals required to comply with the new sections.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 4, 2013, through November 4, 2013, to receive input on the proposed new sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Patricia Murphy, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3359. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed new sections affects no other code, article, or statute.

§10.1004. Housing Tax Credit Properties, TCAP, Exchange and HTF.

(a) Except for certain rural properties, Housing Tax Credit, TCAP, Exchange, and HTF Developments must use the Multifamily Tax Subsidy Program (MTSP) income limits released by HUD, generally, on an annual basis. The MTSP limit tables include:

(1) The 50 percent and 60 percent Area Median Gross Income (AMGI) by household size.

(2) In areas where the income limits did not decrease in 2007 and 2008 because of HUD's hold harmless policy, a HERA Special 50 percent and HERA Special 60 percent income limit by household size. These higher limits can only be used if at least one building in the Project (as defined on line 8b on Form 8609) was placed in service on or before December 31, 2008.

(b) If HUD releases a 30 percent, 40 percent, 60 percent or 80 percent income limit in the MTSP charts the Department will use that data. Otherwise, the following calculation will be used, without rounding, to determine additional income limits:

(1) To calculate the 30 percent AMGI, the 50 percent AMGI limit will be multiplied by .60 or 60 percent.

(2) To calculate the 40 percent AMGI, the 50 percent AMGI limit will be multiplied by .80 or 80 percent.

(3) To calculate the 60 percent AMGI, the 50 percent AMGI limit will be multiplied by 1.2 or 120 percent.

(4) To calculate the 80 percent AMGI, the 50 percent AMGI limit will be multiplied by 1.6 or 160 percent.

(c) Treatment of Rural Properties. Section 42(i)(8) of the Code permits certain Housing Tax Credit, Exchange and Tax Credit Assistance properties to use the national non-metropolitan median income limit when the area median gross income limit for a place is less than the national non-metropolitan median income. The Department will make the determination if a place qualifies as rural using the following process:

(1) When HUD releases MTSP income limits, the Compliance Division will review the most current listing of places on the Housing Tax Credit Site Demographic Characteristics Report found on the Department's website, which classifies each place as Rural or Urban. This determination is made in accordance with §10.3(a)(116) of this chapter (relating to Definitions). For the purposes of determining places that are eligible to use the rural income and rent limits, the following places will be removed from the list:

(A) Urban places.

(B) Places with a population in excess of 20,000 as of the 2010 census.

(C) Places with a population between 10,000 and 20,000 as of the 2010 census that are in a Metropolitan Statistical Area.

(D) Places that have an income limit greater than the national non-metropolitan income limit.

(2) All remaining places will be eligible to use the national non-metropolitan median income.

(3) Generally, HUD only releases the national non-metropolitan median income by household size for the 50 percent AMGI. The Department will calculate the additional income limits in accordance with subsection (b) of this section.

(4) The Department allows the use of rural income limits for HTF multifamily rental Developments that are considered rural using the process described in paragraph (1)(A) - (D) of this subsection.

(d) Rent limits are a calculation of income limits and cannot exceed 30 percent of the applicable Imputed Income Limit. Rent limits are published by bedroom size and will be rounded down to the nearest dollar. *Example 1004(1):* To calculate the 30 percent 1 bedroom rent limit:

(1) Determine the imputed income limited by multiplying the bedroom size by 1.5: 1 bedroom x 1.5 persons = 1.5.

(2) To calculate the 1.5 person income limit, average the 1 person and 2 person income limits: If the 1 person 30 percent income limit is \$12,000 and the 2 person 30 percent income limit is \$19,000, the imputed income limit would be \$15,500 ( $\$12,000 + \$19,000 = \$31,000 / 2 = \$15,500$ ).

(3) To calculate the 30 percent 1 bedroom rent limit, multiply the imputed income limit of \$15,500 by 30 percent, then divide by 12 months and round down. In this example, the 30 percent 1 bedroom limit is \$387 ( $\$15,500 \text{ times } 30 \text{ percent divided by } 12 = \$387.50 \text{ per month. Rounded down the limit is } \$387$ ). *Example 1004(2):* to calculate the 50 percent 2 bedroom rent limit:

(A) Determine the imputed income limited to be calculated by multiplying the bedroom size by 1.5: 2 bedrooms x 1.5 persons = 3.

(B) The 3 person income limit is already published; for this example the applicable 3 person 50 percent income limit is \$27,000.

(C) To calculate the 50 percent 2 bedroom rent limit, multiply the \$27,000 by 30 percent, then divide by 12. In this example, the 50 percent 2 bedroom limit is \$675 ( $\$27,000 \text{ times } 30 \text{ percent divided by } 12 = \$675$ ). No rounding is needed since the calculation yields a whole number).

(e) The Department releases rent limits assuming that the gross rent floor is set by the date the Housing Tax Credits were allocated.

(1) For a 9 percent Housing Tax Credit, the allocation date is the date the Carryover Agreement is signed by the Department.

(2) For a 4 percent Housing Tax Credit, the allocation date is the date of the Determination Notice.

(3) For TCAP, the allocation date is the date the accompanied credit was allocated.

(4) For Exchange, the allocation date is the effective date of the Subaward agreement.

(f) Revenue Procedure 94-57 permits, but does not require, owners to set the gross rent floor to the limits that are in effect at the time the Project (as defined on line 8b on Form 8609) places in service. However this election must be made prior to the Placed in Service Date. A Gross Rent Floor Election form is available on the Department's website. Unless otherwise elected, the initial date of allocation described in subsection (e) of this section will be used.

(g) For the HTF program, the date the LURA is executed is the date that sets the gross rent floor.

(h) Held Harmless Policy.

(1) In accordance with Section 3009 of the Housing and Economic Recovery Act of 2008, once a Project (as defined on line 8b on Form 8609) places in service, the income limits shall not be less than those in effect in the preceding year.

(2) Unless other guidance is received from the U.S. Treasury Department, in the event that a place no longer qualifies as rural, a Project that was placed in service prior to loss of rural designation

can continue to use the rural income limits that were in effect before the place lost such designation. However, if in any subsequent year the rural income limits increase, the existing project cannot use the increased rural limits. *Example 1004(3)*: Project A was placed in service in 2010. At that time, the place was classified as Rural. In 2012 that place lost its rural designation. The rural income limits increased in 2013. Project A can continue to use the rural income limits in effect in 2012 but cannot use the higher 2013 rural income limits. Any Project that places in service in this place after the loss of the rural designation must use the applicable MTSP limits published by HUD.

§10.1005. HOME and NSP.

(a) HOME Developments must use the HOME Program Income and Rent Limits that are calculated annually by HUD's Office of Policy Development and Research (PDR). The limits are made available for each Metropolitan Statistical Areas (MSA), Primary Metropolitan Statistical Areas (PMSA) and Area, District or County by State.

(1) Upon publication, the Department will determine which counties are in each MSA, PMSA, Area or District.

(2) Generally, PDR publishes income limits in tables identifying the following Area Median Gross Income (AMGI) by household size:

(A) 30 percent Limits;

(B) Very Low-Income Limits which are generally 50 percent of median income, but not less than the State non-metropolitan median which will be shown as the 50 percent limit in the Department's income limits;

(C) 60 percent Limits;

(D) Low-Income Limits which are generally 80 percent of the median income, but capped at the national median income with some exceptions which will be shown as the 80 percent limits in the Department's income limits.

(3) If not published, the Department will use the following methodology to calculate, without rounding, additional income limits from the HOME Program income limits released by PDR:

(A) To calculate the 30 percent AMGI, the 50 percent AMGI limit will be multiplied by .60 or 60 percent.

(B) To calculate the 40 percent AMGI, the 50 percent AMGI limit will be multiplied by .80 or 80 percent.

(C) To calculate the 60 percent AMGI, the 50 percent AMGI limit will be multiplied by 1.2 or 120 percent.

(b) PDR publishes High and Low HOME rent limits by bedroom size.

(c) PDR does not publish a 30 percent or 40 percent rent limits that certain HOME Developments are required to use. These limits will be calculated using the same formulas described in §10.1004 of this subchapter (relating to Housing Tax Credit Properties, TCAP, Exchange and HTF).

(d) In the event that PDR publishes rent limits after the HOME program income limits, the Department permits HOME Developments to delay the implementation of the 30 percent and 40 percent rent limits until the High and Low HOME rent limits must be used.

(e) NSP income limits are published annually by HUD for each county with tables identifying the 50 percent AMGI and 120 percent AMGI for household size. If not published, the Department will use the following methodology to calculate, without rounding, addi-

tional income limits from the HOME Program income limits released by HUD:

(1) To calculate the 30 percent AMGI, the 50 percent AMGI limit will be multiplied by .60 or 60 percent.

(2) To calculate the 40 percent AMGI, the 50 percent AMGI limit will be multiplied by .80 or 80 percent.

(3) To calculate the 60 percent AMGI, the 50 percent AMGI limit will be multiplied by 1.2 or 120 percent.

(4) To calculate the 80 percent AMGI, the 50 percent AMGI limit will be multiplied by 1.6 or 160 percent.

(f) If the LURA for an NSP Development restricts rents, the amount of rent the Development Owner is permitted to charge will be the High or Low HOME rent published by PDR or calculated in the same manner described in §10.1004 of this subchapter using the HOME income limits.

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 23, 2013.

TRD-201304212

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 475-3974



## CHAPTER 12. MULTIFAMILY HOUSING REVENUE BOND RULES

### 10 TAC §§12.1, 12.4 - 12.6, 12.10

The Texas Department of Housing and Community Affairs (the "Department") proposes amendment to 10 TAC Chapter 12, §§12.1, 12.4, 12.5, 12.6 and 12.10, concerning the Multifamily Housing Revenue Bond Rules. The purpose of the proposed amendments is to implement changes that will improve the 2014 Private Activity Bond Program.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amended sections will be in effect, enforcing or administering the amended sections does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amended sections are in effect, the public benefit anticipated as a result of the amended sections will be the adoption of amended rules for multifamily housing revenue bonds; thereby enhancing the state's ability to provide decent, safe and sanitary housing administered by the Department. There will not be any economic cost to any individuals required to comply with the amended sections.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 4, 2013 to October 25, 2013, to re-

ceive input on the amended sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Shannon Roth, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-1895. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. OCTOBER 25, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affects no other code, article, or statute.

§12.1. *General.*

(a) Authority. The rules in this chapter apply to the issuance of multifamily housing revenue bonds (Bonds) by the Texas Department of Housing and Community Affairs (the "Department"). The Department is authorized to issue such Bonds pursuant to Texas Government Code, Chapter 2306. Notwithstanding anything in this chapter to the contrary, Bonds which are issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not limited to Texas Government Code, Chapters 1372 and 2306, and federal law pursuant to the requirements of Internal Revenue Code (the "Code"), §142.

(b) General. The purpose of this chapter is to state the Department's requirements for issuing Bonds, the procedures for applying for Bonds and the regulatory and land use restrictions imposed upon Bond financed Developments. The provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit program. Applicants seeking a Housing Tax Credit Allocation should consult Chapter 11 of this title (relating to the Housing Tax Credit Program Qualified Allocation Plan) and Chapter 10 of this title (relating to Uniform Multifamily Rules) for the current program year. In general, the Applicant will be required to satisfy the requirements of the Qualified Allocation Plan (QAP) and Uniform Multifamily Rules in effect at the time the Certificate of Reservation is issued by the Texas Bond Review Board. If the applicable QAP or Uniform Multifamily Rules contradict rules set forth in this chapter, the applicable QAP or Uniform Multifamily Rules will take precedence over the rules in this chapter. The Department encourages participation in the Bond program by working directly with Applicants, lenders, Bond Trustees, legal counsels, local and state officials and the general public to conduct business in an open, transparent and straightforward manner.

(c) Costs of Issuance. The Applicant shall be responsible for payment of all costs associated with the preparation and submission of the pre-application and Application, including but not limited to, costs associated with the publication and posting of required public notices and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any stage during the process, the Applicant is solely responsible for determining whether to proceed with the Application and the Department disclaims any and all responsibility and liability in this regard.

(d) Taxable Bonds. The Department may issue taxable Bonds and the requirements associated with such Bonds, including occupancy requirements, shall be determined by the Department on a case by case basis.

(e) Waivers. Requests for waivers of program rules or pre-clearance relating to Undesirable Area Features pursuant to §10.101(a)(4) of this title (relating to Site and Development Requirements and Restrictions) must be made in accordance with §10.207 of this title (relating to Waiver of Rules or Pre-clearance for Applications)

with the exception of the deadline for submission. Any requests for waivers or pre-clearance [Waiver of Rules for Applications) and]] must be requested at the time the pre-application is submitted.

§12.4. *Pre-Application Process and Evaluation.*

(a) Pre-Inducement Questionnaire. Prior to the filing of a pre-application, the Applicant shall submit the Pre-Inducement Questionnaire, in the form prescribed by the Department, so the Department can get a preliminary understanding of the proposed Development plan before a pre-application and corresponding fees are submitted. Information requested by the Department in the questionnaire includes, but is not limited to, the financing structure, borrower and key principals, previous housing tax credit or private activity bond experience, related party or identity of interest relationships and contemplated scope of work (if proposing Rehabilitation). After reviewing the pre-inducement questionnaire, Department staff will follow-up with the Applicant to discuss the next steps in the process and may schedule a pre-inducement conference call. Prior to the submission of a pre-application, it is important that the Department and Applicant communicate regarding the Department's objectives and policies in the development of affordable housing throughout the State using Bond financing. The acceptance of the questionnaire by the Department does not constitute a pre-application or Application and does not bind the Department to any formal action regarding an inducement resolution.

(b) Pre-Application Process. An Applicant who intends to pursue Bond financing from the Department shall submit a pre-application by the corresponding pre-application submission deadline, as prescribed by the Department. The required pre-application fee as described in §12.10 of this chapter (relating to Fees) must be submitted with the pre-application in order for the pre-application to be accepted by the Department. Department review at the time of the pre-application is limited and not all issues of eligibility and documentation submission requirements pursuant to Chapter 10 of this title (relating to Uniform Multifamily Rules) are reviewed. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or other deficiencies at the time of pre-application. If the Development meets the criteria as described in §12.5 of this chapter (relating to Pre-Application Threshold Requirements), the pre-application will be scored and ranked according to the selection criteria as described in §12.6 of this chapter (relating to Pre-Application Scoring Criteria).

(c) Scoring and Ranking. The Department will rank the pre-application according to score within each priority defined by Texas Government Code, §1372.0321. All Priority 1 pre-applications will be ranked above all Priority 2 pre-applications which will be ranked above all Priority 3 pre-applications. This priority ranking will be used throughout the calendar year. The selection criteria, as further described in §12.6 of this chapter, reflect a structure which gives priority consideration to specific criteria as outlined in Texas Government Code, §2306.359. In the event two or more pre-applications receive the same score, the Department will use the following tie breaker factors in the order they are presented to determine which pre-application will receive preference in consideration of a Certificate of Reservation.

(1) Applications that meet any of the criteria under §11.9(c)(4) of this title (relating to Competitive HTC Selection Criteria).

(2) Applications proposed to be located the greatest linear distance from the nearest Housing Tax Credit assisted Development. The linear measurement will be performed from the closest boundary to closest boundary.

(d) Inducement Resolution. After the pre-applications have been scored and ranked, the pre-application and proposed financing structure will be presented to the Department's Board for consideration

of an inducement resolution declaring the Department's initial intent to issue Bonds with respect to the Development. Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff may recommend that the Board not approve an inducement resolution for a pre-application. Because each Development is unique, making the final determination to issue Bonds is often dependent on the issues presented at the time the full Application is presented to the Board.

*§12.5. Pre-Application Threshold Requirements.*

The threshold requirements of a pre-application include the criteria listed in paragraphs (1) - (10) of this section. As the Department reviews the pre-application the assumptions as reflected in Chapter 10, Subchapter D of this title (relating to Underwriting and Loan Policy) will be utilized even if not reflected by the Applicant in the pre-application.

(1) Submission of the multifamily bond pre-application in the form prescribed by the Department;

(2) Completed Bond Review Board Residential Rental Attachment for the current program year;

(3) Site Control, evidenced by the documentation required under §10.204(10) [§10.204(9)] of this title (relating to Required Documentation for Application Submission). The Site Control must be valid through the date of the Board meeting at which the inducement resolution is considered and must meet the requirements of §10.204(10) [§10.204(9)] of this title at the time of Application;

(4) Zoning evidenced by the documentation required under §10.204(11) [§10.204(10)] of this title;

(5) Boundary survey or plat clearly identifying the location and boundaries of the subject Property;

(6) Current market information (must support affordable rents);

(7) Local area map that shows the location of the Development Site and the location of at least six (6) community assets [services] within a one mile radius (two miles if in a Rural Area). Only one community asset of each type will count towards the number of assets required. The mandatory community assets [site characteristics] are identified in §10.101(a)(2) of this title (relating to Site and Development Requirements and Restrictions);

(8) Organization Chart showing the structure of the Development Owner and of any Developer or Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner or the Developer or Guarantor, as applicable;

(9) Evidence of Entity Registration or Reservation with the Texas Office of the Secretary of State;

(10) A certification, as provided in the pre-application, that the Applicant met the requirements and deadlines for public notifications as identified in §10.203 of this title (relating to Public Notifications (§2306.5705(9))). Notifications must not be older than three (3) months prior to the date of Application submission. Re-notification will be required by Applicants who have submitted a change in the Application, whether from pre-application to Application or as a result of an Administrative Deficiency that reflects a total Unit change [increase] of greater than 10 percent.

*§12.6. Pre-Application Scoring Criteria.*

The section identifies the scoring criteria used in evaluating and ranking pre-applications. The criteria identified below include those items required under Texas Government Code, §2306.359 and other criteria

considered important by the Department. Any scoring items that require supplemental information to substantiate points must be submitted in the pre-application, as further outlined in the Multifamily Bond Pre-Application Procedures Manual. Applicants proposing multiple sites will be required to submit a separate pre-application for each Development Site. Each Development Site will be scored on its own merits and the final score will be determined based on an average of all of the individual scores.

(1) Income and Rent Levels of the Tenants. Pre-applications may qualify for up to (10 points) for this item.

(A) Priority 1 designation includes one of clauses (i) - (iii) of this subparagraph. (10 points)

(i) Set aside 50 percent of Units rent capped at 50 percent AMGI and the remaining 50 percent of units rents capped at 60 percent AMGI; or

(ii) Set aside 15 percent of units rent capped at 30 percent AMGI and the remaining 85 percent of units rent capped at 60 percent AMGI; or

(iii) Set aside 100 percent of units rent capped at 60 percent AMGI for Developments located in a census tract with a median income that is higher than the median income of the county, MSA or PMSA in which the census tract is located.

(B) Priority 2 designation requires the set aside of at least 80 percent of the Units capped at 60 percent AMGI. (7 points)

(C) Priority 3 designation. Includes any qualified residential rental development. Market rate units can be included under this priority. (5 points)

(2) Cost of the Development by Square Foot. (1 point) For this item, costs shall be defined as Hard Costs [construction costs, including Site Work, direct hard costs, contingency, contractor profit, overhead and general requirements,] as represented in the Development Cost Schedule provided in the pre-application. This calculation does not include indirect construction costs. Pre-applications that do not exceed \$95 per square foot of Net Rentable Area will receive one (1) point. Rehabilitation will automatically receive (1 point).

(3) Unit Sizes. (5 points) The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction).

(A) five-hundred-fifty (550) square feet for an Efficiency Unit;

(B) six-hundred-fifty (650) square feet for a one Bedroom Unit;

(C) eight-hundred-fifty (850) square feet for a two Bedroom Unit;

(D) one-thousand-fifty (1,050) square feet for a three Bedroom Unit; and

(E) one-thousand, two-hundred-fifty (1,250) square feet for a four Bedroom Unit.

(4) Extended Affordability. (2 points) A pre-application may qualify for points under this item for Development Owners that are willing to extend the Affordability Period for a Development to a total of thirty-five (35) years.

(5) Unit and Development Features [Amenities]. A minimum of (7 points) must be selected, as certified in the pre-application, for providing specific amenity and quality features in every Unit

at no extra charge to the tenant. The amenities and corresponding point structure is provided in §10.101(b)(6)(B) of this title (relating to Site and Development Requirements and Restrictions). The amenities selected at pre-application may change at Application so long as the overall point structure remains the same. The points selected at pre-application and/or Application and corresponding list of amenities will be required to be identified in the LURA and the points selected must be maintained throughout the Compliance Period. Applications involving scattered site Developments must have a specific amenity located within each Unit to receive points. Rehabilitation Developments will start with a base score of (3 points).

(6) Common Amenities. All Developments must provide [Pre-applications must select] at least the minimum threshold of points for common amenities based on the total number of Units in the Development as provided in subparagraphs (A) - (F) [~~(A) - (G)~~] of this paragraph. The common amenities include those listed in §10.101(b)(5) of this title. For Developments with 41 Units or more, at least two (2) of the required threshold points must come from the Green Building Features as identified in §10.101(b)(5)(C)(xxxii) of this title. The amenities must be for the benefit of all tenants and made available throughout normal business hours. If fees in addition to rent are charged for amenities, then the amenity may not be included among those provided to satisfy the threshold requirement. All amenities must meet accessibility standards and spaces for activities must be sized appropriately to serve the proposed Target Population. Some amenities may be restricted to a specific Target Population. An amenity can only receive points once; therefore combined functions (a library which is part of a community room) can only receive points under one category. [The common amenities include those listed in §10.101(b)(5) of this title. For Developments with at least 41 Units or more, at least two (2) of the required threshold points must come from §10.101(b)(5)(C)(xxxii) of this title.] Applications for non-contiguous scattered site housing, excluding non-contiguous single family sites, will have the threshold test applied based on the number of Units per individual site, and will have to identify in the LURA which amenities are at each individual site.

[~~(A)~~ total Units equal 16 shall have (1 point);]

(A) [~~(B)~~] Developments with 16 [total Units are 17] to 40 Units must qualify for [shall have] (4 points);

(B) [~~(C)~~] Developments with [total Units are] 41 to 76 Units must qualify for [shall have] (7 points);

(C) [~~(D)~~] Developments with [total Units are] 77 to 99 Units must qualify for [shall have] (10 points);

(D) [~~(E)~~] Developments with [total Units are] 100 to 149 Units must qualify for [shall have] (14 points);

(E) [~~(F)~~] Developments with [total Units are] 150 to 199 Units must qualify for [shall have] (18 points); or

(F) [~~(G)~~] Developments with [total Units are] 200 or more Units must qualify for [shall have] (22 points).

(7) Tenant Services. (8 points) By electing points, the Applicant certifies that the Development will provide supportive services, which are listed in §10.101(b)(7) of this title, appropriate for the proposed tenants and that there will be adequate space for the intended services. The provision and complete list of supportive services will be included in the LURA. The Owner may change, from time to time, the services offered; however, the overall points as selected at Application must remain the same. No fees may be charged to the tenants for any of the services. Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item.

(8) Underserved Area. An Application may qualify to receive up to (2 points) for general population Developments located in a Colonia, Economically Distressed Area, or Place, or if outside of the boundaries of any Place, a county that has never received a competitive tax credit allocation or a 4 percent non-competitive tax credit allocation for a Development that remains an active tax credit development.

[~~(A)~~ General Developments (2 points); or]

[~~(B)~~ Qualified Elderly Developments (1 point).]

(9) Development Support/Opposition. (Maximum +24 to -24 points) Each letter will receive a maximum of +3 to -3 and must be received ten (10) business days prior to the date of the Board meeting at which the pre-application will be considered. Letters must clearly state support or opposition to the specific Development. State Representatives or Senators as well as local elected officials to be considered are those in office at the time the pre-application is submitted and represent the district containing the proposed Development Site. Letters of support from State or local elected officials that do not represent the district containing the proposed Development Site will not qualify for points under this exhibit. Neutral letters, letters that do not specifically refer to the Development or do not explicitly state support will receive (zero (0) points). A letter that does not directly express support but expresses it indirectly by inference (i.e., a letter that says "the local jurisdiction supports the Development and I support the local jurisdiction") will be treated as a neutral letter.

(A) State Senator and State Representative of the districts whose boundaries include the proposed Development Site;

(B) Mayor of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(C) All elected members of the Governing Body of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(D) Presiding officer of the Governing Body of the county in which the Development Site is located;

(E) All elected members of the Governing Body of the county in which the Development Site is located;

(F) Superintendent of the school district in which the Development Site is located; and

(G) Presiding officer of the board of trustees of the school district in which the Development Site is located.

(10) Preservation Initiative. (10 points) Preservation Developments, including rehabilitation proposals on properties which are nearing expiration of an existing affordability requirement within the next two (2) years or for which there has been a rent restriction requirement in the past ten (10) years may qualify for points under this item. Evidence must be submitted in the pre-application.

(11) Declared Disaster Areas. (7 points) If at the time the complete pre-application is submitted or at any time within the two-year period preceding the date of submission, the proposed Development Site is located in an area declared to be a disaster area under Texas Government Code, §418.014. This includes federal, state, and Governor declared disaster areas; however, it excludes disaster declarations that are pre-emptive in nature.

#### §12.10. Fees.

(a) Pre-Application Fees. The Applicant is required to submit, at the time of pre-application, the following fees: \$1,000 (payable to TDHCA), \$2,500 (payable to Bracewell & Giuliani, the Department's bond counsel) and \$5,000 (payable to the Texas Bond Review Board (BRB) pursuant to Texas Government Code, §1372.006(a)). These fees

cover the costs of pre-application review by the Department, its bond counsel and filing fees to the BRB.

(b) **Application Fees.** At the time of Application the Applicant is required to submit a tax credit application fee of \$30/unit and \$10,000 for the bond application fee (for multiple site Applications the application fee shall be \$10,000 or \$30/unit, whichever is greater). Such fees cover the costs associated with Application review and the Department's expenses in connection with providing financing for a Development. For Developments proposed to be structured as part of a portfolio such application fees may be reduced on a case by case basis at the discretion of the Executive Director.

(c) **Closing Fees.** The closing fee for Bonds, other than refunding Bonds is equal to 50 basis points (0.005) of the issued principal amount of the Bonds. The Applicant will also be required to pay at closing of the Bonds the first two years of the administration fee equal to 20 basis points (0.002) of the issued principal amount of the Bonds and a Bond compliance fee equal to \$25/unit (such compliance fee shall be applied to the third year following closing).

(d) **Application and Issuance Fees for Refunding Applications.** For refunding Applications the application fee will be \$10,000 unless the refunding is not required to have a public hearing, in which case the fee will be \$5,000. The closing fee for refunding Bonds is equal to 25 basis points (0.0025) of the issued principal amount of the refunding Bonds. If applicable, administration and compliance fees due at closing may be prorated based on the current billing period of such fees. If additional volume cap is being requested other fees may be required as further described in the Bond Refunding Applications Procedures Manual.

(e) **Administration Fee.** The annual administration fee is equal to 10 basis points (0.001) of the outstanding bond amount on its date of calculation and is paid as long as the Bonds are outstanding.

(f) **Bond Compliance Fee.** The Bond compliance monitoring fee is equal to \$25/Unit.

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

Filed with the Office of the Secretary of State on September 23, 2013.

TRD-201304210

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 475-3974



## CHAPTER 23. SINGLE FAMILY HOME PROGRAM

### SUBCHAPTER A. GENERAL GUIDANCE

#### 10 TAC §23.1, §23.2

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to §23.1 and §23.2, concerning General Guidance. The purpose of the proposed amendments is to revise language to conform the state HOME Rule with the federal HOME Investment Partnerships Program (HOME) regulations at 24 CFR Part 92, as amended on July 24,

2013, to add clarity to the State HOME Rule, to define Affiliate and Homeownership, update the definition of Persons with Special Needs, and delete the definition of General Requirements as it is an obsolete reference.

**FISCAL NOTE.** Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

**PUBLIC BENEFIT/COST NOTE.** Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be improved regulatory guidance to enhance the efficiency and effectiveness of the HOME Program. There will not be any economic cost to any individuals required to comply with the amendments.

**ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES.** The Department has determined that there will be no economic effect on small or micro-businesses.

**REQUEST FOR PUBLIC COMMENT.** The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, HOME Division, Jennifer Molinari, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to HOME@tdhca.state.tx.us. Enter Rule Comments in the subject line. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

**STATUTORY AUTHORITY.** The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

#### §23.1. Purpose.

This chapter governs the administration of HOME Single Family Activities [~~contracts and activities~~]. This chapter clarifies the use and administration of all Single Family Activities funds provided to the Texas Department of Housing and Community Affairs (the "Department") by the U.S. Department of Housing and Urban Development (HUD) pursuant to Title II of the Cranston-Gonzalez National Affordable Housing Act of 1990 as amended (42 U.S.C. §§12701 - 12839) and HUD regulations at 24 CFR, Part 92 as amended. Chapter 20 of this title (relating to Single Family Programs Umbrella Rule) will apply to all Single Family activities, including Single Family development [~~involving rental or ownership~~]. All provisions of this chapter apply to any Application including Recertification received on or after the date of adoption of this chapter, unless otherwise noted herein or required by law. Existing Agreements [~~Contracts~~] executed within the preceding twelve (12) months from the date of adoption of this chapter or current pending Applications may be amended in writing at the request of the [~~Contract~~] Administrator [~~(CA)~~] or Applicant, and with Department approval, so that all provisions of this chapter apply to the Agreement or Application. [~~to subject the Contract or Application to all provisions of this chapter.~~] Amendments proposing only partial adoption of this chapter are prohibited and no amendment adopting this chapter shall be granted if, in the discretion of the Department, any of the provisions of this chapter conflict with the Notice of Funding Availability (NOFA) under which the existing Agreement [~~Contract~~] was awarded or Application was submitted. All Administrators [~~CAs~~] with an active Agreement [~~Contract~~] may become Reservation System Participants (RSPs), at the written request

of the Administrator [CA] without the submission of an Application, and with Department approval, subject to all applicable provisions of this chapter. The State's HOME Program is designed to:

- (1) focus on the areas with the greatest housing need described in the State Consolidated Plan;
- (2) provide funds for home ownership and rental housing through acquisition, new construction, rehabilitation, and tenant-based rental assistance;
- (3) promote partnerships among all levels of government and the private sector, including non-profit and for-profit organizations; and
- (4) provide low, very low, and extremely low income families with affordable, decent, safe, and sanitary housing.

§23.2. *Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Additional [Other] definitions may be found in Texas Government Code, Chapter 2306 or Chapter 20 of this title (relating to Single Family Programs Umbrella Rule).

(1) Affiliate--If, directly or indirectly, either one controls or has the power to Control the other or a third person Controls or has the power to Control both. The Department may determine Control to include, but not be limited to:

- (A) interlocking management or ownership;
- (B) identity of interests among family members;
- (C) shared facilities and equipment;
- (D) common use of employees; or

(E) a business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

(2) [(4)] Affiliated Party--A Person with a contractual relationship with the [Contract] Administrator through an Agreement [on a Contract] with the Department.

(3) [(2)] Application Submission Procedures Manual (ASPM)--The manual that sets forth the procedures, forms, and instructions for the completion and submission of an Application to the Department.

(4) [(3)] CFR--Code of Federal Regulations.

(5) [(4)] Commitment of Funds--Occurs when the Activity or a Project is approved by the Department and set up in the Integrated Disbursement and Information System (IDIS) [disbursement and information system] established by U.S. Department of Housing and Urban Development (HUD).

(6) [(5)] Control--The possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership or voting securities, by contract or otherwise, including ownership of more than 50 percent of the General Partner interest in a limited partnership, or designation as a managing member of a limited liability company or managing General Partner of a limited partnership or any similar member.

(7) [(6)] Development Site--The area, or if scattered site, areas on which the development [Development] is proposed to be located.

(8) [(7)] Direct Project Costs--The total of hard construction costs, demolition costs, aerobic septic systems, refinancing costs

(as applicable), acquisition and closing costs, rental and utility subsidy and deposits, and Match funds.

[(8) General Requirements--An allowance for the General Contractor's on-site overhead expenses. General Requirements shall be limited as prescribed in Chapter 10, Subchapter D of this title (relating to Underwriting and Loan Policy) and must follow the standards published by the Construction Specifications Institute.]

(9) HOME Final Rule--The regulations with amendments promulgated at 24 CFR, Part 92 as published by HUD for the HOME Investment Partnerships Program at 42 U.S.C. §§12701 - 12839.

(10) Homeownership--Ownership in fee simple title in a 1 to 4 unit dwelling or in a condominium unit, or equivalent form of ownership approved by the Department. Right to possession under a contract for deed, installment contract, or land contract (pursuant to which the deed is not given until the final payment is made) is not Homeownership.

(11) [(40)] Match--Funds contributed to a Project that meet the requirements of 24 CFR §§92.218 - 92.220. Match contributed to a Project or Activity does not include mortgage revenue bonds, HOME-match eligible projects, and cannot include any other sources of Department funding unless otherwise approved in writing by the Department.

(12) [(41)] Person--Any individual, partnership, corporation, association, unit of government, community action agency, or public or private organization of any character.

(13) [(42)] Persons with Special Needs--Individuals or categories of individuals determined by the Department to have unmet housing needs [consistent with 42 U.S.C. §§12701, et seq. and] as provided in the Consolidated Plan and the State's One Year Action Plan [may include any Households composed of one or more persons with alcohol and/or drug addictions, Colonia residents, Persons with Disabilities, elderly, victims of domestic violence, persons with HIV/AIDS, homeless populations, migrant farm workers, and public housing residents].

(14) [(43)] Predevelopment Costs--Costs related to a specific eligible Project including:

(A) Predevelopment housing project costs that the Department determines to be customary and reasonable, including but not limited to consulting fees, costs of preliminary financial applications, legal fees, architectural fees, engineering fees, engagement of a development team, and site control;

(B) Pre-construction housing project costs that the Department determines to be customary and reasonable, including but not limited to, the costs of obtaining firm construction loan commitments, architectural plans and specifications, zoning approvals, engineering studies and legal fees; and

(C) Predevelopment costs do not include general operational or administrative costs.

(15) [(44)] Principal--A Person, or Persons, that will exercise Control over a partnership, corporation, limited liability company, trust, or any other private entity. In the case of:

(A) Partnerships: Principals include all General Partners, special limited partners, and Principals with ownership interest;

(B) Corporations: Principals include any officer authorized by the board of directors to act on behalf of the corporation, including the president, vice president, secretary, treasurer, and all other executive officers, and each stock holder having a 10 percent or more interest in the corporation; and

(C) Limited liability companies: Principals include all managing members, members having a 10 percent or more interest in the limited liability company or any officer authorized to act on behalf of the limited liability company.

(16) [(45)] Project--A single housing unit with a unique physical address. A Project may also refer to an individual Project, Development, or site.

(17) [(46)] Reservation System Participant (RSP)--Administrator who has [whose] executed a written agreement with the Department that allows for participation in the Reservation System.

(18) [(47)] Service Area--The city(ies), county(ies) and/or place(s) identified in the Application and/or Agreement [Contract] that the Administrator [CA or RSP] will serve.

(19) [(48)] Texas Minimum Construction Standard (TMCS)--The program standard used to determine the minimum acceptable housing condition for the purposes of rehabilitation, ~~new~~ construction, and acquisition].

(20) [(49)] Third Party--A Person who is not:

(A) an Applicant, Administrator [CA, RSP], Borrower, General Partner, Developer, Development Owner, or General Contractor; or

(B) an Affiliate, Affiliated Party to the Applicant, Administrator [CA], Borrower, General Partner, Developer, Development Owner, or General Contractor; or

(C) a Person receiving any portion of the administration, contractor fee, or developer fee.

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 23, 2013.

TRD-201304209

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 475-3916



## SUBCHAPTER B. AVAILABILITY OF FUNDS, APPLICATION REQUIREMENTS, REVIEW AND AWARD PROCEDURES, GENERAL ADMINISTRATIVE REQUIREMENTS, AND RESALE AND RECAPTURE OF FUNDS

### 10 TAC §§23.20 - 23.29

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to Subchapter B, concerning Availability of Funds, Application Requirements, Review and Award Procedures, General Administrative Requirements, and Resale and Recapture of Funds, §§23.20 - 23.29. The purpose of the proposed amendments is to revise language to conform the State HOME Rule with the federal HOME Investment Partnerships Program (HOME) regulations at 24 CFR Part

92, as amended on July 24, 2013, limit approval of a recertification request to Administrators that have at least one household assisted under that current RSP Agreement, relocate the Match requirement to this subchapter, require all set-ups be submitted twenty (20) days prior to the RSP Agreement expiration date, clarify that construction activities must be completed within nine (9) months, allow a one-time six (6) month extension for household commitment contracts, and to allow a low income purchaser to assume the existing recapture obligation if no additional HOME assistance is provided to the Homebuyer.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be improved regulatory guidance to enhance the efficiency and effectiveness of the HOME Program. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, HOME Division, Jennifer Molinari, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to HOME@tdhca.state.tx.us. Enter Rule Comments in the subject line. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

#### §23.20. *Availability of Funds and Regional Allocation Formula.*

Funds subject to regional allocation shall be made available as described in paragraphs (1) - (3) of this section:

(1) Applicants applying in response to a competitive application cycle [Competitive Application Cycle] will be ranked highest to lowest by region and subregion. Funding that remains available after awarding all available eligible Applications in each region and subregion shall collapse and be directed to the next Application in the most underserved region and subregion. If funding is made available to multiple Activities under one NOFA, the funds remaining after awarding all eligible Applications by Activity shall collapse and be directed to the next Application in the most underserved region and subregion regardless of Activity;

(2) Funds made available through an open application cycle [Open Application Cycle] and subject to regional allocation shall be made available to each region and subregion for a time period to be specified in the applicable NOFA, after which the funds remaining shall collapse and be made available statewide; and

(3) In the event of a tie between two or more Applicants, the Department reserves the right to determine which Application will

receive a recommendation for funding, or as otherwise specified in the NOFA. Tied Applicants may also receive a partial recommendation for funding.

§23.21. *Application Forms and Materials and Deadlines.*

(a) The Department will develop and publish an Application, which if completed by an eligible Applicant, would satisfy the Department's requirements to administer HOME activities [for requesting funds from the Department]. The Department will also issue an Application Submission Procedures Manual (ASPM) to provide guidance on proper completion of the Application.

(b) Applicants must submit an Application for a Contract award by the deadline date specified in the NOFA. All Applications must be received during business hours, Monday through Friday, 8:00 a.m. - 5:00 p.m., Austin local time, except for [observed] holidays observed by the State of Texas.

§23.22. *Contract Award Application Review Process.*

(a) An Application received by the Department in response to an open application cycle [Open Application Cycle] NOFA will be assigned a "Received Date" based on the date it is received by the HOME Division. An Application will be prioritized for review based on its "Received Date." An Application with outstanding administrative deficiencies [Administrative Deficiencies] may be held from further review until all administrative deficiencies [Administrative Deficiencies] have been cured. Applications that have completed the review process may be presented to the Board for approval with priority over Applications that continue to have administrative deficiencies [Administrative Deficiencies] at the time Board materials are prepared, regardless of Received Date. If all funds available under a NOFA are awarded, all remaining Applicants will be notified and the remaining Applications will not be processed.

(b) For Applications received by the Department in response to a Competitive Application Cycle NOFA, the Department will accept Applications on an ongoing basis during the application acceptance period as specified in the NOFA. Applications will be prioritized for review based upon the score of the Application.

(c) An administrative deficiency [Administration Deficiency] may not be cured if it would, in the Departments determination, [require] substantially change [changing] an Application or if the Applicant provides any new unrequested information to cure the deficiency [Deficiency]. An Applicant may not change or supplement any part of an Application in any manner after submission to the Department, and may not add any set-asides, increase the award request amount, or revise the unit mix (both income levels and bedroom mixes), except in response to a direct request from the Department to remedy an administrative deficiency [Administrative Deficiency] as further described in this chapter or by amendment of an Application after the Board approval of a HOME award. The curative time periods allowable for administrative deficiencies [Administrative Deficiencies] are: for Applications received under an open application cycle [Open Application Cycle] NOFA, administrative deficiencies [Administrative Deficiencies] not cured within five (5) business days will be terminated. Applicants that have been terminated may reapply for funds; or for Applications received under a Competitive Application Cycle NOFA, if administrative deficiencies [Administrative Deficiencies] are not cured to the satisfaction of the Department within five (5) business days of the deficiency notice date, then one (1) point [five (5) points] shall be deducted from the selection score for each additional day the administrative deficiencies [Administrative Deficiency] remains unresolved. If administrative deficiencies [Administrative Deficiencies] are not clarified or corrected within seven (7) business days from the deficiency notice date, then the Application shall be terminated. [An

Applicant may not adjust the self-score without a request from the Department as a result of an Administrative Deficiency.]

§23.23. *Reservation System Participant Review Process.*

(a) In order for an Applicant to participate in the Reservation System, the Department must review and approve an Application to become a Reservation System Participant (RSP). Applications will be reviewed and, if the Application is not terminated in accordance with subsection (c) of this section, a Reservation System Participation Agreement will be drafted and presented to the Executive Director or his/her authorized representative for approval in the order in which they are received.

(b) Applications for recertification may be submitted ninety (90) days before [prior to the end of] the RSP Agreement [agreement] term ends and will be required to demonstrate that all Application requirements are met. Administrators may request a one-time recertification as a Reservation System Participant if the RSP Agreement has not expired. Administrator may only be recertified to administer those Activities which the Administrator has used to assist at least one household under the RSP Agreement that is not expired.

(c) Administrative deficiencies [Administrative Deficiencies] must be cured within five (5) [ten (10)] business days of the date of the deficiency notice. If administrative deficiencies [Administrative Deficiencies] are not clarified or corrected within five (5) [ten] business days from the deficiency notice date, the Application may be terminated.

§23.24. *General Threshold and Selection Criteria.*

All Applicants and Applications must submit or comply with:

(1) an Applicant certification of compliance with state and federal laws, rules and guidance governing the HOME Program;

(2) a resolution signed and dated within the six (6) months preceding the Application submission date from the Applicant's direct governing body which includes:

(A) authorization of the submission of the Application;

(B) commitment and amount of cash reserves, if applicable, for use during the Contract or RSP Agreement [agreement] term;

(C) source of funds for Match obligation and Match dollar amount, if applicable. [;]

(i) Except for Match that is proposed to meet Application threshold criteria or is otherwise proposed to be provided, the Match requirement is not in effect until January 1, 2015. Any Projects submitted to the Department under a RSP Agreement or Contract award prior to January 1, 2015, will not be required to provide Match as outlined in §23.30 and §23.40 of this chapter. Agreements under the Persons with Disabilities set-aside, Disaster Relief set-aside, and Tenant-Based Rental Assistance program are exempt from the Match requirement.

(ii) An itemized schedule of the proposed Match and evidence to support the Applicant's ability to provide the required Match, is required at the time of Application submission.

(iii) For Applications submitted to become an RSP, the Department may withhold disbursements if, after every four reservation of funds, sufficient Match documentation has not been provided.

(iv) The Department shall use population figures from the most recently available U.S. Census to determine the applicable tier for an Application. The Department may incentivize or provide preference to Applicants committing to provide additional Match above the requirement of this subsection. Such incentives may

be established in the form of a threshold or selection criteria in the NOFA and may be different for each Activity.

(D) name and title of the person authorized to represent the organization; and

(E) name and title of the person with signature authority to execute a contract and loan documents, where applicable;

(3) any Applicant requesting \$25,000 or more must be registered in the federal Central Contractor Registration (CCR) and have a current Data Universal Numbering System (DUNS) number. [Applicants requesting funds for multifamily housing development and that are "to-be-formed" are not required to submit a CCR or DUNS number until after award but prior to Contract execution.] If the property will be owned by a partnership, the partnership must be the registrant. If a partnership will be receiving funds under the CHDO set-aside, the partnership and the CHDO must both be registered;

(4) an Application fee, to be defined in the NOFA or in this chapter;

(5) to be eligible for a new Contract award, an Applicant must have committed funds to at least 80 percent of the total number of contractually required Households or has committed at least 80 percent of the total Project funds on their current Contract for the same Activity. This provision shall not apply to Applications submitted for disaster relief funding or those with an exclusively different Service Area;

(6) an Application must be substantially complete when received by the Department. An Application will be terminated if an entire volume of the Application is missing; has excessive omissions of documentation from the threshold or selection criteria or uniform Application documentation; or is so unclear, disjointed, or incomplete that a thorough review cannot reasonably be performed by the Department, as determined by the Department. Such Application will be terminated without being processed as an administrative deficiency [Administrative Deficiency]. To the extent that a review was able to be performed, specific reasons for the Department's termination will be included in the notification sent to the Applicant but, because of the suspended review, may not include an all inclusive list of deficiencies in the Application; and

(7) the Department may incentivize or provide preference to Applicants targeting very low and extremely low income Households or to Applicants that have successfully executed a previous HOME Contract with the Department. Such incentives may be established in the form of threshold or selection criteria in the NOFA and may be different for each Activity.

#### §23.25. *Contract [Award] Limitations.*

(a) Project Funds Limits. Project funds for Contract awards are limited to \$510,000 per [Contract] Administrator for Homeowner Rehabilitation and Contract for Deed Conversion Activity Applicants and \$300,000 per [Contract] Administrator for Homebuyer Assistance and Tenant-Based Rental Assistance Activity Applicants. The Contract award limits [for Project funds] for Single Family Development Activity Applicants will be established in the NOFA [for these Activities].

(b) Contract Award Terms. With the exception of Tenant-Based Rental Assistance, all Activity Contract awards will have a Contract term of twenty-four (24) months exclusive of any applicable affordability period or Loan [loan] term. Tenant-Based Rental Assistance Activity Contract awards will have a Contract term of thirty-six (36) months.

(c) Contract Award Benchmarks. All Contract Administrators must submit to the Department complete Project setup information for the Commitment of Funds of all contractually required Households in

accordance with the requirements herein within twelve (12) months from the effective date of the Contract. All remaining funds will be [automatically] deobligated and returned to the Department unless an amendment has been requested in writing prior to this date and is approved.

(d) Voluntary deobligation. The [Contract] Administrator may fully deobligate funds in the form of a written request signed by the signatory, or successor thereto, of the Contract. The [Contract] Administrator may partially deobligate funds under a Contract in the form of a written request from the signatory if the letter also deobligates the associated number of targeted Households, funds for Administrative costs, and Match and the partial deobligation would not have impacted the award of the Contract.

(e) The Department may request information regarding the performance or status under a Contract prior to a Contract benchmark or at various times during the term of a Contract. [Contract] Administrator must respond within the time limit stated in the request. Prolonged or repeated failure to respond may result in an administrative deficiency [Administrative Deficiency] and ultimately in termination of the Contract by the Department.

(f) Pre-Award Costs. Before the effective date of the HOME Contract, the [Contract] Administrator may incur and be reimbursed for travel costs, as provided for with Administrative funds, related to mandatory training required by the Department as a condition of receiving a HOME award and Contract. Department authorized pre-award costs for predevelopment costs, including but not limited to legal, architectural, engineering, appraisal, surveying, environmental, and market study fees, may be paid if incurred before the effective date of the Contract if the costs are in accordance with 24 CFR §92.212 and at the sole discretion of the Department.

#### §23.26. *Reservation System Participant (RSP) Agreements.*

(a) Terms of Agreement [agreement]. RSP Agreements [agreements] will have a twenty-four (24) month term for all Activities. Execution of an RSP Agreement [agreement] does not guarantee the availability of funds under a reservation system.

(b) Limits on Number of Reservations. The number of Homeowner Rehabilitation, Homebuyer Assistance or Single Family Development reservations for an RSP is limited to five (5) per county within the RSP's Service Area at any given time. The number of Tenant-Based Rental Assistance reservations for an RSP is limited to thirty (30) at any given time. All required documentation for the reservation of funds must be submitted to the Department twenty (20) days prior to the end of RSP Agreement term.

(c) Extremely Low-Income Households. Except for Households served with disaster relief, homebuyer assistance, or single family development funds, each RSP will be required to serve at least one extremely low-income Household out of every four Households submitted and approved for assistance. For purposes of this subsection, extremely low-income is defined as families that are either at or below 30% area median family income (AMFI) for the county in which they reside or have an income that is lower than the statewide extremely low-income limit as defined by the U.S. Department of Housing and Urban Development (HUD).

(d) Match. [The requirements of this subsection are waived until December 31, 2013. Any Projects submitted to the Department under a Reservation Agreement prior to December 31, 2013, will not be required to provide Match as outlined in this section, except for Match that is proposed to meet Application threshold criteria.] An RSP must meet the tiered Match requirements per Activity for at least every fourth Household submitted and approved for assistance. For example, if Match is not provided for the first three Households assisted by an

RSP, the Match provided to the fourth Household must meet the Match requirement for all four Households.

(e) Completion of Construction. For Projects involving construction, an RSP must complete construction [and submit all requests for disbursement] within nine (9) months from the Commitment of Funds for the Project.

(f) Extensions. The Executive Director or his/her designee may approve up to a cumulative six (6) [one three (3)] month time extension to the Commitment of Funds to allow for the completion of construction [and submission of requests for disbursement].

(g) An RSP must remain in good standing with the Department, the state of Texas, and HUD. If an RSP is not in good standing, participation in the Reservation System [reservation system] will be suspended and may result in termination of the RSP Agreement [agreement].

§23.27. *Procurement of Contractor.*

The Department may procure a contractor or contractors to provide services for the administration of the HOME Program. A contractor must provide services and/or administer HOME funds in accordance with state and federal rules and the HOME Program [program] requirements [of this chapter] for the applicable Activity.

§23.28. *General Administrative Requirements.*

Unless otherwise provided in this chapter, the Administrator [CA, RSP], or Developer [Development Owner], must comply with the requirements described in paragraphs (1) - (18) of this section, for the administration and use of HOME funds:

- (1) complete training, as applicable;
- (2) provide all applicable Department Housing Contract System access request information and documentation requirements;
- (3) establish and maintain sufficient records at its regular place of business and make available for examination by the Department, HUD, the State Auditor of Texas, the U.S. General Accounting Office, the Comptroller of Public Accounts of the State of Texas, and the U.S. Comptroller, or any of their duly authorized representatives, throughout the applicable record retention period;
- (4) for non-development Activities, develop and establish written procurement procedures that comply with federal, state, and local procurement requirements including:
  - (A) develop and comply with written procurement selection criteria and committees;
  - (B) develop and comply with a written code of conduct governing employees, officers, or agents engaged in administering HOME funds and appoint a procurement officer to manage any bid process;
  - (C) ensure consultant or any procured service provider does not participate in or direct the process of procurement for services. A consultant cannot assist in their own procurement before or after an award is made;
  - (D) ensure that procedures established for procurement of building construction contractors do not include requirements for the provision of general liability insurance coverage in an amount to exceed the value of the contract and do not give preference for contractors in specific geographic locations;
  - (E) ensure that building construction contractors are procured in accordance with State and Federal regulations for Single Family HOME Activities [using a formal sealed bid procedure for

single family New Construction, Reconstruction or Rehabilitation Projects];

(F) ensure that professional service providers (consultants) are procured using an open competitive procedure and are not procured based solely on the lowest priced bid; and

(G) ensure that any Request for Proposals or Invitation for Bid include:

- (i) an equal opportunity disclosure and a notice that bidders are subject to search for listing on the Excluded Parties List;
- (ii) bidders' protest rights and an outline of the procedures bidders must take to address procurement related disputes;
- (iii) a conflict of interest disclosure;
- (iv) a clear and accurate description of the technical requirements for the material, product, or service to be procured. The description must include complete, adequate, and realistic specifications;
- (v) for sealed bid procedures, disclose the date, time and location for public opening of bids and indicate a fixed-price contract; [and]
- (vi) must not have a term of services greater than five years; and
- (vii) [(v+)] for competitive proposals, disclose the specific selection/evaluation criteria;

(5) in instances where a potential conflict of interest exists, follow procedures to submit a request to the Department to grant an exception to any conflicts prohibited by 24 CFR §92.356. The request submitted to the Department must include a disclosure of the nature of the conflict, accompanied by an assurance that there has been public disclosure of the conflict by newspaper publication, [and] a description of how the public disclosure was made, and an attorneys opinion that the conflict does not violate state or local law. No HOME funds will be committed to or reserved to assist a Household until HUD has granted an exception to the conflict of interest provisions;

(6) perform environmental clearance procedures, as required, before acquiring any Property or before performing any construction activities, including demolition, or before the occurrence of the Loan [loan] closing, if applicable;

(7) develop and comply with written applicant intake and selection criteria for program eligibility that [and] promote and comply with Fair Housing requirements and the States One Year Action Plan;

(8) complete applicant intake and applicant selection. Notify each applicant Household in writing of either acceptance or denial of HOME assistance within sixty (60) days following receipt of the intake application. For Homeowner Rehabilitation Assistance and Contract for Deed Conversion the Administrator [CA or RSP] must:

- (A) provide rehabilitation [Rehabilitation] as an available option to Households, provide Households with a general cost estimate, and to the extent that rehabilitation [Rehabilitation] would not meet the program requirements, explain these program requirements;
- (B) unless not allowed by local code, provide replacement of an existing housing unit with a new MHU as an available option; and
- (C) explain relocation as an available option to any Households located within the 100-year floodplain and present the costs associated with flood insurance;

(9) determine the income eligibility of a Household using the "Annual Income" as defined at 24 CFR §5.609;

(10) except for Single Family Development, complete an updated income eligibility determination of a Household if more than six (6) months has elapsed from the date of certification and the date the HOME assistance is provided to the Household. For Single Family Development, complete income eligibility determination of a Household if more than six (6) months has elapsed from the date of certification and the date the contract to purchase the housing unit is executed with the Household;

(11) for single family Activities involving construction, perform initial inspection in accordance with Chapter 20 of this title (relating to Single Family Programs Umbrella Rule) ~~and at least four (4) progress inspections~~. Property inspections must include photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms. The inspection must be signed and dated by the inspector and the Administrator [CA or RSP];

(12) submit requests for the Commitment or Reservation of Funds, Loan [loan] closing preparation, and disbursements and all required information and verification documentation in the Housing Contract System. A request will not be reviewed by the Department until the Administrator or Developer [CA, RSP, or Development Owner] has submitted all required documentation. If, during review, the Department identifies administrative deficiencies [Administrative Deficiencies], the Department will allow a cure period of ten (10) business days beginning at the start of the first business day following the date the Administrator or Developer [CA, RSP or Development Owner] is notified of the deficiency. If any administrative deficiencies [Administrative Deficiency] remain after the cure period, the Department, in its sole discretion, shall disapprove the request. Disapproved requests will not be considered sufficient to meet the performance benchmark and shall not constitute a Reservation of Funds;

(13) not proceed or allow a contractor to proceed with construction, including demolition, on any Project or development [Development] without first completing the required environmental clearance procedures, preconstruction conference and receiving notice to proceed, if applicable, and execution of grant agreement or Loan [loan] closing with the Department, whichever is applicable;

(14) submit any Program Income received by the Administrator or Developer [CA, RSP or Development Owner] to the Department within ten (10) business days of receipt. Return any refunds to the Department's accounting division and include a written explanation of the return of funds, the Contract number, name of Administrator or Developer [CA, RSP, or Development Owner], Project address and Project number referenced on the check;

(15) submit required documentation, for project completion reports no later than sixty (60) days after the completion of the Project;

(16) for Contract awards, submit certificate of Contract Completion within ten (10) business days of the Department's request;

(17) submit to the Department reports or information regarding the operations related to HOME funds provided by the Department; and

(18) if required by state or federal law, place the appropriate bonding requirement in any contract or subcontract entered into by the Administrator or Developer [CA, RSP, or Development Owner] in connection with a HOME award.

§23.29. *Resale and Recapture Provisions.*

(a) The Department has elected to utilize the recapture provision under 24 CFR §92.254(a)(5)(ii) as its primary method of recapturing HOME funds.

(b) The Department has established the recapture provisions described in paragraphs (1) - (4) of this subsection to ensure affordability as defined in 24 CFR §92.254(a)(5)(ii).

(1) In the event that a federal affordability period is required and the assisted property is rented or leased, or otherwise ceases to be the Principal Residence of the Household, the forgiveness of the Loan, if applicable, will cease and the entire HOME investment is subject to recapture.

(2) In the event that a federal affordability period is required and the unit is sold, including through a short sale or foreclosure, prior to the end of the affordability period, the Department will recapture the shared net proceeds available based on the requirements of 24 CFR §92.254 and as outlined in the State's One Year Action [Consolidated] Plan.

(3) The Household can sell the unit to any willing buyer at any price. In the event of sale to a subsequent low-income purchaser of a HOME-assisted homeownership unit, the low-income purchaser may assume the existing HOME Loan and recapture obligation entered into by the original buyer if no additional HOME assistance is provided to the subsequent homebuyer. In cases in which the subsequent homebuyer needs HOME assistance in excess of the balance of the original HOME Loan, the HOME subsidy (the direct subsidy as described in 24 CFR §92.254) to the original homebuyer must be recaptured. A separate HOME subsidy must be provided to the new homebuyer, and a new affordability period must be established based on that assistance to the buyer.

(4) If there are no net proceeds from the sale, no repayment will be required of the Household and the balance of the Loan [loan] shall be forgiven as outlined in the State's applicable One Year Action [Consolidated] Plan.

(c) The Department has established the resale provisions described in paragraphs (1) - (7) of this subsection, in the event that the Department must impose the resale provisions of 24 CFR §92.254(a)(i).

(1) Resale is defined as the continuation of the affordability period upon the sale or transfer, rental or lease, refinancing, or the initial Household is no longer occupying the property as their Principal Residence.

(2) In the event that a federal affordability period is required and the assisted property is rented or leased, or is otherwise ceases to be the Principal Residence of the initial Household, the entire HOME investment must be repaid.

(3) In the event that a federal affordability period is required and the assisted property is sold, foreclosed, or transferred in lieu of foreclosure to a qualified low income buyer at an affordable price, the HOME Loan [loan] balance shall be transferred to the subsequent qualified buyer and the affordability period shall remain in force to the extent allowed by law.

(4) The resale provisions shall remain in force from the date of Loan [loan] closing until the expiration of the required affordability period.

(5) The Household is required to sell the home at an affordable price to a reasonable range of low income homebuyers that will occupy the home as their Primary Residence. Affordable to a reasonable range of low-income buyers is defined as targeting households

that have a family income between 70 and 80 percent of the area median family income and meet all program requirements.

(A) The seller will be afforded a fair return on investment defined as the sum of down payment and closing costs paid from the initial seller's cash at purchase, closing costs paid by the seller at sale, the principal payments only made by the initial homebuyer in excess of the amount required by the Loan [~~loan~~], and any documented capital improvements in excess of \$500.

(B) Fair return on investment is paid to the seller at sale once first mortgage debt is paid and all other conditions of the initial written agreement are met. In the event there are no funds for fair return, then fair return does not exist. In the event there are partial funds for fair return, then the appropriate partial fair return shall remain in force.

(6) The appreciated value is the affordable sales price less first mortgage debt less fair return.

(A) If appreciated value is zero, or less than zero, then no appreciated value exists.

(B) The initial homebuyer's initial investment of down payment and closing costs divided by the Department's HOME investment equals the percentage of appreciated value that shall be paid to the initial homebuyer. The balance of appreciated value shall be paid to the Department.

(7) The property purchased by the initial homebuyer will be encumbered with a lien [~~deed restriction~~] for the full affordability period.

(d) In the event that a federal affordability period is not required and the housing unit transfers by devise, descent, or operation of law upon the death of the assisted homeowner, forgiveness of installment payments under the Loan [~~loan~~] may continue until maturity or the grant amount under the conditional grant agreement may be forgiven, if the heir or remainderman Household qualifies for assistance in accordance with this subchapter [~~chapter~~].

(e) Forgiveness of installment payments under the Loan [~~loan~~] may continue until maturity or the grant amount under conditional grant agreement may be forgiven if the housing unit is sold by the decedent's estate to a purchasing Household that qualifies for assistance in accordance with this chapter.

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

Filed with the Office of the Secretary of State on September 23, 2013.

TRD-201304208

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 475-3916



## SUBCHAPTER C. HOMEOWNER REHABILITATION ASSISTANCE PROGRAM

10 TAC §§23.30 - 23.32

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 23, Single Family HOME Program, Subchapter C, §§23.30 - 23.32, concerning Homeowner Rehabilitation Assistance. The purpose of the proposed amendments is to revise language to conform the state HOME Rule with the federal HOME Investment Partnerships Program (HOME) regulations at 24 CFR Part 92, as amended on July 24, 2013, to add clarity to the State HOME Rule, facilitate rebuilding efforts after disasters when housing may no longer be standing on the site, amend loan terms for assistance to Households under the HRA Program to a grant agreement with a five (5) year affordability period, remove loan requirements for households with income levels between sixty (60) and eighty (80) percent of the area median family income (AMFI) for rehabilitation or reconstruction activities, and allow up to a total of \$5,000 in additional costs for site work and accessibility features.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be improved regulatory guidance to enhance the efficiency and effectiveness of the HOME Program. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, HOME Division, Jennifer Molinari, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to HOME@tdhca.state.tx.us. Enter Rule Comments in the subject line. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

§23.30. *Homeowner Rehabilitation Assistance (HRA) Program Threshold and Selection Criteria.*

All Applicants and Applications must submit or comply with this section.

(1) [The requirements of this section are not effective until December 31, 2013. Any Projects submitted to the Department under a Reservation Agreement or Contract awarded prior to December 31, 2013 will not be required to provide Match as outlined in this section, except for Match that is proposed to meet Application threshold criteria. An itemized schedule of the proposed Match and evidence to support the Applicant's ability to provide the required Match is required at the time of submission. For Applications submitted to become an RSP, the Department may withhold disbursements if after every four reservations sufficient Match documentation has not been provided. The

Department shall use population figures from the most recently available U.S. Census to determine the applicable tier for an Application. The Department may incentivize or provide preference to Applicants committing to provide additional Match above the requirement of this subsection. Such incentives may be established in the form of a threshold or selection criteria and may be different for each Activity.] Except for Applications for disaster relief, Match shall be required based on the tiers described in subparagraphs (A) - (C) of this paragraph:

(A) zero percent of Project funds is required as Match [match] if serving a city of less than 5,000 Persons or an unincorporated area of a county whose population in the total unincorporated area of the county is less than 25,000 Persons;

(B) one percent Match for every 1,000 in population to a maximum of 12 percent Match [match] for projects in or contracts serving cities with a population greater than 5,000; and

(C) one percent Match for every 10,000 in population in the total unincorporated area of the county to a maximum of 12 percent Match [match] for projects in or contracts serving the unincorporated area of a county.

(2) Documentation of a commitment of at least \$80,000 or for a Contract award 80 percent of the award amount, whichever is less, in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(A) financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(B) evidence of an available line of credit or equivalent in an amount equal to or exceeding the requirement in subparagraph (A) of this paragraph; or

(C) the Certified Public Accountant (CPA) opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

(3) Housing proposed to be constructed under this Activity must [Housing construction plans must] meet the requirements of Chapter 20 of this title (relating to Single Family Programs Umbrella Rule).

(A) The Department will reimburse only for the first time a set of architectural plans are used, unless any subsequent site specific fees are paid to a Third Party architect, or a licensed engineer; and

(B) A NOFA [Notice of funding Availability (NOFA)] may include incentives or otherwise require architectural plans to incorporate "green building" elements.

*§23.31. Homeowner Rehabilitation Assistance (HRA) Program Requirements.*

(a) Eligible Projects are limited to:

(1) the Rehabilitation or Reconstruction of existing owner-occupied housing on the same site. The Rehabilitation of a Manufactured Housing Unit (MHU) is not an eligible Project;

(2) the New Construction of site-built housing on the same site to replace an existing owner-occupied MHU;

(3) the replacement of existing owner-occupied housing with an MHU or New Construction of site-built housing on another site contingent upon written approval of the Department;

(4) if a housing unit is uninhabitable, within the previous five (5) years from requested assistance, as a result of a natural or man-made disaster or a condemnation order from the unit of local government, or presents an imminent threat to the life, health, or safety of occupants as determined by the local government with jurisdiction over the property, the Household is eligible for the New Construction of site-built housing or an MHU under this section provided the assisted Household documents that the housing unit was previously their Principal Residence through evidence of a homestead exemption from the local taxing jurisdiction and Household certification. If a housing unit is destroyed due to a disaster (housing unit may no longer be standing on the site), that unit is eligible for reconstruction provided that the HOME funds are committed within twelve (12) months of the date of destruction; or

(5) if allowable under the NOFA [Notice of funding Availability (NOFA)], the refinance of an existing mortgage meeting the federal requirements at 24 CFR §92.206(b) and any additional requirements in the NOFA.

(b) If a housing unit has an existing mortgage Loan [loan] and Department funds are provided in the form of a Loan [loan], the Department will require a first lien if the loan has an outstanding balance that is less than the investment of HOME funds and any of the statements described in paragraphs (1) - (3) of this subsection are true:

(1) a federal affordability period is required; or

(2) any existing mortgage has been in place for less than three (3) years from the date the Household applies for assistance; or

(3) the HOME Loan [loan] is structured as a repayable loan.

(c) The Household must be current on any existing mortgage loans or home equity loans. If the Department's assistance is provided in the form of a Loan [loan], the property cannot have any existing home equity loan liens.

(d) Direct Project Costs, exclusive of Match funds, and are limited to:

(1) Reconstruction and New Construction of site-built housing: the lesser of \$78 per square foot or \$85,000, or for Households of six or more Persons the lesser of \$78 per square foot or \$90,000;

(2) replacement with an MHU: \$65,000;

(3) rehabilitation that is not Reconstruction: \$40,000; and

(4) refinancing of existing mortgages: in addition to the costs limited under paragraphs (1) - (3) of this subsection, the cost to refinance an existing mortgage is limited to \$35,000. To qualify, a Household's current total housing payment must be greater than 30 percent of their monthly gross income or their total monthly recurring debt payments must be greater than 45 percent of their gross monthly income.

(e) In addition to the Direct Project Costs allowable under subsection (d) of this section, up to a total of \$5,000 will be allowed in Direct Project Costs for any of the following items or a combination of these items: [additional sitework related to accessibility features if the house will be located more than 50 feet from the nearest paved roadway or if the house is being elevated above the floodplain.]

(1) additional sitework if the unit will be located more than 50 feet from the nearest paved roadway; and

(2) if the unit is being elevated above the floodplain; and

(3) homeowner requests for accessibility features.

(f) Project soft costs are limited to:

(1) Reconstruction or New Construction: no more than \$9,000 per housing unit;

(2) replacement with an MHU: no more than \$3,500 per housing unit;

(3) rehabilitation that is not Reconstruction: \$5,000 per housing unit. This limit may be exceeded for lead-based paint remediation and only upon prior approval of the Division Director. The costs of testing and assessments for lead-based paint are not eligible Project soft costs for housing units that are Reconstructed or if the existing housing unit was built after December 31, 1977; and

(4) third-party Project soft costs related to ~~[loan closing]~~ requirements under this section, such as appraisals, title reports or insurance, tax certificates, recording fees, and surveys are not subject to a maximum per Project.

(g) Funds for Administrative costs are limited to no more than 4 percent of the Direct Project Costs, exclusive of Match funds.

(h) In the instances described in paragraphs (1) - (4) of this subsection, the assistance to an eligible Household shall be in the form of a Loan [loan] in the amount of the Direct Project Costs excluding Match funds. ~~[If the Household is at or below 60 percent area median family income (AMFI), The Loan [the loan] will be at zero percent interest and include deferral of payment and annual pro rata forgiveness with a term based on the federal affordability requirements as defined in 24 CFR §92.254. [If the Household is above 60 percent AMFI but at or below 80 percent AMFI, the assistance to the Household will be a zero percent interest repayable with a 30-year term.]~~

(1) An MHU being replaced with newly constructed housing (site-built) on the same site;

(2) Any housing unit being replaced on an another site;

(3) Any housing unit that is being relocated out of the floodplain or replaced due to uninhabitability as allowed under subsection (a)(4) of this section; and

(4) Any Project that requires a federal affordability period.

(i) For any Project involving refinancing described in subsection (d)(4) of this section, the HOME funds used for refinancing shall be structured as a fully amortizing, repayable Loan [loan] at zero percent interest. The Loan [loan] term shall be calculated by setting the total estimated housing payment (including principal, interest, property taxes, insurance, and any other homebuyer assistance), equal to 20 percent of the Household's gross monthly income. The term shall not exceed thirty (30) years. Total debt service (back-end ratio) may not exceed 45 percent. Any Direct Project Costs, exclusive of refinancing costs and Match funds, shall be structured as a deferred, forgivable Loan [loan] with a 15-year term.

(j) In all other instances not described in subsections (h) and (i) of this section, the assistance to an eligible Household will be in the form of a grant agreement with a 5-year affordability period. ~~[may be in the form of a loan or grant agreement in the amount of the Direct Project Costs exclusive of Match funds with an affordability term based on the Household's AMFI as reflected in Figure: 40 TAC §23.31(j).] [Figure: 40 TAC §23.31(j)]~~

(k) To ensure affordability, the Department will impose resale and recapture provisions established in this chapter.

(l) For Reconstruction and New Construction, site-built housing units must meet or exceed the 2000 International Residential Code and all applicable local codes and standards. In addition, housing that is Rehabilitated under this chapter must meet the Texas Minimum Construction Standards (TMCS) and all other applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with this chapter. MHUs must be installed according to the manufacturer's instructions and in accordance with Federal and State laws and regulations.

*§23.32. Homeowner Rehabilitation Assistance (HRA) Administrative Requirements.*

(a) Commitment or Reservation of Funds. The Administrator ~~[Contract Administrator (CA) or Reservation System Participant (RSP)]~~ must submit the true and complete information, certified as such, with a request for the Commitment or Reservation of Funds as described in paragraphs (1) - (15) of this subsection:

(1) head of Household name and address of housing unit for which assistance is being requested;

(2) a budget that includes the amount of Project funds specifying the acquisition costs, construction costs, soft costs and administrative costs requested, a maximum of 5 percent of hard construction costs for contingency items, proposed Match to be provided, evidence that Direct Project Cost and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) verification of environmental clearance;

(4) a copy of the Household's intake application on a form prescribed by the Department;

(5) certification of the income eligibility of the Household signed by the Administrator [CA or RSP] and all Household members age 18 or over, and including the date of the income eligibility determination. In instances where the total Household income is within \$3,000 of the 80 percent AMFI, all documentation used to determine the income of the Household;

(6) when assistance is provided in the form of a Loan [loan], provide written consent from all Persons who have a valid lien or ownership interest in the Property for the rehabilitation or reconstruction Projects;

(7) in the instance of relocation and in accordance with §23.31(a)(3) of this chapter (relating to Homeowner Rehabilitation Assistance (HRA) Program Requirements), the Household must document Homeownership of the existing unit to be replaced and must establish Homeownership of the lot on which the replacement housing unit will be constructed. The Household must agree to the demolition of the existing housing unit. HOME Project funds cannot be used for the demolition of the existing unit and any funding used for the demolition is not eligible Match; however, solely for a Project under this paragraph, the Administrator [CA or RSP] Match obligation may be reduced by the cost of such demolition without any Contract amendment;

(8) identification of any Lead-Based Paint (LBP);

(9) for housing units located within the 100-year floodplain, a quote for the cost of flood insurance and certification from the Household that they understand the flood insurance requirements;

(10) consent to demolish from any existing mortgage lien holders and consent to subordinate to the Department's Loan, if applicable;

(11) if applicable, documentation to address or resolve any potential conflict of interest, identity of interest, duplication of benefit, or floodplain mitigation;

(12) a title commitment or policy or a down date endorsement to an existing title policy, and the actual documents, or legible copies thereof, establishing the Household's ownership, such as a warranty deed or ninety-nine (99) year leasehold. For assistance provided in the form of a grant agreement, a title report may be submitted in lieu of a title commitment or policy. In instances of an MHU, a Statement of Ownership and Location (SOL) must be submitted. Together, these documents must evidence the definition of Homeownership is met;

(13) tax certificate that evidences a current paid status, and in the case of delinquency, evidence of an approved payment plan with the taxing authority and evidence that the payment plan is current;

(14) appraisal or other valuation method approved by the Department which establishes the post rehabilitation or reconstruction value of improvements for Projects involving construction; and

(15) any other documentation necessary to evidence that the Project meets the program requirements.

(b) Loan closing or grant agreement. The Administrator [~~CA~~ ~~or~~ ~~RSP~~] must comply with or submit the documents described in paragraphs (1) - (3) of this subsection, with a request for the preparation of Loan [~~loan~~] closing or grant agreement as applicable, with the request for the Commitment or Reservation of Funds:

(1) a title commitment [~~or title policy~~] that expires prior to execution of closing must be updated at closing and must not have any adverse changes in order to close. An updated title report is not required for grant agreements;

(2) in the instances of replacement with an MHU, information necessary to draft Loan [~~loan~~] documents or grant agreements to issue SOL; and

(3) life event documentation, as applicable, and all information necessary to prepare any applicable affidavits such as marital status and heirship.

(c) Disbursement of funds. The Administrator [~~CA~~ ~~or~~ ~~RSP~~] must comply with all of the requirements described in paragraphs (1) - (11) of this subsection, for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Administrator's [~~CA's~~ ~~or~~ ~~RSP's~~] compliance with requirements described in paragraphs (1) - (11) of this subsection, may be required with a request for disbursement:

(1) for construction costs associated with a Loan [~~loan~~], a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least forty (40) [~~thirty (30)~~] days after the date of construction completion;

(2) for construction costs associated with a grant agreement, an interim lien waiver or final lien waiver. For release of retainage the release on final payment [~~lien waiver~~] must be dated at least forty (40) [~~thirty (30)~~] days after the date of construction completion;

(3) if applicable, up to 50 percent of Project funds for a Project may be drawn before providing evidence of Match. Thereafter, each Administrator [~~CA~~ ~~or~~ ~~RSP~~] must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(4) property inspections, including photographs of the front and side elevation of the housing unit and at least one picture

of the kitchen, family room, one of the bedrooms and one of the bathrooms with date and property address reflected on each photo. The inspection must be signed and dated by the inspector and Administrator [~~CA~~ ~~or~~ ~~RSP~~];

(5) certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursement of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(6) the executed grant agreement or original, executed, legally enforceable Loan [~~loan~~] documents and statement of location, if applicable, for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official;

(7) expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request Administrator [~~CA~~ ~~or~~ ~~RSP~~] to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to Administrator [~~CA~~ ~~or~~ ~~RSP~~] as may be necessary or advisable for compliance with all Program Rules;

(8) the request for funds for Administrative costs must be proportionate to the amount of Direct Project Costs requested or already disbursed;

(9) include the withholding of 10 percent of hard construction costs for retainage. Retainage will be held until at least forty (40) [~~thirty (30)~~] days after completion of construction;

(10) for final disbursement requests, submission of documentation required for Project completion reports and evidence that the demolition or, if an MHU, salvage and removal of all dilapidated housing units on the lot occurred for Newly Constructed or Rehabilitated housing unit, certification or other evidence acceptable to Department that the replacement house, whether site-built or MHU, was constructed or placed on and within the same lot for which ownership was established and on and within the same lot secured by the Loan [~~loan~~] or grant agreement, if applicable, and evidence of floodplain mitigation; and

(11) the final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Agreement [~~Contract~~] in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

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 23, 2013.

TRD-201304207

Timothy K. Irvine  
Executive Director  
Texas Department of Housing and Community Affairs  
Earliest possible date of adoption: November 3, 2013  
For further information, please call: (512) 475-3916



## SUBCHAPTER D. HOMEBUYER ASSISTANCE PROGRAM

### 10 TAC §§23.40 - 23.42

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 23, Single Family HOME Program, Subchapter D, §§23.40 - 23.42, concerning Homebuyer Assistance Program. The purpose of the proposed amendments is to revise language to conform the state HOME Rule with the federal HOME Investment Partnerships Program (HOME) regulations at 24 CFR Part 92, as amended on July 24, 2013, and to add clarity to the State HOME Rule.

**FISCAL NOTE.** Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

**PUBLIC BENEFIT/COST NOTE.** Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be improved regulatory guidance to enhance the efficiency and effectiveness of the HOME Program. There will not be any economic cost to any individuals required to comply with the amendments.

**ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES.** The Department has determined that there will be no economic effect on small or micro-businesses.

**REQUEST FOR PUBLIC COMMENT.** The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, HOME Division, Jennifer Molinari, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to HOME@tdhca.state.tx.us. Enter Rule Comments in the subject line. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

**STATUTORY AUTHORITY.** The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amended section affects no other code, article, or statute.

§23.40. *Homebuyer Assistance (HBA) Threshold and Selection Criteria.*

All Applicants and Applications must submit or comply with this section.

(1) [The requirements of this section are waived until August 31, 2013. Any Projects submitted to the Department under a Reservation Agreement or Contract awarded prior to December 31, 2013 will not be required to provide Match as outlined in this section, except for Match that is proposed to meet Application threshold criteria. An itemized schedule of the proposed Match and evidence to support the Applicant's ability to provide the required Match must be

submitted. The Department may not require such support at the time an Application is submitted when the funds are made available under a reservation system.] Except for Applications for disaster relief and Persons with Disabilities set-asides, the amount of Match required must be at least 5 percent of Project funds requested. The Department may incentivize or provide preference to Applicants committing to provide additional Match above the requirement of this section. Such incentives may be established in the form of a threshold or selection criteria and may be different for each Activity.

(2) Documentation of a commitment of at least \$80,000 or for a Contract award, 100 percent of the award amount, whichever is less, in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(A) financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(B) evidence of an available line of credit or equivalent in an amount equal to or exceeding the requirement in subparagraph (A) of this paragraph; or

(C) the Certified Public Accountant (CPA) opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

§23.41. *Homebuyer Assistance (HBA) Program Requirements.*

(a) Eligible activities are limited to the acquisition or acquisition and Rehabilitation for accessibility modifications of single family housing units.

(b) The Household must complete a homebuyer counseling program/class.

(c) First lien purchase loans must comply with the requirements described in paragraphs (1) - (7) of this subsection:

(1) No adjustable rate mortgage loans or temporary interest rate buy-down loans are allowed;

(2) No first lien mortgage loans with a total loan to value equal to or greater than 100 percent are allowed;

(3) No subprime mortgage loans [~~Subprime Mortgage Loans~~] are allowed;

(4) For conforming mortgage loans [~~Noneonforming Mortgage Loans~~], the debt to income ratio (back-end ratio) may not exceed 45 percent;

(5) Fees charged by third party mortgage lenders are limited to the greater of 2 percent of the mortgage loan amount or \$3,500, including but not limited to origination, application, and/or underwriting fees. Fees associated with the origination of Single Family Mortgage Revenue Bond and Mortgage Credit Certificate programs will not be included in the limit. Fees paid to parties other than the first lien lender and reflected on the HUD-1 will not be included in the limit. Fees collected by the first lien lender at closing to be paid to other parties by the first lien lender that are supported by an invoice and reflected on the HUD-1 will not be included in the limit;

(6) No identity of interest relationship between the lender and the Household is allowed; and

(7) If an identity of interest exists between the Household and the seller, the Department may require additional documentation that evidences that the sales price is equal to or less than the appraised value of the property as documented by a Third-Party appraisal ordered by the first lien lender. If an identity of interest exists between the builder and ~~Administrator~~ [Contract Administrator (CA) or Reservation System Participant (RSP)], the ~~Administrator~~ [CA or RSP] must provide documentation that evidences that the sales price does not provide for a profit of more than 15 percent of the total hard construction costs and does not exceed the current appraised value as documented by a Third-Party appraisal ordered by the first lien lender.

(d) Direct Project Costs, exclusive of Match funds, are limited to:

(1) acquisition and closing costs: the lesser of \$20,000 or the amount necessary as determined by an affordability analysis that evidences the total estimated housing payment (including principal, interest, property taxes, insurance, and any other homebuyer assistance) is no less than 20 percent of the Household's gross monthly income based on a thirty (30) year amortization schedule. If the estimated housing payment will be less than 20 percent, the Department shall reduce the amount of downpayment assistance to the homebuyer such that the total estimated housing payment is no less than 20 percent of the homebuyer's gross income; or

(2) closing costs and downpayment: the lesser of \$6,000 or the total estimated settlement charges shown on the good faith estimate that are paid by the buyer at closing which are not paid by the buyer's contribution. Households assisted under this paragraph who, at the time of application, have assets which may be liquidated without a federal income tax penalty and which exceed three months of estimated principal, interest, property tax, and property insurance payments for the unit to be purchased as shown in the truth-in-lending statement must contribute the excess funds to the total estimated settlement charges as shown on the good faith estimate; and

(3) rehabilitation for accessibility modifications: \$20,000; ~~and~~

~~[(4) the amount necessary to acquire the home and make accessibility modifications.]~~

(4) ~~[(5)]~~ No funds shall be disbursed to the assisted Household at closing. The HOME assistance shall be reduced in the amount necessary to prevent the Household's direct receipt of funds if the HUD-1 settlement statement shows funds to be provided to the buyer at closing.

(5) ~~[(6)]~~ Total assistance to the Household must be in an amount of no less than \$1,000. Households who are not eligible for at least \$1,000 in total homebuyer assistance are ineligible for assistance under this subchapter.

(e) Project soft costs are limited to:

(1) acquisition and closing costs: no more than \$1,500 per housing unit; and

(2) rehabilitation for accessibility modifications: \$5,000 per housing unit.

(f) Funds for Administrative costs are limited to no more than 4 percent of the Direct Project Costs, exclusive of Match funds.

(g) The assistance to an eligible Household shall be in the form of a Loan [~~loan~~] in the amount of the Direct Project Costs, excluding Match funds. The Loan [~~loan~~] will be at zero percent interest and include deferral of payment and annual pro rata forgiveness with a term

based on the federal affordability requirements as defined in 24 CFR §92.254.

(h) Any forgiveness of the Loan occurs upon the anniversary date of the Household's continuous occupancy as its Principal Residence and continues on an annual pro-rata basis until maturity of the Loan.

(i) To ensure affordability, the Department will impose the recapture provisions established in this chapter.

(j) Housing units that will be rehabilitated with HOME funds must meet or exceed the Texas Minimum Construction Standard (TMCS), as applicable and all applicable codes and standards. In addition, housing that is Rehabilitated under this chapter must meet all applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the HOME Final Rule. Housing units that are provided assistance for acquisition only must meet all applicable state and local housing quality standards and code requirements. In the absence of such standards and requirements, the housing units must meet the Housing Quality Standards (HQS) in 24 CFR §982.401.

*§23.42. Homebuyer Assistance (HBA) Administrative Requirements.*

(a) Commitment or Reservation of Funds. The Administrator [CA or RSP] must submit true and complete information, certified as such, with a request for the Commitment or Reservation of Funds, as described in paragraphs (1) - (11) of this subsection:

(1) Head of Household name and address of housing unit for which assistance is being requested;

(2) A budget that includes the amount of Project funds specifying the acquisition costs, construction costs, soft costs and administrative costs requested. A maximum of 5 percent of hard construction costs for contingency items, proposed Match to be provided, evidence that Project and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) Verification of environmental clearance;

(4) A copy of the Household's intake application on a form prescribed by the Department;

(5) Certification of the income eligibility of the Household signed by the Administrator [CA or RSP], and all Household members age 18 or over, and including the date of the income eligibility determination. In instances the total Household income is within \$3,000 of the 80 percent area median family income, all documentation used to determine the income of the Household;

(6) Identification of Lead-Based Paint (LBP);

(7) For housing units located within the 100-year floodplain, a quote for the cost of flood insurance and certification from the Household that they understand the flood insurance requirements;

(8) Executed sales contract and documentation that the first lien mortgage meets the eligibility requirements;

(9) If applicable, documentation to address or resolve any potential Conflict of Interest, identity of interest, or duplication of benefit;

(10) Appraisal which includes post rehabilitation or reconstruction improvements for Projects involving construction; and

(11) Any other documentation necessary to evidence that the Project meets the program requirements.

(b) Loan closing. The Administrator [CA or RSP] must submit the documents described in paragraphs (1) and (2) of this subsection,

with a request for the preparation of Loan [~~loan~~] closing with the request for the Commitment or Reservation of Funds:

(1) A title commitment to issue a title policy that evidences the property will transfer with no tax lien, child support lien, mechanics or materialman's lien or any other restrictions or encumbrances that impair the good and marketable nature of title to the ownership interest and that the definition of Homeownership will be met. Commitments that expire prior to execution of closing must be updated at closing and must not have any adverse changes in order to close; and

(2) A good faith estimate that is, or letter from the lender confirming that the loan terms and closing costs will be consistent with the executed sales contract, the first lien mortgage loan requirements, and the requirements of this chapter.

(c) Disbursement of funds. The Administrator [~~CA or RSP~~] must comply all of the requirements described in paragraphs (1) - (10) of this subsection, for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Administrator's [~~CAs or RSPs~~] compliance with requirements described in paragraphs (1) - (10) of this subsection, may be required with a request for disbursement:

(1) For construction costs that are a part of a Loan [~~loan~~] subject to the requirements of this subsection, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least forty (40) [~~thirty (30)~~] days after the date of construction completion;

(2) If applicable, up to 50 percent of Project funds for a Project may be drawn before providing evidence of Match. Thereafter, each Administrator [~~CA or RSP~~] must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(3) The property inspection must be signed and dated by the inspector and the Administrator or Developer [~~CA, RSP, or Development Owner~~];

(4) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursement of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) Original, executed, legally enforceable Loan [~~loan~~] documents for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official. This provision is not applicable for funds made available at the Loan [~~loan~~] closing;

(6) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request Administrator [~~CA or RSP~~] to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to Administrator [~~CA or RSP~~] as may be necessary or advisable for compliance with all program requirements;

(7) The request for funds for Administrative costs must be proportionate to the amount of Direct Project Costs requested or already disbursed;

(8) Table funding requests must be submitted to the Department with complete documentation no later than ten (10) business days prior to the anticipated Loan [~~loan~~] closing date. Such a request must include a draft settlement statement, title company payee identification information, the Administrator or Developer's [~~Development Owner's~~] authorization for disbursement of funds to the title company, request letter from title company to the Texas Comptroller with bank account wiring instructions, and invoices for soft costs being paid at closing;

(9) For Activities involving Rehabilitation, include the withholding of 10 percent of hard construction costs for retainage. Retainage will be held until at least forty (40) [~~thirty (30)~~] days after completion of construction and until submission of documentation required for Project completion reports; and

(10) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

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 23, 2013.

TRD-201304206

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 475-3916



## SUBCHAPTER E. CONTRACT FOR DEED CONVERSION PROGRAM

### 10 TAC §§23.50 - 23.52

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 23, Single Family HOME Program, Subchapter E, §§23.50 - 23.52, concerning Contract for Deed Conversion Program. The purpose of the proposed amendments is to revise language to conform the state HOME Rule with the federal HOME Investment Partnerships Program (HOME) regulations at 24 CFR Part 92, as amended on July 24, 2013, to add clarity to the State HOME Rule, and to allow up to a total of \$5,000 in additional costs for site work and accessibility features.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be improved regulatory guidance to enhance the effi-

ciency and effectiveness of the HOME Program. There will not be any economic cost to any individuals required to comply with the amendments.

**ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES.** The Department has determined that there will be no economic effect on small or micro-businesses.

**REQUEST FOR PUBLIC COMMENT.** The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, HOME Division, Jennifer Molinari, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to HOME@tdhca.state.tx.us. Enter Rule Comments in the subject line. **ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.**

**STATUTORY AUTHORITY.** The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments section affects no other code, article, or statute.

*§23.50. Contract for Deed Conversion (CFDC) Threshold and Selection Criteria.*

All Applicants and Applications must submit or comply with this section.

(1) Documentation of a commitment of at least \$80,000 in cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(A) financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(B) evidence of an available line of credit or equivalent in an amount equal to or exceeding the requirement in subparagraph (A) of this paragraph; or

(C) the CPA opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program award.

(2) Housing proposed to be constructed under this Activity must [~~Housing construction plans must~~] meet the requirements in Chapter 20 of this title (relating to Single Family Programs Umbrella Rule).

(A) The Department will reimburse only for the first time a set of architectural plans are used unless any subsequent site specific fees are paid to a Third Party architect, or a licensed engineer; and

(B) A NOFA may include incentives or otherwise require architectural plans to incorporate "green building" elements.

*§23.51. Contract for Deed Conversion (CFDC) Program Requirements.*

(a) Eligible activities are limited to the acquisition or acquisition and Rehabilitation, Reconstruction, or New Construction of single family housing units.

(b) A new Manufactured Housing Unit (MHU) is an eligible property type for acquisition only. An MHU is not an eligible property type for Rehabilitation. MHUs must be installed according to the manufacturer's installation instructions and in accordance with Federal and State laws and regulations.

(c) The Household's income must not exceed 60 percent area median family income (AMFI) and the Household must complete a homebuyer counseling program/class.

(d) The Department will require a first lien position.

(e) Direct Project Costs, exclusive of Match funds, are limited to:

(1) acquisition and closing costs: \$35,000. In the case of a contract for deed conversion housing unit that involves the acquisition of a loan on an existing MHU and/or the loan for the associated land, the Executive Director may grant an exception to exceed this amount, however, the Executive Director will not grant an exception to exceed \$40,000 of assistance;

(2) Reconstruction and New Construction of site-built housing: the lesser of \$78 per square foot or \$85,000, or for Households of six or more Persons the lesser of \$78 per square foot or \$90,000;

(3) replacement with an MHU: \$65,000; and

(4) rehabilitation that is not Reconstruction: \$40,000.

(f) In addition to the Direct Project Costs allowable under subsection (e) of this section, up to a total of \$5,000 will be allowed in Direct Project Costs for any of the following items or a combination of these items: [~~additional sitework related to accessibility features if the house will be located more than 50 feet from the nearest paved roadway or if the house is being elevated above the floodplain.~~]

(1) additional sitework if the unit will be located more than 50 feet from the nearest paved roadway; and

(2) if the unit is being elevated above the floodplain; and

(3) homeowner requests for accessibility features.

(g) Project soft costs are limited to:

(1) acquisition and closing costs: no more than \$1,500 per housing unit;

(2) Reconstruction or New Construction: no more than \$9,000 per housing unit;

(3) replacement with an [and] MHU: no more than \$3,500 per housing unit; and

(4) rehabilitation that is not Reconstruction: \$5,000 per housing unit. This limit may be exceeded for lead-based remediation and only upon prior approval of the Division Director. The costs of testing and assessments for lead-based paint are not eligible Project soft costs for housing units that are reconstructed or if the existing housing unit was built after December 31, 1977.

(h) Funds for administrative costs are limited to no more than 4 percent of the Direct Project Costs, exclusive of Match funds.

(i) The assistance to an eligible Household shall be in the form of a Loan [loan] in the amount of the Direct Project Costs excluding Match funds. The Loan [loan] will be at zero percent interest and include deferral of payment and annual pro rata forgiveness with a term based on the federal affordability requirements as defined in 24 CFR §92.254.

(j) Any forgiveness of the Loan occurs upon the anniversary date of the Household's continuous occupancy as its Principal Residence and continues on an annual pro rata basis until maturity of the Loan.

(k) To ensure affordability, the Department will impose resale and recapture provisions established in this chapter.

(l) For Reconstruction and New Construction, site-built housing units must meet or exceed the 2000 International Residential Code and all applicable local codes and standards. In addition, housing that is Rehabilitated under this chapter must meet the Texas Minimum Construction Standards (TMCS) and all other applicable local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the HOME Final Rule. Housing units that are provided assistance for acquisition only must meet all applicable state and local housing quality standards and code requirements. In the absence of such standards and requirements, the housing units must meet the Housing Quality Standards (HQS) in 24 CFR §982.401.

§23.52. *Contract for Deed Conversion (CFDC) Administrative Requirements.*

(a) Commitment or Reservation of Funds. The Administrator [~~Contract Administrator (CA)~~ or ~~Reservation System Participant (RSP)~~] must submit true and correct information, certified as such, with a request for the Commitment or Reservation of Funds:

(1) head of Household name and address of housing unit for which assistance is being requested;

(2) a budget that includes the amount of Project funds specifying the acquisition costs, construction costs, soft costs and administrative costs requested, a maximum of 5 percent of hard construction costs for contingency items, proposed Match to be provided, evidence that Project and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) verification of environmental clearance;

(4) a copy of the Household's intake application on a form prescribed by the Department;

(5) certification of the income eligibility of the Household signed by the Administrator [~~CA~~ or ~~RSP~~] and all Household members age 18 or over, and including the date of the income eligibility determination. In instances the total Household income is within \$3,000 of the 80 percent AMFI, all documentation used to determine the income of the Household;

(6) identification of Lead-Based Paint (LBP);

(7) for housing units located within the 100-year floodplain, a quote for the cost of flood insurance and certification from the Household that they understand the flood insurance requirements;

(8) if applicable, documentation to address or resolve any potential Conflict of Interest, identity of interest, duplication of benefit, or floodplain mitigation;

(9) appraisal which includes post rehabilitation or reconstruction improvements for Projects involving construction; and

(10) any other documentation necessary to evidence that the Project meets the program requirements.

(b) Loan closing. The Administrator [~~CA~~ or ~~RSP~~] must submit the documents described in paragraphs (1) - (4) of this subsection, with a request for the preparation of Loan [~~loan~~] closing with the request for the Commitment or Reservation of Funds:

(1) a title commitment to issue a title policy not older than ninety (90) days when submitted for a Commitment of Funds that ev-

idences the property will transfer with no tax lien, child support lien, mechanic's or materialman's lien or any other restrictions or encumbrances that impair the good and marketable nature of title to the ownership interest and that the definition of Homeownership will be met. Commitments that expire prior to execution of closing must be updated at closing and must not have any adverse changes in order to close;

(2) in the instances of replacement with an MHU, information necessary to draft Loan [~~loan~~] documents and issue Statement of Ownership and Location (SOL);

(3) life event documentation, as applicable, and all information necessary to prepare any applicable affidavits such as marital status and heirship; and

(4) A copy of the recorded contract for deed and a current payoff statement.

(c) Disbursement of funds. The Administrator [~~CA~~ or ~~RSP~~] must comply all of the requirements described in paragraphs (1) - (11) of this subsection, for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Administrator's [~~CA's~~ or ~~RSP's~~] compliance with requirements described in paragraphs (1) - (11) of this subsection may be required with a request for disbursement:

(1) for construction costs, a down date endorsement to the title policy not older than the date of the last disbursement of funds or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least forty (40) [~~thirty (30)~~] days after the date of construction completion;

(2) if applicable, up to 50 percent of Project funds for a Project may be drawn before providing evidence of Match. Thereafter, each Administrator [~~CA~~ or ~~RSP~~] must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(3) property inspections, including photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms with date and property address reflected on each photo. The inspection must be signed and dated by the inspector and Administrator [~~CA~~ or ~~RSP~~];

(4) certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursal of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) original, executed, legally enforceable Loan [~~loan~~] documents, and statement of location, as applicable, for each assisted Household containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official. This provision is not applicable for funds made available at the Loan [~~loan~~] closing;

(6) expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request the Administrator or Developer [~~CA~~, ~~RSP~~, or ~~Development Owner~~] to make mod-

ifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to Administrator [CA or RSP] as may be necessary or advisable for compliance with all program requirements;

(7) the request for funds for Administrative costs must be proportionate to the amount of Direct Project Costs requested or already disbursed;

(8) table funding requests must be submitted to the Department with complete documentation no later than ten (10) business days prior to the anticipated Loan [loan] closing date. Such a request must include a draft settlement statement, title company payee identification information, the Administrator or Developer's [Development Owner's] authorization for disbursement of funds to the title company, request letter from title company to the Texas Comptroller with bank account wiring instructions, and invoices for soft costs being paid at closing;

(9) include the withholding of 10 percent of hard construction costs for retainage. Retainage will be held until at least forty (40) [thirty (30)] days after completion of construction;

(10) for final disbursement requests, submission of documentation required for Project completion reports and evidence that the demolition or, if an MHU, salvage and removal of all dilapidated housing units on the lot, certification or other evidence acceptable to Department that the replacement house, whether site-built or MHU, was constructed or placed on and within the same lot secured by the Loan [loan] or grant agreement, if applicable, and evidence of floodplain mitigation; and

(11) the final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

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 23, 2013.

TRD-201304205  
Timothy K. Irvine  
Executive Director  
Texas Department of Housing and Community Affairs  
Earliest possible date of adoption: November 3, 2013  
For further information, please call: (512) 475-3916



## SUBCHAPTER F. TENANT-BASED RENTAL ASSISTANCE PROGRAM

### 10 TAC §§23.60 - 23.62

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 23, Subchapter F, §§23.60 - 23.62, concerning Tenant-Based Rental Assistance Program. The purpose of the proposed amendments is to revise language to conform the state HOME Rule with the federal HOME Investment Partnerships (HOME) Program regulations at 24 CFR Part 92, as amended on July 24, 2013, to add

clarity to the State HOME Rule, and to allow eligible soft costs to be charged under the Tenant-Based Rental Assistance Program.

FISCAL NOTE. Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

PUBLIC BENEFIT/COST NOTE. Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be improved regulatory guidance to enhance the efficiency and effectiveness of the HOME Program. There will not be any economic cost to any individuals required to comply with the amendments.

ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES. The Department has determined that there will be no economic effect on small or micro-businesses.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, HOME Division, Jennifer Molinari, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to HOME@tdhca.state.tx.us enter Rule Comments in the Subject line. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

STATUTORY AUTHORITY. The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

§23.60. *Tenant-Based Rental Assistance (TBRA) Threshold and Selection Criteria.*

All Applicants and Applications must submit Documentation of a commitment of at least \$15,000 for [in] cash reserves to facilitate administration of the program and to ensure the capacity to cover costs prior to reimbursement or costs determined to be ineligible for reimbursement. Evidence of this commitment and the amount of the commitment must be included in the Applicant's resolution. To meet this requirement, Applicants must submit:

(1) financial statements indicating adequate local unrestricted cash or cash equivalents to utilize as cash reserves and a letter from the Applicant's bank(s) or financial institution(s) indicating that current account balances are sufficient; or

(2) evidence of an available line of credit or equivalent in an amount equal to or exceeding the requirement in paragraph (1) of this section; or

(3) the Certified Public Accountant (CPA) opinion letter from the most recent audit and a statement from the CPA that indicates, based on past experience with grant programs and past audits, the applicant has in place the best practices and financial capacity necessary in order to effectively administer a HOME Program Activity [award].

§23.61. *Tenant-Based Rental Assistance (TBRA) Program Requirements.*

(a) The Household must participate in a self-sufficiency program.

(b) The amount of assistance will be determined using the Housing Choice Voucher method [Method].

(c) Households certifying to zero income must also complete a questionnaire which includes a series of questions regarding how basic hygiene, dietary, transportation, and other living needs are met.

(d) The minimum Household contribution toward gross monthly rent must be 10 percent of the Household's gross monthly income.

(e) Project funds are limited to:

(1) rental subsidy: The rental subsidy term is limited to no more than twenty-four (24) months under a contract award. Households served under a reservation agreement may be granted a twelve (12) month extension, for a period of assistance not to exceed thirty-six (36) month cumulatively. A household may be eligible for an additional twenty-four months of assistance, for a period of assistance not to exceed sixty (60) months cumulatively, if:

(A) the Household [household] has applied for a Section 8 Housing Choice Voucher and is placed on a waiting list during their TBRA participation tenure; and

(B) the Household [household] has not been removed from the Section 8 Housing Choice Voucher waiting list due to failure to respond to required notices or other ineligibility factors; and

(C) the Household [household] has not been denied participation in the Section 8 Housing Choice Voucher program while they were being assisted with HOME TBRA; and

(D) the Household [household] did not refuse to participate in the Section 8 Housing Choice Voucher program when a voucher was made available;

(2) security deposit: no more than the amount equal to two (2) month's rent for the unit;[-]

(3) utility deposit in conjunction with a TBRA rental subsidy.

(f) The payment standard must be the current U.S. Department of Housing and Urban Development (HUD) "Fair Market Rent for the Housing Choice Voucher Program" at the time the household is income certified (or the rental coupon is executed). In instances where the area rents exceed the established Fair Market Rent, the Administrator [~~Contract Administrator (CA)~~ or Reservation System Participant (RSP)] may submit a written request to the Department for approval of a higher payment standard. The request must be evidenced by a market study. For HOME-assisted units, the payment standard must be the current HOME rent applicable for the unit.

(g) The lease agreement start date must correspond to the date of the TBRA rental coupon contract. The dates may be different only upon prior approval of the Executive Director or his/her designee.

(h) Project soft costs are limited to \$1,200 per Household assisted for determining household income eligibility, including recertification, and conducting Housing Quality Standards (HQS) inspections. All costs must be reasonable and customary for the Administrator's service area.

(i) [(h)] Funds for Administrative costs are limited to 4 [8] percent of Direct Project Costs, excluding Match funds. Funds for Administrative costs may be increased an additional 1 percent of Direct Project Costs if Match is provided in an amount equal to 5 percent or more of Direct Project Costs.

(j) [(i)] Rental units must be inspected prior to occupancy, annually upon Household recertification, and must comply with Housing Quality Standards established by HUD.

§23.62. *Tenant-Based Rental Assistance (TBRA) Administrative Requirements.*

(a) Commitment or Reservation of Funds. The Administrator [CA or RSP] must submit the documents described in paragraphs (1) - (8) of this subsection, with a request for the Commitment or Reservation of Funds:

(1) head of Household name and address of housing unit for which assistance is being requested;

(2) a budget that includes the amount of Direct Project Costs, Project soft costs, [~~and~~] Administrative costs requested, Match to be provided, evidence that Direct Project Cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

(3) verification of environmental clearance;

(4) a copy of the Household's intake application on a form prescribed by the Department;

(5) certification of the income eligibility of the Household signed by the Administrator [CA or RSP], and all Household members age 18 or over, and including the date of the income eligibility determination. Administrator [CA or RSP] must submit documentation used to determine the income and rental subsidy of the Household;

(6) identification of Lead-Based Paint (LBP);

(7) if applicable, documentation to address or resolve any potential conflict of interest or duplication of benefit; and

(8) any other documentation necessary to evidence that the Project meets the Program Rules.

(b) Disbursement of funds. The Administrator [CA or RSP] must comply with all of the requirements described in paragraphs (1) - (8) of this subsection for a request for disbursement of funds. Submission of documentation related to the Administrator [CA's or RSP's] compliance with requirements described in paragraphs (1) - (8) of this subsection may be required with a request for disbursement.

(1) If required or applicable, up to 50 percent of Direct Project Costs for a Project may be drawn before providing evidence of Match. Thereafter, each Administrator [CA or RSP] must provide evidence of Match, including the date of provision, in accordance with the percentage of Direct Project Costs disbursed;

(2) The property inspection must be signed and dated by the inspector and Administrator [CA or RSP];

(3) Certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursement of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(4) Expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request Administrator [CA or RSP] to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to the Administrator or Developer [CA, RSP, or Development Owner]

as may be necessary or advisable for compliance with all Program Requirements;

(5) With the exception of up to 25 percent of the total funds available for Administrative costs, the request for funds for Administrative costs must be proportionate to the amount of Direct Project Costs requested or already disbursed;

(6) Requests may come in up to ten (10) days in advance of the first day of the following month;

(7) For final disbursement requests, submission of documentation required for Project completion reports; and

(8) The final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

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

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TRD-201304188

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 475-3974



## SUBCHAPTER G. SINGLE FAMILY DEVELOPMENT PROGRAM

### 10 TAC §§23.70 - 23.72

The Texas Department of Housing and Community Affairs (the "Department") proposes amendments to 10 TAC Chapter 23, Single Family HOME Program, Subchapter G, §§23.70 - 23.72, concerning Single Family Development Program. The purpose of the proposed amendments is to revise language to conform the state HOME Rule with the federal HOME Investment Partnerships Program (HOME) regulations at 24 CFR Part 92, as amended on July 24, 2013, and to add clarity to the State HOME Rule.

**FISCAL NOTE.** Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the amendments are in effect, enforcing or administering the amendments does not have any foreseeable implications related to costs or revenues of the state or local governments.

**PUBLIC BENEFIT/COST NOTE.** Mr. Irvine also has determined that, for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of the amendments will be improved regulatory guidance to enhance the efficiency and effectiveness of the HOME Program. There will not be any economic cost to any individuals required to comply with the amendments.

**ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES.** The Department has determined that there will be no economic effect on small or micro-businesses.

**REQUEST FOR PUBLIC COMMENT.** The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the amendments. Written comments may be submitted to the Texas Department of Housing and Community Affairs, HOME Division, Jennifer Molinari, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to HOME@tdhca.state.tx.us enter Rule Comments in the Subject line. ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.

**STATUTORY AUTHORITY.** The amendments are proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed amendments affect no other code, article, or statute.

*§23.70. Single Family Development (SFD) Threshold and Selection Criteria.*

All Applicants and Applications must submit or comply with this section.

(1) An Application for Community Housing Development Organization (CHDO) certification.

(2) If the total of the Department's Loan [~~Department loan~~] equals more than 50 percent of the total development cost, except for developments also financed with U.S. Department of Agriculture (USDA) funds, the Applicant must provide:

(A) evidence of a line of credit or equivalent tool of [equal to] at least \$80,000 [~~40 percent of the total development cost~~] from a financial institution that will be [is] available for use during the proposed development activities; or

(B) a letter from a third party Certified Public Accountant (CPA) verifying the capacity of the owner or developer to provide at least \$80,000 [~~40 percent of the total development cost~~] as a short term loan for development; and

(C) a letter from the developer's or owner's bank(s) confirming funds amounting to at least \$80,000 [~~is 40 percent of the total development cost are~~] available.

(3) A proposed development plan that is consistent with the requirements of this chapter, all other federal and state rules, and includes:

(A) a floor plan and front exterior elevation for each proposed unit which reflects the exterior building composition;

(B) a FEMA Issued Flood Map that identifies the location of the proposed site(s);

(C) letters from local utility providers, on company letterhead, confirming each site has access to the following services: water and wastewater, sewer, electricity, garbage disposal and natural gas, if applicable;

(D) documentation of site control of each proposed lot: A recorded warranty deed with corresponding executed settlement statement; or a contract or option for the purchase of the proposed lots that is valid for at least one hundred-twenty (120) days from the date of application submission; and

(E) an "as vacant" appraisal of at least one of the proposed lots if: The Applicant has an Identity of Interest with the seller or current owner of the property; or any of the proposed property is part of a newly developed or under-development subdivision in which at least three other third-party sales cannot be evidenced. The purchase price of any lot in which the current owner has an identity of interest must

comply with the identity of interest transfer requirements in Chapter 10, Subchapter D of this title (relating to Underwriting and Loan Policy).

(4) The Department may prioritize Applications or otherwise incentivize Applications that partner with other lenders to provide permanent purchase money financing for the purchase of units developed with funds provided under this subchapter.

§23.71. *Single Family Development (SFD) Program Requirements.*

(a) Eligible activities include the acquisition and New Construction or acquisition and Rehabilitation of single family housing. Single family housing units assisted with HOME funds must comply with the required affordability requirements as defined at 24 CFR §92.254.

(b) This Activity is a CHDO-eligible activity.

(c) The Household's income must not exceed 80 percent area median family income (AMFI) and the Household must complete a homebuyer counseling program/class.

(d) Each unit must meet the design and quality requirements described in paragraphs (1) - (5) of this subsection:

(1) for New Construction and Reconstruction, current applicable International Residential Code, local codes, rehabilitation standards, ordinances, and zoning ordinances in accordance with the 24 CFR §92.251(a);

(2) include the following amenities: Wired with RG-6 COAX or better and CAT3 phone cable or better to each bedroom and living room; Blinds or window coverings for all windows; Disposal and Energy-Star or equivalently rated dishwasher (must only be provided as an option to each Household); Oven/Range; Exhaust/vent fans (vented to the outside) in bathrooms; Energy-Star or equivalently rated lighting in all rooms, which may include compact florescent bulbs. The living room and each bedroom must contain at least one ceiling lighting fixture and wiring must be capable of supporting ceiling fans; and Paved off-street parking for each unit to accommodate at least one mid-sized car and access to on-street parking for a second car;

(3) contain no less than two bedrooms. Each unit must contain complete physical facilities and fixtures for living, sleeping, eating, cooking, and sanitation;

(4) each bedroom must be no less than 100 square feet; have a length or width no less than 8 feet; be self contained with a door; have at least one window that provides exterior access; and have at least one closet that is not less than 2 feet deep and 3 feet wide and high enough to contain at least 5 feet of hanging space; and

(5) be no less than 800 total net square feet for a two bedroom home; no less than 1,000 total net square feet for a three bedroom and two bathroom home; and no less than 1,200 total net square feet for a four bedroom and two bathroom home.

(e) The total hard construction costs are limited as described in paragraphs (1) and (2) of this subsection:

(1) Reconstruction and New Construction of site-built housing: The hard construction costs are limited to \$78 per square foot and \$85,000 or for Households of 6 or more Persons \$90,000; and

(2) Rehabilitation that is not Reconstruction: \$40,000.

(f) Developer fees (including consulting fees) are limited to 15 percent of the total hard construction costs.

(g) Construction period financing for each unit shall be structured as a zero [0] percent interest Loan [loan] with a six (6) month

term. The maximum construction Loan [loan] amount may not exceed the total sales price less developer fees/profit, homebuyer closing costs, and other ineligible Project costs. Prior to construction Loan [loan] closing, a sales contract must be executed with a qualified homebuyer.

(h) In the instance that the Combined Loan to Value equals more than 100 percent of the appraised value, the portion of the sales price that exceeds 100 percent of the appraised value will be granted to the developer to buy down the purchase price if the homebuyer is receiving downpayment assistance or a first lien mortgage from the Department.

(i) The HOME assistance to the homebuyer shall be structured as a first and/or second lien Loan(s) [loan(s)]:

(1) the downpayment assistance is limited to \$20,000 and shall be structured as a ten (10) [~~fifteen~~ (15)] year deferred, forgivable Loan [loan] with a subordinate lien; and

(2) a first lien conventional mortgage not provided by the Department must meet the mortgage financing requirements applicable to §23.41 of this chapter (relating to Homebuyer Assistance (HBA) Program Requirements). If the Department is providing the first lien mortgage with HOME financing, the Loan [loan] will be fully amortizing with a thirty (30) year term. The Department will require a debt to income ratio (back-end ratio) not to exceed 45 percent. The total estimated housing payment (including principal, interest, property taxes, and insurance) shall be no less than 20 percent and no greater than 30 percent of the Household's gross monthly income. Should the estimated housing payment be less than 20 percent of the Household's gross income, the Department shall reduce the amount of downpayment assistance and/or charge an interest rate to the homebuyer such that the total estimated housing payment is no less than 20 percent of the homebuyer's gross income. In no instance shall the interest rate charged to the homebuyer exceed 5 percent. The Department shall use to the Household's income certification to make this determination.

(j) Earnest money is limited to no more than \$500, which will be credited to the homebuyer at closing. HOME funds may be used to pay other reasonable and customary closing costs that are HOME eligible costs.

(k) If a Household should become ineligible or otherwise cease participation and a replacement Household is not located within ninety (90) days of the end of the construction period, all additional funding closings and draws on the award will cease and the Department will require the Applicant to repay any outstanding construction debt in full.

(l) The Division Director may approve the use of alternative floor plans or lots from those included in the approved Application, provided the requirements of this section can still be met and such changes do not materially affect the total budget.

(m) To ensure affordability, the Department will impose resale or recapture provisions established in this chapter.

§23.72. *Single Family Development (SFD) Administrative Requirements.*

(a) Commitment or Reservation of Funds. The Administrator [~~Contract Administrator (CA) or Reservation System Participant (RSP)~~] must submit the documents described in paragraphs (1) - (10) of this subsection, with a request for the Commitment or Reservation of Funds:

(1) head of Household name and address of housing unit for which assistance is being requested;

(2) a budget that includes the amount of Project funds specifying the acquisition cost, construction costs, developer fees. A max-

imum of 5 percent of hard construction costs for contingency items, proposed Match to be provided, evidence that Project and soft cost limitations are not exceeded, and evidence that any duplication of benefit is addressed;

- (3) verification of environmental clearance;
- (4) a copy of the Household's intake application on a form prescribed by the Department;
- (5) certification of the income eligibility of the Household signed by the Administrator [CA or RSP] and all Household members age 18 or over, and including the date of the income eligibility determination. In instances where the total Household income is within \$3,000 of the 80 percent AMFI, all documentation used to determine the income of the Household;
- (6) identification of Lead-Based Paint (LBP);
- (7) executed sales contract and documentation that the first lien mortgage meets the eligibility requirements;
- (8) if applicable, documentation to address or resolve any potential conflict of interest, identity of interest, duplication of benefit, or floodplain mitigation;
- (9) appraisal, which includes post rehabilitation or reconstruction improvements for Projects involving construction; and
- (10) any other documentation necessary to evidence that the Project meets the Program Rules.

(b) Loan closing. The Administrator or Developer [CA, RSP, or Development Owner] must submit the documents described in paragraphs (1) - (3) of this subsection, with a request for the preparation of Loan [loan] closing with the request for the Commitment or Reservation of Funds:

- (1) a title commitment to issue a title policy not older than ninety (90) days when submitted for a Commitment of Funds that evidences the property will transfer with no tax lien, child support lien, mechanic's or materialman's lien or any other restrictions or encumbrances that impair the good and marketable nature of title to the ownership interest and that the definition of Homeownership will be met. Commitments that expire prior to execution of closing must be updated at closing and must not have any adverse changes in order to close;
- (2) within ninety (90) days after the Loan [loan] closing date, the Administrator or Developer [Contract Administrator or Development Owner] must submit to the Department the original recorded deed of trust and transfer of lien, if applicable. Failure to submit these documents within ninety (90) days after the Loan closing date will result in the Department withholding payment for disbursement requests; and
- (3) a draft settlement statement that is consistent with the executed sales contract, the first lien mortgage loan requirements (as applicable), and the terms of this Contract will be provided to Department.

(c) Disbursement of funds. The Administrator [CA or RSP] must comply with the requirements described in paragraphs (1) - (10) of this subsection, for a request for disbursement of funds to reimburse eligible costs incurred. Submission of documentation related to the Administrator's [CA's or RSP's] compliance with requirements described in paragraphs (1) - (10) of this subsection may be required with a request for disbursement:

- (1) for construction costs, a down date endorsement to the title policy not older than the date of the last disbursement of funds

or forty-five (45) days, whichever is later. For release of retainage the down date endorsement must be dated at least forty (40) [~~thirty (30)~~] days after the date of construction completion;

(2) if required or applicable, up to 50 percent of Direct Project Costs for a Project may be drawn before providing evidence of Match. Thereafter, each Administrator [CA or RSP] must provide evidence of Match, including the date of provision, in accordance with the percentage of Project funds disbursed;

(3) property inspections, including photographs of the front and side elevation of the housing unit and at least one picture of the kitchen, family room, one of the bedrooms and one of the bathrooms with date and property address reflected on each photo. The inspection must be signed and dated by the inspector and the Administrator or Developer [CA, RSP, or Development Owner];

(4) certification that its fiscal control and fund accounting procedures are adequate to assure the proper disbursement of, and accounting for, funds provided, no Person that would benefit from the award of HOME funds has provided a source of Match or has satisfied the Applicant's cash reserve obligation or made promises in connection therewith; that each request for disbursement of HOME funds is for the actual cost of providing a service and that the service does not violate any conflict of interest provisions;

(5) original, executed, legally enforceable Loan [loan] documents containing remedies adequate to enforce any applicable affordability requirements. Original documents must evidence that such agreements have been recorded in the real property records of the county in which the housing unit is located and the original documents must be returned, duly certified as to recordation by the appropriate county official;

(6) expenditures must be allowable and reasonable in accordance with federal, state, and local rules and regulations. The Department shall determine the reasonableness of each expenditure submitted for reimbursement. The Department may request the Administrator or Developer [CA, RSP, or Development Owner] to make modifications to the disbursement request and is authorized to modify the disbursement procedures set forth herein and to establish such additional requirements for payment of HOME funds to the Administrator or Developer [CA, RSP, or Development Owner] as may be necessary or advisable for compliance with all Program Requirements;

(7) table funding requests must be submitted to the Department with complete documentation no later than ten (10) business days prior to the anticipated Loan [loan] closing date. Such a request must include a draft settlement statement, title company payee identification information, the Administrator or Developer's [Development Owner's] authorization for disbursement of funds to the title company, request letter from title company to the Texas Comptroller with bank account wiring instructions, and invoices for soft costs being paid at closing;

(8) include the withholding of 10 percent of hard construction costs for retainage. Retainage will be held until at least forty (40) [~~thirty (30)~~] days after completion of construction;

(9) for final disbursement requests, submission of documentation required for Project completion reports; and

(10) the final request for disbursement must be submitted to the Department with support documentation no later than sixty (60) days after the termination date of the Contract in order to remain in compliance with Contract and eligible for future funding. The Department shall not be obligated to pay for costs incurred or performances rendered after the termination date of a Contract.

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

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Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-3916



## SUBCHAPTER H. APPLICATION AND CERTIFICATION OF COMMUNITY HOUSING DEVELOPMENT ORGANIZATIONS

### 10 TAC §23.80

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

The Texas Department of Housing and Community Affairs (the "Department") proposes the repeal of 10 TAC Chapter 23, Subchapter H, §23.80, concerning Application Procedures for Certification of Community Housing Development Organization (CHDO). The purpose of the proposed repeal is to streamline the CHDO certification process, and eliminate reiterating the CHDO requirements in 24 CFR Part 92.

**FISCAL NOTE.** Timothy K. Irvine, Executive Director, has determined that, for each year of the first five years the repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

**PUBLIC BENEFIT/COST NOTE.** Mr. Irvine also has determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be to improved regulatory guidance to enhance the efficiency and effectiveness of the HOME Program. There will not be any economic cost to any individuals required to comply with the repeal.

**ADVERSE IMPACT ON SMALL OR MICRO-BUSINESSES.** The Department has determined that there will be no economic effect on small or micro-businesses

**REQUEST FOR PUBLIC COMMENT.** The public comment period will be held October 4, 2013, to November 4, 2013, to receive input on the proposed repeal. Written comments may be submitted to the Texas Department of Housing and Community Affairs, HOME Division, Jennifer Molinari, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, or by e-mail to [HOME@tdhca.state.tx.us](mailto:HOME@tdhca.state.tx.us). Enter Rule Comments in the subject line. **ALL COMMENTS MUST BE RECEIVED BY 5:00 P.M. NOVEMBER 4, 2013.**

**STATUTORY AUTHORITY.** The repeal is proposed pursuant to Texas Government Code §2306.053, which authorizes the Department to adopt rules.

The proposed repeal affects no other code, article, or statute.

§23.80. *Application Procedures for Certification of Community Housing Development Organization (CHDO).*

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 23, 2013.

TRD-201304189

Timothy K. Irvine

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-3974



## TITLE 16. ECONOMIC REGULATION

### PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

#### CHAPTER 59. CONTINUING EDUCATION REQUIREMENTS

##### 16 TAC §59.3

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 59, §59.3, regarding the continuing education program.

The proposed amendments to §59.3 implement Senate Bill (SB) 562, 83rd Legislature, Regular Session (2013) which amended Texas Occupations Code, Chapter 1703, relating to the regulation of polygraph examiners regarding mandatory continuing education.

The proposed amendments to §59.3 add polygraph examiners to the list of occupations regulated by the Department that require continuing education.

Additional amendments to §59.3 are also being proposed to implement House Bill (HB) 3038, 83rd Legislature, Regular Session (2013) which eliminated the licensing and regulation of associate auctioneers. Since the Department no longer regulates associate auctioneers, the proposed amendment deletes them from the list of occupations that require continuing education.

Water well and pump installer apprentices are also proposed to be deleted from §59.3. The Department believes that Texas Occupations Code, Chapters 1901 and 1902, do not authorize this regulation. Effective March 1, 2013, 16 TAC Chapter 76 was amended to remove all references to water well drillers and pump installer apprentices.

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

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendment is in effect, the public benefit will be added protection for the public health and safety and to delete requirements that are no longer required.

There will be no adverse economic effect on small or micro-businesses or to persons who are required to comply with the rule as proposed.

Since the Department has determined that the proposed amendment will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapters 51, 1703, 1802, 1901, and 1902, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the proposal.

*§59.3. Purpose and Applicability.*

These rules are promulgated to establish continuing education provider and course requirements for the following occupations regulated by the Department of Licensing and Regulation:

(1) (No change.)

(2) Auctioneers [~~and associate auctioneers~~], as provided by Texas Occupations Code, Chapter 1802. Additional continuing education requirements relating to auctioneers and associate auctioneers may be found in Chapter 67 of this title.

(3) - (5) (No change.)

(6) Polygraph examiners, as provided by Texas Occupations Code, Chapter 1703. Additional continuing education requirements relating to polygraph examiners may be found in Chapter 88 of this title.

(7) [~~(6)~~] Property tax consultants, as provided by Texas Occupations Code, Chapter 1152. Additional continuing education requirements relating to property tax consultants may be found in Chapter 66 of this title.

(8) [~~(7)~~] Registered accessibility specialists, as provided by Texas Government Code, Chapter 469. Additional continuing education requirements relating to registered accessibility specialists may be found in Chapter 68 of this title.

(9) [~~(8)~~] Towing operators, as provided by Texas Occupations Code, Chapter 2308. Additional continuing education requirements relating to towing operators may be found in Chapter 86 of this title.

(10) [~~(9)~~] Water well drillers~~;~~ and pump installers [~~and apprentices~~], as provided by Texas Occupations Code, Chapters 1901 and 1902. Additional continuing education requirements relating to water well drillers, pump installers, and apprentices may be found in Chapter 76 of this title.

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 23, 2013.

TRD-201304226

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-7348



## CHAPTER 64. TEMPORARY COMMON WORKER EMPLOYERS

### 16 TAC §64.80

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 64, §64.80, regarding the temporary common worker employers program.

The proposed amendments to §64.80 reduce the application fee for an initial and renewal license as part of the Department's annual fee review. Other proposed amendments to this section add the "Revised/Duplicate License/Certificate/Permit/Registration" fee to be consistent with the same fee in other Department programs.

The proposed amendments are necessary to implement Texas Occupations Code, §51.202, which requires the Texas Commission of Licensing and Regulation (Commission) to set fees in amounts reasonable and necessary to cover the costs of administering programs under the Department's jurisdiction. The General Appropriations Act (GAA), 83rd Legislature, reduces the amount of revenue that the Department is required to collect above the amounts appropriated to the Department. Additionally, Article VIII, Section 2 of the GAA requires that the Department's revenue cover the cost of the Department's appropriations and other direct and indirect costs. As a result, the fees currently in place are above the amounts that will be required for the Department to cover its costs. The decrease will not adversely affect the administration and enforcement of the program.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no cost to state or local government as a result of enforcing or administering the proposed rule. State revenue will decrease by \$13,080 in each year of the first five-year period the proposed amendments are in effect.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public benefit will be lower fees for licensees in this program and therefore lower costs for licensees to conduct business, which may be passed along as savings to consumers.

The anticipated economic effect on small and micro-businesses and to all other persons who are required to comply with the proposed amendments will be either a decrease in fees owed to the Department or no change in fees owed.

There will be no adverse effect on small or micro-businesses or to persons who are required to comply with the section as proposed.

Since the agency has determined that the rule will have no adverse economic effect on small or micro-businesses, preparation

of an Economic Impact Statement and a Regulatory Flexibility Analysis, under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; by facsimile to (512) 475-3032; or by email to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 92, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department, in particular Texas Occupations Code, §51.202.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 92. No other statutes, articles, or codes are affected by the proposal.

*§64.80. Fees.*

(a) The non-refundable application fee for an initial license is \$30 [~~\$150~~].

(b) The non-refundable application fee for a renewal license is \$150 for licenses expiring before February 1, 2014; \$30 for licenses expiring on or after February 1, 2014.

(c) Revised/Duplicate License/Certificate/Permit/Registration--\$25.

(d) [~~€~~] Late renewal fees for licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

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

Filed with the Office of the Secretary of State on September 23, 2013.

TRD-201304217

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 463-7348



## CHAPTER 71. WARRANTORS OF VEHICLE PROTECTION PRODUCTS

### 16 TAC §71.80

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 71, §71.80, regarding the warrantors of vehicle protection products program.

The proposed amendments to §71.80 reduce registration and renewal fees as part of the Department's annual fee review. Also, the wording for the duplicate or amended registration certificates has been changed to "Revised/Duplicate

License/Certificate/Permit/Registration" to be consistent with the same fee in other Department programs.

The proposed amendments are necessary to implement Texas Occupations Code, §51.202, which requires the Texas Commission of Licensing and Regulation (Commission) to set fees in amounts reasonable and necessary to cover the costs of administering programs under the Department's jurisdiction. The General Appropriations Act (GAA), 83rd Legislature, reduces the amount of revenue that the Department is required to collect above the amounts appropriated to the Department. Additionally, Article VIII, Section 2 of the GAA requires that the Department's revenue cover the cost of the Department's appropriations and other direct and indirect costs. As a result, the fees currently in place are above the amounts that will be required for the Department to cover its costs. The decrease will not adversely affect the administration and enforcement of the program.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no cost to state or local government as a result of enforcing or administering the proposed rule. State revenue will decrease by \$11,250 in each year of the first five-year period the proposed amendments are in effect.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public benefit will be lower fees for licensees in this program and therefore lower costs for licensees to conduct business, which may be passed along as savings to consumers.

The anticipated economic effect on small and micro-businesses and to all other persons who are required to comply with the proposed amendments will be either a decrease in fees owed to the Department or no change in fees owed.

There will be no adverse effect on small or micro-businesses or to persons who are required to comply with the section as proposed.

Since the agency has determined that the rule will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; by facsimile to (512) 475-3032; or by email to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapters 51 and 2306, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department, in particular Texas Occupations Code, §51.202.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 2306. No other statutes, articles, or codes are affected by the proposal.

*§71.80. Fees.*

(a) All fees are non-refundable.

(b) The original registration fee for a warrantor of vehicle protection products shall be \$250 [~~\$350~~].

(c) The renewal registration fee is: [fees shall be]

(1) \$350 for registrants who became obligated as warrantors of 0 to 999 vehicle protection product warranties during the twelve (12) months preceding the date of the application for registrations expiring before February 1, 2014; \$250 for registrations expiring on or after February 1, 2014;

(2) \$750 for registrants who became obligated as warrantors of 1,000 to 1,999 vehicle protection product warranties during the twelve (12) months preceding the date of the application for registrations expiring before February 1, 2014; \$500 for registrations expiring on or after February 1, 2014; and

(3) \$1,000 for registrants who became obligated as warrantors of 2,000 or more vehicle protection product warranties during the twelve (12) months preceding the date of the application.

(d) Revised/Duplicate License/Certificate/Permit/Registration-- [A] \$25 [fee shall be charged for duplicate or amended registration certificates].

(e) Late renewal fees for registrations issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

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

Filed with the Office of the Secretary of State on September 23, 2013.

TRD-201304216

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 463-7348



## CHAPTER 72. PROFESSIONAL EMPLOYER ORGANIZATION

### 16 TAC §§72.10, 72.20 - 72.23, 72.25, 72.70 - 72.73

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 72, §§72.10, 72.20 - 72.23, 72.25, 72.70, and 72.71; and proposes new §72.72 and §72.73, regarding the professional employer organization (PEO) program (formerly staff leasing services).

The proposed amendments and new rules are necessary to implement Senate Bill (SB) 1286, 83rd Legislature, Regular Session (2013) which made changes to Texas Labor Code, Chapter 91. The amendments to the law include replacing the outdated term "staff leasing services company" with "professional employer organization", replacing related terms, such as "assigned employee" with "covered employee", and adding new terms "coemployer" and "coemployer relationship." Some of the more substantive changes to the law include authorizing a client company to purchase workers' compensation insurance for covered employees and for the professional employer organization to offer a self-funded health insurance plan, provided the plan is approved by the Texas Department of Insurance.

The proposed amendments to §72.10 add definitions that clarify some new terms used in SB 1286, and define "offer to perform" consistent with other programs regulated by the Department.

The proposed amendments to §§72.20 - 72.23, 72.25, and 72.71 replace "staff leasing" with "professional employer organization" and "assigned employee" with "covered employee."

The proposed amendments to §72.70 rewrite and reorganize the section to clarify new notice requirements in SB 1286 relating to providing notice to covered employees of the coemployment relationship between a PEO and a client.

Proposed new §72.72 is added to clarify that a PEO is responsible for providing to the Department which party in the coemployment relationship (if any) carries workers' compensation insurance.

Proposed new §72.73 is added to clarify that a PEO that offers a self-funded health insurance plan to covered employees must provide proof to the Department that the plan is approved by the Texas Department of Insurance.

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

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments and new rules are in effect, there will be no increase or decrease in revenue to the state or local governments as a result of enforcing the proposed rules. The public benefit is anticipated to be the potential for cost and time savings to the regulated industry by developing uniformity between the states in using current terminology and licensing practices.

There will be no adverse economic effect on small or micro-businesses or to persons who are required to comply with the rules as proposed.

Since the Department has determined that the proposed amendments and new rules will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments and new rules are proposed under Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 91, both of which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed amendments and new rules are those set forth in Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 91. No other statutes, articles, or codes are affected by the proposal.

*§72.10. Definitions.*

The following words and terms, as used in this chapter and Texas Labor Code, Chapter 91, have the following meanings, unless the context clearly indicates otherwise.

(1) Department--Texas Department of Licensing and Regulation.

(2) Offering to Perform--Making a written or oral proposal, contracting in writing or orally to perform professional employer services, or advertising in any form through any medium that a person or business entity is a professional employer organization, or that implies in any way that a person or business entity is available to enter into a professional employer services agreement.

(3) PEO--Professional Employer Organization.

(4) [(2)] Person--Any individual, partnership, corporation, or any other business entity.

(5) [(3)] The Code--The Texas Labor Code, Chapter 91.

§72.20. *License Requirements--Full License.*

(a) Any person who performs or offers to perform PEO [staff leasing] services as defined by the Code, must be licensed with the department.

(b) To obtain an original PEO [staff leasing services] license, a person must provide the department with all of the following required information, on forms prescribed by the executive director:

(1) a completed registration form, including any applicable attachments or application forms;

(2) a completed personal information form from each controlling person as defined in Texas Labor Code §91.001(7);

(3) fingerprint cards for the applicant and any controlling persons;

(4) a completed criminal history questionnaire, as applicable;

(5) documentation from the Texas Secretary of State recognizing the person's authority to do business in this state;

(6) proof of positive working capital as described under §72.40; and

(7) the required fees.

(c) Each individual applicant and all controlling persons must pass a background investigation that includes:

(1) A comparison of the person's fingerprints by appropriate state or federal law enforcement agencies with fingerprints on file; and

(2) A criminal history check with appropriate state and federal law enforcement agencies.

(d) Falsification of a required document by the applicant is grounds for denial and/or revocation of license.

(e) Falsification of documentation provided by a controlling person disqualifies that person from serving as a controlling person on the PEO [staff leasing services company].

§72.21. *License Renewal Requirements--Full License.*

(a) In order for a PEO [staff leasing services company] to continue operating in this state, a license must be renewed annually.

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

(c) To renew a PEO [staff leasing services] license, a person must provide the department with all of the following required information, on forms prescribed by the executive director:

(1) a completed registration form, including any applicable attachments or application forms;

(2) a completed personal information form from each controlling person as defined in Texas Labor Code §91.001(7), or a form indicating there has been no change in the personal information form since the previous license application or renewal from each controlling person;

(3) fingerprint cards for any new controlling persons;

(4) a completed criminal history questionnaire, as applicable;

(5) proof of positive working capital as described under §72.40; and

(6) the required fees.

(d) Each individual applicant and all controlling persons of the PEO [staff leasing service company] must submit to a background investigation as described in §72.20(c) each year at the time of renewal.

(e) Falsification of a required document by the applicant is grounds for denial and/or revocation of license.

(f) Falsification of documentation provided by a controlling person disqualifies that person from serving as a controlling person on the PEO [staff leasing services company].

(g) The department may refuse to renew a registration if the applicant or a controlling person of the applicant has violated Texas Labor Code, Chapter 91, this chapter, or a rule or an order issued by the commission or executive director.

§72.22. *License Requirements--Limited License.*

(a) To qualify for a limited license, a person at all times must:

(1) employ less than 50 covered [assigned] employees in this state at any one time;

(2) not assign covered employees to client companies that are based or domiciled in the state;

(3) not maintain an office in this state; and

(4) not solicit client companies located or domiciled in this state.

(b) A person applying for a limited license must provide the department with all of the following required information, on forms prescribed by the executive director:

(1) a completed registration form, including any applicable attachments or application forms;

(2) a completed personal information form from each controlling person as defined in Texas Labor Code §91.001(7);

(3) a completed criminal history questionnaire, as applicable;

(4) proof of current licensure as a PEO [staff leasing services company], in good standing, if licensed in another state;

(5) documentation from the Texas Secretary of State recognizing the person's authority to do business in this state;

(6) proof of positive working capital as described under §72.40; and

(7) the required fees.

(c) Falsification of a required document by the applicant is grounds for denial and/or revocation of license.

(d) Falsification of documentation provided by a controlling person disqualifies that person from serving as a controlling person on the PEO [~~staff leasing services company~~].

(e) After the person obtains the limited license, the person must continue to meet all of the requirements under subsection (a) in order to retain the limited license. Failure to continue meeting the requirements will result in loss of the limited license.

*§72.23. License Renewal Requirements--Limited License.*

(a) In order for a limited license PEO [~~staff leasing services company~~] to continue operating in this state, a limited license must be renewed annually.

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

(c) To continue qualification for a limited license, a person at all times while licensed must:

(1) employ less than 50 covered [~~assigned~~] employees in this state at any one time;

(2) not assign covered employees to client companies that are based or domiciled in the state;

(3) not maintain an office in this state; and

(4) not solicit client companies located or domiciled in this state.

(d) To renew a limited license, a person must provide the department with all of the following required information, on forms prescribed by the executive director:

(1) a completed registration form, including any applicable attachments or application forms;

(2) a completed personal information form from each controlling person as defined in Texas Labor Code §91.001(7), or a form indicating there has been no change in the personal information form since the previous license application or renewal from each controlling person;

(3) a completed criminal history questionnaire, as applicable;

(4) proof of current licensure as a PEO [~~staff leasing services company~~], in good standing, if licensed in another state;

(5) proof of positive working capital as described under §72.40; and

(6) the required fees.

(e) Falsification of a required document by the applicant is grounds for denial of the application and/or revocation of a license.

(f) Falsification of documentation provided by a controlling person disqualifies that person from serving as a controlling person on the PEO [~~staff leasing services company~~].

(g) The person must continue to meet all of the requirements under subsection (a) in order to retain the limited license. Failure to continue meeting the requirements will result in loss of the limited license.

*§72.25. Use of Assurance Organization by Applicant or License Holder.*

(a) The department shall accept an approved assurance organization's written certification as evidence that an applicant or license holder has met and continues to meet the criteria and obligations set forth in this chapter and the Code. The department retains the right to independently verify any information or certification provided by the assurance organization, including the ability to verify information contained in the assurance organization's databases.

(b) An applicant or licensee wishing to utilize the services of an assurance organization shall execute, and the assurance organization shall submit to the department, together with any fees, the appropriate application form prescribed by the executive director which includes a certification by the assurance organization that the license holder or applicant is in compliance with the assurance organization's standards which meet the requirements of the Code and the rules and a certification by the licensee or applicant that the applicant is in full compliance with all requirements of the Code and the rules, together with the license holder or applicant's authorization for the department to accept information provided by the assurance organization on behalf of the applicant or licensee.

(c) Two or more applicants or license holders using the services of an approved assurance organization and desiring to apply or renew as a group, may do so provided that the applicants or license holders apply or renew on a form prescribed by the executive director and demonstrate that they have at least two of the following criteria in common:

(1) financial statement;

(2) controlling person;

(3) insurance coverage; or

(4) ownership.

(d) Though qualified applicants may apply as a group, the department will issue licenses only to qualified applicants having unique federal employment identification numbers.

(e) An approved assurance organization shall notify the department in writing no later than 10 days after it receives a complaint, or becomes aware of information indicating that an applicant or license holder utilizing its services is not in compliance with its obligations under this chapter or the Code. The notification shall include the originals or a certified copy of all such information in the assurance organization's possession.

(f) An approved assurance organization shall notify the department in writing no later than 10 days after the assurance organization has made a determination that an accredited PEO [~~staff leasing company~~] has violated any of the standards of accreditation of the assurance organization.

(g) Should the department elect to take action against any bond made available to it by an assurance organization because of a license holder or applicant's violation of this chapter or the Code as determined by the department, the department shall provide the assurance organization thirty (30) days written notice prior to taking action against the bond. This notification requirement shall neither affect the department's enforcement procedures nor affect the department's ability to take appropriate disciplinary action against a licensee or applicant.

*§72.70. Responsibilities of Licensee--General.*

(a) Notices to Clients.

(1) A licensee must notify its clients of the name, mailing address, and telephone number of the department. The notice also must contain a statement that unresolved complaints concerning a licensee

or questions concerning the regulation of PEOs [staff leasing services] may be addressed to the department.

(2) The notice required by this subsection must be made a part of all ~~[contractual]~~ agreements between licensees and clients. The notification shall appear in a typeface no smaller than the body of the contract and shall be printed in bold face, all capital letters or contrasting color of ink to set it out from the surrounding written material.

(b) Notices to Covered [Assigned] Employees.

(1) A licensee must provide a written professional employer services agreement to ~~[notify]~~ each covered [assigned] employee that sets forth the coemployment relationship, and additionally contains ~~[ef]~~ the name, mailing address, website, and telephone number of the department. The agreement ~~[notice]~~ also must contain a statement that unresolved complaints concerning a licensee or questions concerning the regulation of PEO [staff leasing] services may be addressed to the department.

(2) A licensee must notify each covered [assigned] employee that, pursuant to §91.032(c) of the Code, a client company is solely obligated to pay any wages for which:

(A) an obligation to pay is created by an agreement, contract, plan, or policy between the client company and the covered [assigned] employee; and

(B) the PEO [staff leasing services company] has not contracted to pay.

~~[(3) A licensee must provide the notices required by this subsection in writing. The required notices shall be provided either as:]~~

~~[(A) a wallet size card;]~~

~~[(B) a notice printed not less often than once every six months on a pay check stub; or]~~

~~[(C) a separate piece of paper provided to the assigned employee which may be part of a contract or other agreement with the assigned employee.]~~

(3) ~~[(4)]~~ A licensee shall have each covered [assigned] employee sign a document indicating the covered [assigned] employee has received the professional employer services agreement and other ~~[required]~~ notices set forth in this subsection. The signed document must be kept on file for two years after employment is terminated. The signed document may be included as part of the professional employer services agreement [a contract] or other agreement with the covered [assigned] employee or may be a separate document.

(c) Notwithstanding subsection (b)(2), a PEO [staff leasing company] may process payments for wages that it has not contracted to pay at the request or direction of its clients.

(d) A licensee must update the information provided to the department as part of the original or renewal license application within 45 days after any change to the information.

#### §72.71. Responsibility of Licensee--Records.

(a) Upon notification, the licensee shall allow the executive director or his designee to audit records required by the Code and any records required by this chapter.

(b) All licensees shall maintain the following documents for two (2) years following the termination of a professional employer [staff leasing] services agreement ~~[contract]~~:

(1) insurance coverage documents which may be required for filing with the Texas Department of Insurance, or insurance cov-

erage documents which the licensee may be required to retain by the Texas Department of Insurance;

(2) all documents pertaining to insurance claims;

(3) workers compensation coverage documents;

(4) all documents pertaining to workers' compensation claims;

(5) professional employer [staff leasing] services agreements ~~[contracts]~~ between the license holder and client companies;

(6) employee tax records that may be required to be retained by or filed with the Texas Workforce Commission;

(7) employee tax records that may be required to be retained by or filed with the Internal Revenue Service; and

(8) employee tax records that may be required to be retained by or filed with the county or state.

(c) This section does not require a licensee to obtain documents that it would not otherwise obtain in the course of business and does not require a licensee to obtain documents from any other person or entity. This section requires licensees to maintain copies of documents actually received in the course of business or required to be maintained by the governmental entities listed in this section.

#### §72.72. Workers' Compensation Coverage.

If a PEO or any of its clients purchases workers' compensation insurance for the covered employees subject to their coemployment relationship, the PEO must notify the department which client has purchased the workers' compensation insurance within 45 days of obtaining the coverage.

#### §72.73. Self-funded Health Benefit Plans.

A PEO that offers a self-funded health insurance plan shall deliver to the department the following, within 45 days of receiving approval from the Texas Department of Insurance:

(1) a copy of the written approval to offer the plan from the Texas Department of Insurance; and

(2) a copy of proof that the PEO has appointed the commissioner of the Texas Department of Insurance as its resident agent for purposes of service of process in this 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 September 23, 2013.

TRD-201304222

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 463-7348



#### 16 TAC §72.80

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 72, §72.80, regarding the professional employer organization program (formerly staff leasing services).

The proposed amendments to §72.80 reduce the license and renewal fees as part of the Department's annual fee review. Also, the wording for issuance of the duplicate or revised license fee has been changed to "Revised/Duplicate License/Certificate/Permit/Registration" to be consistent with the same fee in other Department programs.

The proposed amendments are necessary to implement Texas Occupations Code, §51.202 which requires the Texas Commission of Licensing and Regulation (Commission) to set fees in amounts reasonable and necessary to cover the costs of administering programs under the Department's jurisdiction. The General Appropriations Act (GAA), 83rd Legislature, reduces the amount of revenue that the Department is required to collect above the amounts appropriated to the Department. Additionally, Article VIII, Section 2 of the GAA requires that the Department's revenue cover the cost of the Department's appropriations and other direct and indirect costs. As a result, the fees currently in place are above the amounts that will be required for the Department to cover its costs. The decrease will not adversely affect the administration and enforcement of the program.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no cost to state or local government as a result of enforcing or administering the proposed rule. State revenue will decrease by \$66,575 in each year of the first five-year period the proposed amendments are in effect.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public benefit will be lower fees for licensees in this program and therefore lower costs for licensees to conduct business, which may be passed along as savings to consumers.

The anticipated economic effect on small and micro-businesses and to all other persons who are required to comply with the proposed amendments will be either a decrease in fees owed to the Department or no change in fees owed.

There will be no adverse effect on small or micro-businesses or to persons who are required to comply with the section as proposed.

Since the agency has determined that the rule will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; by facsimile to (512) 475-3032; or by email to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 91, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department, in particular Texas Occupations Code, §51.202.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapter 51, and Texas Labor Code, Chapter 91. No other statutes, articles, or codes are affected by the proposal.

§72.80. Fees.

(a) Application Fees.

- (1) All application fees are non-refundable.
- (2) The application fee is a required fee that is separate from the required license fee.
- (3) The original application fee is \$150.
- (4) The renewal application fee is \$150.
- (5) The limited license original application fee is \$150.
- (6) The limited license renewal application fee is \$150.

(b) License Fees.

(1) The license fee is a required fee that is separate from the required application fee.

(2) The original license fee is:

- (A) \$150 [~~\$250~~] for 0 to 249 assigned employees;
- (B) \$300 [~~\$500~~] for 250 to 750 assigned employees;

and,

(C) \$550 [~~\$750~~] for more than 750 assigned employees.

(3) The renewal license fee is:

(A) For [~~\$250 for~~] 0 to 249 assigned employees, \$250 for licenses expiring before February 1, 2014; \$150 for licenses expiring on or after February 1, 2014;

(B) For [~~\$500 for 250~~] to 750 assigned employees, \$500 for licenses expiring before February 1, 2014; \$300 for licenses expiring on or after February 1, 2014; and,

(C) For [~~\$750 for~~] more than 750 assigned employees, \$750 for licenses expiring before February 1, 2014; \$550 for licenses expiring on or after February 1, 2014.

(4) The limited license original license fee is \$150 [~~\$750~~].

(5) The limited license renewal license fee is \$750 for licenses expiring before February 1, 2014; \$150 for licenses expiring on or after February 1, 2014.

(c) Late renewal fees for licenses and limited licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(d) Revised/Duplicate License/Certificate/Permit/Registration-- [~~The fee for issuing a duplicate license or limited license or for changing the name on a license or limited license is~~] \$25.

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 23, 2013.

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-7348



CHAPTER 73. ELECTRICIANS

**16 TAC §§73.10, 73.20, 73.24 - 73.26, 73.28, 73.53, 73.100**

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 73, §§73.10, 73.20, 73.24 - 73.26, 73.28, 73.53, and 73.100 regarding the electricians program.

The proposed amendments are necessary to implement House Bill 796 (H.B. 796), 83rd Legislature, Regular Session (2013) which amended Texas Occupations Code, Chapter 1305, relating to the regulation of electricians, and updates the current technical standard to the current edition of the National Electrical Code.

The proposed amendments to §73.10 mirror the changes in definition of an instrument in H.B. 796.

The proposed amendments to §73.20 add journeyman lineman to the list of licensee types required to submit applications proving qualification for licensure and to pay an application fee.

Proposed amendments to §73.24 allow journeyman linemen to obtain a reciprocal license in an equivalent state without examination. It also requires that an applicant's qualifications of training or experience be demonstrated on a form prescribed by the Department.

The proposed amendments to §73.25 add journeyman lineman licensees into continuing education requirements consistent with the other license classes.

The proposed amendments to §73.26 require applicants for licensure as a journeyman lineman to provide verified proof of experience and training on a form acceptable by the Department.

Proposed amendments to §73.28 add journeyman lineman into the list of emergency licenses that may be granted in case of a declared emergency.

The proposed amendments to §73.53 add non-exempt journeyman lineman work into the list of responsibilities of all persons performing this work under applicable code and statutes.

The proposed amendments to §73.100 update technical requirements by adopting the most recent edition of the National Electrical Code as adopted by the National Fire Protection Association, Inc.

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

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public benefit will be added protection for public health and safety.

There will be no adverse economic effect on small or micro-businesses or to persons who are required to comply with the rules as proposed.

Since the Department has determined that the proposed amendments will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157,

Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapters 51 and 1305, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1305. No other statutes, articles, or codes are affected by the proposal.

*§73.10. Definitions.*

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

(1) - (26) (No change.)

(27) Journeyman Lineman--An individual who engages in electrical work involving the maintenance and operation of equipment associated with the transmission and distribution of electricity from the electricity's original source to a substation for further distribution.

*§73.20. Licensing Requirements--Applicant and Experience Requirements.*

(a) An applicant for a license must submit the required fees with a completed application and the appropriate attachments:

(1) Applicants for Master Electrician, Master Sign Electrician, Journeyman Electrician, Journeyman Sign Electrician, Residential Wireman, Journeyman Lineman, and Maintenance Electrician licenses must submit documentation proving the required amount of on-the-job-training.

(2) - (3) (No change.)

(4) An applicant for a journeyman lineman license must submit documentation proving the required amount of training in an apprenticeship program or the required amount of experience as a journeyman lineman.

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

*§73.24. Licensing Requirements-Waiver of Examination Requirements.*

(a) An applicant who is licensed in another state that has entered into a reciprocity agreement with Texas regarding licensure of electricians, sign electricians, journeyman lineman, or residential appliance installers may obtain an equivalent license in Texas without passing the examination, provided that all other licensure requirements are met, as defined by Texas Occupations Code, Chapter 1305.

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

(d) Acceptable proof of an applicant's qualifications for a journeyman lineman's license must be presented on a form prescribed by the department that demonstrates the required amount of training in an apprenticeship program or the required amount of experience as a journeyman lineman.

*§73.25. Continuing Education.*

(a) (No change.)

(b) For each renewal, an electrical apprentice, electrical sign apprentice, journeyman electrician, master electrician, journeyman sign electrician, master sign electrician, residential wireman, journeyman lineman or maintenance electrician must complete four hours of continuing education in:

(1) the National Electrical Code, as adopted under Title 8, Occupations Code §1305.101, or the current version of the National Electrical Code, as approved by the National Fire Protection Association (NFPA);

(2) state law and rules that regulate the conduct of licensees; and

(3) safety as defined in the National Fire Protection Association (NFPA) 70E.

(c) - (n) (No change.)

§73.26. *Documentation of Required On-The-Job Training.*

(a) Individual applicants for licensure as an electrician, sign electrician, or residential appliance installer may meet requirements for on-the-job training by providing verified proof, in a form acceptable to the department, showing that the applicant has been supervised for the requisite period by one or more persons licensed by any jurisdiction as a master electrician or master sign electrician as appropriate for the license.

(b) (No change.)

(c) A journeyman lineman applicant may meet the requirements for training in an apprenticeship program or experience requirements for a journeyman lineman by providing verified proof, in a form acceptable to the department.

§73.28. *Licensing Requirements--Emergency Licenses.*

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

(c) Emergency licenses will be classified as master, master sign, journeyman, journeyman sign, residential wireman, journeyman lineman, or maintenance electrician and will be issued to applicants at a level equivalent to the license the applicant holds in another state.

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

§73.53. *Responsibilities of All Persons Performing Electrical Work.*

All persons must perform non-exempt electrical work, non-exempt electrical sign work, non-exempt journeyman lineman work, or non-exempt residential appliance installation work in compliance with applicable codes and ordinances. The department will interpret applicable codes and ordinances for purposes of enforcement of the Act.

§73.100. *Technical Requirements.*

Effective September 1, 2014 [2014] the Department adopts the National Electrical Code, 2014 [2014] Edition as it existed on August 21 [25], 2013 [2010], as adopted by the National Fire Protection Association, Inc.

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

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TRD-201304227

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-7348



## 16 TAC §73.80

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 73, §73.80, regarding the electricians program.

The proposed amendments to §73.80(a)(5) and (b)(5) include a new fee for application and renewal of a journeyman lineman's license which is a new license class created by House Bill (H.B.) 796, 83rd Legislature, Regular Session (2013). The fees are necessary for the administration of the new license under Chapter 73. Other proposed amendments to §73.80 reduce various application and renewal fees as part of the Department's annual fee review.

Proposed amendments to this section also change the wording for revised or duplicate license fees to "Revised/Duplicate License/Certificate/Permit/Registration" fee to be consistent with the same fee in other Department programs. In addition, the Revised/Duplicate License/Certificate/Permit/Registration fees for residential wireman and maintenance electrician have been added to this section.

The proposed amendments are necessary to implement Texas Occupations Code, §51.202, which requires the Texas Commission of Licensing and Regulation (Commission) to set fees in amounts reasonable and necessary to cover the costs of administering programs under the Department's jurisdiction. The General Appropriations Act (GAA), 83rd Legislature, reduces the amount of revenue that the Department is required to collect above the amounts appropriated to the Department. Additionally, Article VIII, Section 2 of the GAA requires that the Department's revenue cover the cost of the Department's appropriations and other direct and indirect costs. As a result, the fees currently in place are above the amounts that will be required for the Department to cover its costs. The decrease will not adversely affect the administration and enforcement of the program.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no cost to state or local government as a result of enforcing or administering the proposed rule. State revenue will decrease by \$660,890 in each year of the first five-year period the proposed amendments are in effect.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public benefit will be lower fees for licensees in this program and therefore lower costs for licensees to conduct business, which may be passed along as savings to consumers.

The anticipated economic effect on small and micro-businesses and to all other persons who are required to comply with the proposed amendments will be either a decrease in fees owed to the Department or no change in fees owed.

There will be no adverse effect on small or micro-businesses or to persons who are required to comply with the section as proposed.

Since the agency has determined that the rule will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office,

Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; by facsimile to (512) 475-3032; or by email to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapters 51 and 1305, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department, in particular Texas Occupations Code, §51.202.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1305. No other statutes, articles, or codes are affected by the proposal.

§73.80. *Fees.*

(a) Application fees:

- (1) Master Electrician--\$45 [~~\$50~~]
- (2) Master Sign Electrician--\$45 [~~\$50~~]
- (3) Journeyman Electrician--\$30 [~~\$35~~]
- (4) Journeyman Sign Electrician--\$30 [~~\$35~~]
- (5) Journeyman Lineman Electrician--\$30
- (6) [~~(5)~~] Residential Wireman--\$20 [~~\$25~~]
- (7) [~~(6)~~] Maintenance Electrician--\$20 [~~\$25~~]
- (8) [~~(7)~~] Electrical Contractor--\$110 [~~\$115~~]
- (9) [~~(8)~~] Electrical Sign Contractor--\$110 [~~\$115~~]
- (10) [~~(9)~~] Electrical Apprentice--\$20
- (11) [~~(10)~~] Electrical Sign Apprentice--\$20
- (12) [~~(11)~~] Residential Appliance Installer--\$30 [~~\$35~~]
- (13) [~~(12)~~] Residential Appliance Installation Contractor--\$110 [~~\$115~~]
- (14) [~~(13)~~] Apprentice Training Program Registration--\$95 [~~\$100~~]

(b) Renewal fees:

- (1) Master Electrician--\$50 for licenses expiring before February 1, 2014; \$45 for licenses expiring on or after February 1, 2014
- (2) Master Sign Electrician--\$50 for licenses expiring before February 1, 2014; \$45 for licenses expiring on or after February 1, 2014
- (3) Journeyman Electrician--\$35 for licenses expiring before February 1, 2014; \$30 for licenses expiring on or after February 1, 2014
- (4) Journeyman Sign Electrician--\$35 for licenses expiring before February 1, 2014; \$30 for licenses expiring on or after February 1, 2014
- (5) Journeyman Lineman Electrician--\$30
- (6) [~~(5)~~] Residential Wireman--\$25 for licenses expiring before February 1, 2014; \$20 for licenses expiring on or after February 1, 2014
- (7) [~~(6)~~] Maintenance Electrician--\$25 for licenses expiring before February 1, 2014; \$20 for licenses expiring on or after February 1, 2014

(8) [~~(7)~~] Electrical Contractor--\$115 for licenses expiring before February 1, 2014; \$110 for licenses expiring on or after February 1, 2014

(9) [~~(8)~~] Electrical Sign Contractor--\$115 for licenses expiring before February 1, 2014; \$110 for licenses expiring on or after February 1, 2014

(10) [~~(9)~~] Electrical Apprentice--\$20

(11) [~~(10)~~] Electrical Sign Apprentice--\$20

(12) [~~(11)~~] Residential Appliance Installer--\$40 for licenses expiring before February 1, 2014; \$30 for licenses expiring on or after February 1, 2014

(13) [~~(12)~~] Residential Appliance Installation Contractor--\$115 for licenses expiring before February 1, 2014; \$110 for licenses expiring on or after February 1, 2014

(c) Late Renewal Fees. Late renewal fees for licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(d) Revised/Duplicate License/Certificate/Permit/Registration [~~Revised or duplicate license~~] fees:

- (1) All licenses except as set out below--\$25
- (2) Electrical Apprentice--\$20
- (3) Electrical Sign Apprentice--\$20
- (4) Residential Wireman--\$20
- (5) Maintenance Electrician--\$20

(e) All fees are non-refundable.

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

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-7348



## CHAPTER 75. AIR CONDITIONING AND REFRIGERATION

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 75, §75.25 and §75.80, and proposes the repeal of existing rule §75.26, regarding the Air Conditioning and Refrigeration program.

Senate Bill (S.B.) 383, 83rd Legislature, Regular Session (2013), amended Texas Occupations Code, Chapter 1302, related to the regulation of air conditioning and refrigeration contractors and technicians. S.B. 383 repealed Subchapter H of Chapter 1302, relating to the regulation of refrigerants and the state certificates of registration to purchase refrigerants, and it repealed other related provisions throughout Chapter 1302. The proposed repeal and amendments under Chapter 75 are necessary to im-

plement the changes made by S.B. 383 to Texas Occupations Code, Chapter 1302.

In addition, the Department's Air Conditioning and Refrigeration Contractors Advisory Board recommended at its November 14, 2012, board meeting that the continuing education rules be amended. The advisory board recommended that the total number of hours remain at eight hours per license period, but that the number of hours required for statute and rule courses be reduced from two hours to one hour. The proposed rules are necessary to implement the advisory board's recommendation.

The proposed amendment to §75.25 reduces the number of continuing education hours required for statute and rule courses from two hours to one hour. The total number of continuing education hours will remain at eight hours per licensing period. This proposed change will apply to contractor licenses that expire on or after June 1, 2014.

Section 75.26 related to state certificates of registration to purchase refrigerants is proposed for repeal, since Subchapter H of Texas Occupations Code, Chapter 1302, was repealed by S.B. 383. While the state certificates issued by the Department are being eliminated, persons purchasing refrigerants and equipment containing refrigerants will still need to comply with the federal law and regulations for purchasing refrigerants and equipment containing refrigerants, including obtaining the required federal refrigerant certificate.

The proposed amendment to §75.80, related to fees, deletes the fees associated with the state certificates of registration to purchase refrigerants, which are being eliminated as a result of S.B. 383. In addition, the wording for the "Revised/Duplicate License/Certificate/Permit/Registration" fee has been changed to be consistent with the same fee in other Department programs.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments and repeal are in effect, there will be no cost to state or local government as a result of enforcing or administering the proposed rules. While there will be a reduction in state revenues from eliminating the fees for the state certificate of registration to purchase refrigerants, this is a result of the statutory changes made by S.B. 383.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments and repeal are in effect, the public benefit will be the elimination of state regulatory requirements and fees that were duplicative of federal requirements. Persons will no longer need a state certificate in addition to a federal certificate to purchase refrigerants or equipment containing refrigerants.

There will be no adverse economic effect on small or micro-businesses or to persons who are required to comply with the rules as proposed. The state certificate of registration to purchase refrigerants, which has a one-time registration fee of \$25, is being eliminated.

Since the agency has determined that the proposed amendments and repeal will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or elec-

tronically to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

## 16 TAC §75.25, §75.80

The amendments are proposed under Texas Occupations Code, Chapters 51 and 1302, which authorize the Texas Commission of Licensing and Regulation (Commission), the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1302. No other statutes, articles, or codes are affected by the proposal.

### §75.25. Continuing Education.

(a) Terms used in this section have the meanings assigned by Chapter 59 of this title, unless the context indicates otherwise.

(b) To renew [a license as] an air conditioning and refrigeration contractor license under Texas Occupations Code, Chapter 1302, Subchapter F, that expires prior to June 1, 2014, a licensee must complete eight hours of continuing education in courses approved by the department, including two hours of instruction in Texas state law and rules that regulate the conduct of licensees.

(c) To renew an air conditioning and refrigeration contractor license under Texas Occupations Code, Chapter 1302, Subchapter F, that expires on or after June 1, 2014, a licensee must complete eight hours of continuing education in courses approved by the department, including one hour of instruction in Texas state law and rules that regulate the conduct of licensees.

(d) [(e)] The continuing education hours must have been completed within the term of the current license, in the case of a timely renewal. For a late renewal, the continuing education hours must have been completed within the one year period immediately prior to the date of renewal.

(e) [(d)] A licensee may not receive continuing education credit for attending the same course more than once.

(f) [(e)] A licensee must retain a copy of the certificate of completion for a course for one year after the date of completion. In conducting any inspection or investigation of the licensee, the department may examine the licensee's records to determine compliance with this subsection.

(g) [(f)] To be approved under Chapter 59 of this title, a provider's course must be dedicated to instruction in one or more of the following topics:

- (1) Texas Occupations Code, Chapter 1302, Air Conditioning and Refrigeration Contractors;
- (2) Title 16, Texas Administrative Code, Chapter 75, Air Conditioning and Refrigeration Administrative Rules;
- (3) the International Mechanical Code, the Uniform Mechanical Code, or other applicable codes;
- (4) ethics;
- (5) business practices; or
- (6) technical requirements.

### §75.80. Fees.

(a) All application fees are non-refundable.

(b) Air Conditioning and Refrigeration Contractors.

- (1) Contractor license application fee is \$115.

(2) Contractor license renewal application fee is \$65.

(3) Revised/Duplicate License/Certificate/Permit/Registration--[Revised or duplicate contractor license application fee is] \$25.

(4) The application fee for adding an endorsement to an existing contractor license is \$25.

~~[(e) Certificate of Registration for the Sale and Use of Refrigerants.]~~

~~[(1) Certificate of Registration application fee is \$25.]~~

~~[(2) Revised or duplicate certificate of registration application fee is \$25.]~~

~~(c) [(d)] Air Conditioning and Refrigeration Technicians.~~

(1) Technician registration application fee is \$20.

(2) Certified technician designation application fee is \$15. This fee is in addition to the technician registration application fee.

(3) Technician registration renewal application fee (with or without the certified technician designation) is \$20.

(4) Revised/Duplicate License/Certificate/Permit/Registration--[Revised or duplicate technician registration application fee (with or without the certified technician designation) is] \$15.

(d) ~~[(e)]~~ Late renewal fees for licenses and registrations issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

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

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-7348



### 16 TAC §75.26

*(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 Licensing and Regulation or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeal is proposed under Texas Occupations Code, Chapters 51 and 1302, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed repeal are those set forth in Texas Occupations Code, Chapters 51 and 1302. No other statutes, articles, or codes are affected by the proposed repeal.

§75.26. *Sale and Use of Refrigerants--Certificate of Registration.*

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

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-7348



## CHAPTER 87. USED AUTOMOTIVE PARTS RECYCLERS

### 16 TAC §87.85

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 87, §87.85, regarding the used automotive parts recyclers program.

The proposed amendments to §87.85 reduce various permit application, license, and renewal fees as part of the Department's annual fee review. Also, the wording for the duplicate and amended permit and license fees has been changed to "Revised/Duplicate License/Certificate/Permit/Registration" to be consistent with the same fee in other Department programs.

The proposed amendments are necessary to implement Texas Occupations Code §51.202, which requires the Texas Commission of Licensing and Regulation (Commission) to set fees in amounts reasonable and necessary to cover the costs of administering programs under the Department's jurisdiction. The General Appropriations Act (GAA), 83rd Legislature, reduces the amount of revenue that the Department is required to collect above the amounts appropriated to the Department. Additionally, Article VIII, Section 2 of the GAA requires that the Department's revenue cover the cost of the Department's appropriations and other direct and indirect costs. As a result, the fees currently in place are above the amounts that will be required for the Department to cover its costs. The decrease will not adversely affect the administration and enforcement of the program.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no cost to state or local government as a result of enforcing or administering the proposed rule. State revenue will decrease by \$52,364 in each year of the first five-year period the proposed amendments are in effect.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public benefit will be lower fees for licensees in this program and therefore lower costs for licensees to conduct business, which may be passed along as savings to consumers.

The anticipated economic effect on small and micro-businesses and to all other persons who are required to comply with the proposed amendments will be either a decrease in fees owed to the Department or no change in fees owed.

There will be no adverse effect on small or micro-businesses or to persons who are required to comply with the section as proposed.

Since the agency has determined that the rule will have no adverse economic effect on small or micro-businesses, preparation

of an Economic Impact Statement and a Regulatory Flexibility Analysis, under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; by facsimile to (512) 475-3032; or by email to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, Chapters 51 and 2309, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department, in particular Texas Occupations Code §51.202.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 2309. No other statutes, articles, or codes are affected by the proposal.

§87.85. *Fees.*

(a) Application Fees.

(1) Permit Used Automotive Parts Facility Business.

(A) Original Application--~~\$75~~ [~~\$120~~]

(B) Renewal--~~\$120~~ for permits expiring before February 1, 2014; ~~\$75~~ for permits expiring on or after February 1, 2014

~~[(C) Duplicate Permit--\$25]~~

~~[(D) Permit Amendment--\$25]~~

(2) Used Automotive Parts Recycling Employee License.

(A) Original Application--~~\$25~~ [~~\$30~~]

(B) Renewal--~~\$30~~ for licenses expiring before February 1, 2014; ~~\$25~~ for licenses expiring on or after February 1, 2014

~~[(C) Duplicate License--\$25]~~

~~[(D) Permit Amendment--\$25]~~

(b) Risk-based inspections--\$150

(c) Revised/Duplicate License/Certificate/Permit/Registration--~~\$25~~

(d) ~~[(e)]~~ Late renewal fees for licenses issued under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(e) ~~[(d)]~~ All fees are non-refundable [~~nonrefundable~~] except as provided for by commission rules or statute.

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

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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## CHAPTER 88. POLYGRAPH EXAMINERS

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 88, §§88.10, 88.20, and 88.70; proposes new §§88.25, 88.100, and 88.101; and proposes the repeal of existing §88.100, regarding the polygraph examiners program.

The proposed amendments, new rules, and repeal implement Senate Bill (S.B.) 562, 83rd Legislature, Regular Session (2013) which amended Texas Occupations Code, Chapter 1703, relating to the regulation of polygraph examiners.

The proposed amendment to §88.10 mirrors the statutory changes in definition of an instrument in S.B. 562.

The proposed amendment to §88.20 deletes the licensing option of a 12-month polygraph examiner internship. This alternative was eliminated in statute by S.B. 562.

Proposed new §88.25 creates mandatory continuing education requirements for polygraph examiners as required by S.B. 562. Six hours of continuing education is mandated per year.

The proposed amendments to §88.70 change the term "curriculum" to "training" or "training material" to update the terminology to industry standards.

The Department proposes to repeal existing §88.100 to delete the curriculum standards for the 12-month internship since it was statutorily eliminated under S.B. 562. The Department proposes to replace it with new §88.100 which updates the polygraph examiner education course to 320 hours of specific course content and hours for each subject consistent with current industry standards. In addition, proposed new §88.100 delineates the fundamental subjects and hours for the statutorily designated six-month internship.

Proposed new §88.101 provides placement in the rules for the consideration of other instruments and instrumentation by the Texas Commission of Licensing and Regulation (Commission) as provided for in S.B. 562.

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

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments, new rules, and repeal are in effect, the public benefit will be added protection for the public health and safety.

The potential for additional cost to polygraph examiners will come from the cost to obtain six hours of continuing education credit; however, it is a change in statute, not rule, requiring continuing education. The Department does not monitor the fees that continuing education providers charge for hours or courses, but a review of courses shows an average price of \$55 to \$65 dollars for a six-hour course. Because the potential for additional cost is in the statute, and not originating from a rule requirement for continuing education, the Department has determined that the proposed rules will not have an adverse economic effect on small or micro-businesses or to persons who are required to comply with the rules as proposed. Furthermore, the Department does not anticipate any costs affiliated with the polygraph course requirements, for the proposed rules recognize the industry standards already used.

Since the Department has determined that the proposed amendments, new rules, and repeal will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Caroline Jackson, Legal Assistant Team Lead, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or by facsimile to (512) 475-3032, or electronically to [erule@tdlr.texas.gov](mailto:erule@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

#### 16 TAC §§88.10, 88.20, 88.25, 88.70, 88.100, 88.101

The amendments and new rules are proposed under Texas Occupations Code, Chapters 51 and 1703, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the proposal.

#### §88.10. *Definitions.*

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

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

(7) Instrument--A device used to test a subject to detect deception or verify the truth of a statement including by recording visually, permanently, and simultaneously a subject's cardiovascular and respiratory patterns. The term includes a lie detector, polygraph, deceptograph, or any other similar or related device used to detect deception or verify the truth of a statement.

(8) - (14) (No change.)

#### §88.20. *Licensing Requirements--Polygraph Examiner.*

To be eligible for a polygraph examiner license, an applicant must:

- (1) submit a completed application on a department-approved form;
- (2) pay the fee required under §88.80;
- (3) provide a copy of an insurance policy, surety bond or bond continuation certificate required under §88.40;
- (4) either:
  - (A) hold a baccalaureate degree from a college or university; or
  - (B) have active investigative experience during the five (5) years preceding the application;

(5) graduate from a department-approved polygraph school and satisfactorily complete a six (6) month polygraph examiner internship;

~~[(5) either:]~~

~~[(A) graduate from a department-approved polygraph school and satisfactorily complete a six (6) month polygraph examiner internship; or]~~

~~[(B) satisfactorily complete a twelve (12) month polygraph examiner internship;]~~

(6) pass a written and practical examination required under §88.29; and

(7) successfully pass a criminal background check.

#### §88.25. *Continuing Education.*

(a) Terms used in this section have the meanings assigned by Chapter 59 of this title, unless the context indicates otherwise.

(b) To renew a license as a polygraph examiner, a licensee must complete six hours of continuing education in courses approved by the department.

(c) The continuing education hours must have been completed within the term of the current license, in the case of a timely renewal. For a late renewal, the continuing education hours must have been completed within the one year period immediately prior to the date of renewal.

(d) A licensee may not receive continuing education credit for attending the same course more than once.

(e) To be approved under Chapter 59 of this title, a provider's course must be dedicated to instruction in one or more of the following topics:

(1) Texas Occupations Code, Chapter 1703, polygraph examiners;

(2) Title 16, Texas Administrative Code, Chapter 88, Polygraph Examiners Administrative Rules;

(3) other laws and rules that regulate the conduct of polygraph examiners;

(4) polygraph examiner-related laws, such as history and development of polygraph, legal and ethical aspects of polygraph, physiology, psychology, interrogation and interviews, chart interpretation, question formulation and test construction, instrumentation supervised testing and interviewing, and counseling and critique; and

(5) business practices, such as insurance, polygraph examiner ethics, contracts, maintenance of trust accounts, and marketing.

(f) This section shall apply to providers and courses for polygraph examiners upon the effective date of this section.

(g) This section shall apply to polygraph examiner licenses issued under Texas Occupations Code, Chapter 1703, Subchapter E that expire on or after December 1, 2014.

(h) A licensee whose license has been placed on inactive status, pursuant to Texas Occupations Code §51.4011 is not required to complete continuing education as required by this section until the licensee seeks to change to "active" status.

#### §88.70. *General Responsibilities--Sponsor.*

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

(f) The sponsor must prepare and keep a monthly report of all polygraph related work conducted by the trainee and all training materials ~~[curriculum]~~ used in the course of supervised instruction. The report must contain the following information:

(1) For examinations directly observed by the sponsor:

- (A) the examination date;
- (B) the examinee's name;
- (C) the employer's name (if applicable);
- (D) the technique and type of instrument used;
- (E) the type of test; and
- (F) the result of test.

(2) For examinations conducted outside the direct observation of the sponsor, the report must include paragraph (1)(A) - (E) and:

(A) the trainee's preliminary opinion of examination results;

(B) the date the sponsor reviewed the trainee's preliminary opinion;

(C) whether the sponsor's opinion confirmed or contradicted the trainee's preliminary opinion;

(D) documentation of any real time communication method used by the trainee to confer with the sponsor during the course of the examination; and

(E) a description of the assistance provided by the sponsor.

(3) For training [curriculum]:

(A) the number of hours of supervised instruction provided to trainee; and

(B) the type of training materials [curriculum] used in the course of supervised instruction.

(g) The sponsor must use in the course of supervised instruction the training materials [curriculum] approved and adopted under §88.100.

(h) - (j) (No change.)

§88.100. Technical Requirements--Polygraph Examiner Course Training Material and Internship.

(a) Polygraph Examiner Course--320 Hours.

(1) Polygraph techniques, methodology, instrumentation--20 hours.

(2) History and development--8 hours.

(3) Mechanics and functioning of the instrument components (both analog and computerized), basic procedures for instrument activation and operation, chart marking, etc.--20 hours.

(4) Semantics and test question construction--30 hours.

(5) Techniques of understanding the use of multi-technique procedures, instruction for understanding the use of comparison question techniques, relevant-irrelevant techniques, peak of tension procedures--60 hours.

(6) Test data analysis. Skill development in chart analysis providing an introductory knowledge of different chart analysis procedures such as global procedures, numerical scoring procedures, etc.--50 hours.

(7) Interviewing/Post-Test Procedures. Skill development in pre and post-test interview methods and procedures taught--14 hours.

(8) Ethics. A thorough understanding of the ethical obligations of the examiner to the polygraph examinee, to the client, and to the profession--6 hours.

(9) Development of Student Skills. Development of the student's proficiency in chart work, includes the student producing, a minimum of 60 minutes of charts to be maintained in the student files; not to include calibration charts and instruments maintenance time--40 hours.

(10) Legal issues. Instruction in the basic legal matters pertinent to the practice of polygraph; local, state, and federal applicable regulations, admissibility issues, courtroom testimony, and others--8 hours.

(11) Psychological issues. Basic psychological and psychophysiological issues forming the foundation of polygraph sciences--24 hours.

(12) Physiological issues. Basic physiological and psychophysiological issues forming the foundation of polygraph sciences--20 hours.

(13) Student evaluation--20 hours.

(b) Polygraph Examiner Internship--200 hours. A six month internship training must contain at least the following:

(1) Interrogation and interviews including receiving case briefing, pre-test interview and post-test interview--50 hours.

(2) Chart interpretation including all types of tests and responses, chart marking and test results; no deception indicated, deception indicated, inconclusive or no opinion--65 hours.

(3) Question formulation and test construction consisting of all types of tests, all types of question and semantics--65 hours.

(4) Instrumentation to include construction and maintenance, trouble shooting and nomenclature--10 hours.

(5) Summary and general review--10 hours.

(6) Supervised testing and interviewing--minimum of 20 tests conducted in accordance with Texas Occupations Code, Chapter 1703.

(7) Counseling and critique as required in opinion of sponsor--NA.

(c) This section shall apply to Polygraph Examinees license applications received under Texas Occupations Code, Chapter 1703, Subchapter E on or after March 1, 2014.

§88.101. Other Instruments and Instrumentation.

The commission may adopt rules to identify other instruments and instrumentation requirements that are acceptable for use in this 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 September 23, 2013.

TRD-201304218

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 463-7348



## 16 TAC §88.100

*(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 Licensing and Regulation or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeal is proposed under Texas Occupations Code, Chapters 51 and 1703, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed repeal are those set forth in Texas Occupations Code, Chapters 51 and 1703. No other statutes, articles, or codes are affected by the proposed repeal.

*§88.100. Technical Requirements--Polygraph Examiner Internship Curriculum.*

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 23, 2013.

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William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-7348



## PART 9. TEXAS LOTTERY COMMISSION

### CHAPTER 401. ADMINISTRATION OF STATE LOTTERY ACT

#### SUBCHAPTER D. LOTTERY GAME RULES

##### 16 TAC §401.317

The Texas Lottery Commission (Commission) proposes amendments to §401.317 "Powerball®" On-Line Game Rule. The purpose of the proposed amendments is to make changes to the Power Play add-on game feature, with the first drawing with the new Power Play occurring on or around January 22, 2014 (subject to change by the executive director and/or the Multistate Lottery Association Member Lotteries). The Texas Lottery presently offers Powerball under an agreement between the Mega Millions Party Lotteries and MUSL (herein called the Reciprocal Game Agreement). Should the Texas Lottery later decide to join the MUSL Powerball Product Group, the Texas Lottery will offer Powerball under the MUSL Powerball Group Rules, not the Reciprocal Game Agreement.

Kathy Pyka, Controller, has determined that for each year of the first five years the amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments, as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the amendments will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of Lottery Operations, has determined that for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated is that players will have the opportunity to participate in a new version of the Power Play add-on game feature.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed

amendments may be submitted to Deanne Rienstra, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. The Commission will hold a public hearing on this proposal at 9:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701. Comments must be received within 30 days after publication of this proposal in order to be considered.

These amendments are proposed under Texas Government Code §466.015, which authorizes the Commission to adopt rules governing the operation of the lottery, and under the authority of Texas Government Code §467.102, which provides the Commission with the authority to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

This proposal is intended to implement Texas Government Code, Chapter 466.

*§401.317. "Powerball®" On-Line Game Rule.*

(a) Powerball. Powerball is a Multi-State Lottery Association (MUSL) on-line game, which has been opened to the participation of the twelve states now conducting the Mega Millions on-line games, and with which the Texas Lottery Commission has elected to participate under an Agreement with MUSL (hereinafter called the Reciprocal Game Agreement.) "Powerball" is authorized to be conducted by the executive director under the conditions of the Reciprocal Game Agreement, MUSL rules, the laws of the State of Texas, this section, and under such further instructions, directives, and procedures as the executive director may issue in furtherance thereof. In this regard, the executive director is authorized to issue such further instructions and directives as may be necessary to conform the conduct and play of Powerball to the requirements of the Reciprocal Game Agreement, if, in the opinion of the executive director, such instructions, directives, and procedures are in conformance with state law. If a conflict arises between this section and §401.304 of this chapter (relating to On-Line Game Rules (General)), this section shall have precedence. The purpose of the Powerball game is the generation of revenue for MUSL Party Lottery members and Mega Millions Party Lotteries participating under the Reciprocal Game Agreement, through the operation of a specially designed multi-jurisdiction lottery game that will award prizes to ticket holders matching specified combinations of numbers randomly selected in regularly scheduled drawings. In addition to other applicable rules contained in Chapter 401, this section and definitions apply unless the context requires a different meaning or is otherwise inconsistent with the intention of the rules adopted by the MUSL or the MUSL Powerball Group. To be clear, the authority to participate in the MUSL Powerball game is provided to the Texas Lottery by MUSL. The conduct and play of Powerball must conform to the MUSL Powerball game.

(b) Definitions.

(1) "Agent" or "retailer" means a person or entity authorized by the Texas Lottery Commission (TLC) to sell lottery tickets.

~~{(2) "Quick Pick" means the random selection of numbers by the terminals that are printed on a ticket and are played by a player in the game.}~~

(2) ~~[(3)]~~ "Drawing" means the formal process of selecting winning numbers which determine the number of winners for each prize level of the game.

(3) ~~[(4)]~~ "Game board", "board", "panel", or "playboard" means that area of the playslip ~~[play slip]~~ which contains two sets of numbered squares to be marked by the player, the first set containing fifty-nine (59) squares, number one (1) through fifty-nine (59), and the

second set containing thirty-five (35) squares, number one (1) through thirty-five (35).

(4) [(5)] "Game ticket" or "ticket" means an acceptable evidence of play, which is a ticket produced by a terminal and meets the specifications defined in the MUSL rules or the rules of each member or participating Party Lottery (Ticket Validation).

(5) [(6)] "MUSL" means the Multi-State Lottery Association, a government-benefit association wholly owned and operated by the MUSL Party Member Lotteries. [an association of governmental lotteries.]

(6) [(7)] "MUSL Board" means the governing body of the MUSL which is comprised of the chief executive officer of each Party Lottery member of MUSL. It does not include participating non-members.

(7) [(8)] "On-Line Lottery Game" means a lottery game which utilizes a computer system to administer plays, the type of game, and amount of play for a specified drawing date, and in which a player either selects a combination of numbers or allows number selection by a random number generator operated by the terminal, referred to as Quick Pick. MUSL will conduct a drawing to determine the winning combination(s) in accordance with the Powerball rules and the Powerball drawing procedures.

(8) [(9)] "Party Lottery" means a state lottery or lottery of a political jurisdiction or entity which is a member of MUSL, or is a participating lottery, participating in Powerball pursuant to the Reciprocal Game Agreement between the Mega Millions Party Lotteries and [with] MUSL, and, in the context of these rules and the MUSL Powerball Group Rules, that has joined in selling the Powerball game or games.

(9) [(10)] "Play" or "bet" means the six (6) numbers, the first five (5) from a field of fifty-nine (59) numbers and the last one (1) from a field of thirty-five (35) numbers, that appear on a ticket as a single lettered selection and are to be played by a player in the game.

(10) [(11)] "Playslip" ["Play Slip"] or "bet slip" means an optically readable card issued by the Commission used by players of Powerball to select plays and to elect all features. There shall be five playboards [play boards] on each playslip. A playslip has no pecuniary value and shall not constitute evidence of ticket purchase or of numbers selected.

(11) [(12)] "Powerball Group" means the MUSL member group of lotteries which have [has] joined together to offer the Powerball product pursuant to the terms of the Multi-State Lottery Agreement and the Powerball Group's rules, including the MUSL Powerball Drawing Procedures. In these rules, wherever the term "Powerball Group" is used it is referring to the MUSL Powerball Group.

(12) [(13)] "Prize" means an amount paid to a person or entity holding a winning ticket. "No advertised Grand Prize in a Powerball game is a guaranteed amount, and all advertised prizes, even Set Prizes, are estimated amounts."

(13) [(14)] "Set Prize" means all other prizes except the Grand Prize that are advertised to be paid by a single cash payment and, except in instances outlined in this section, will be equal to the prize amount established by the MUSL Board for the prize level.

(14) [(15)] "Terminal" means a device authorized by a Party Lottery to function in an on-line, interactive mode with the lottery's computer system for the purpose of issuing lottery tickets and entering, receiving, and processing lottery transactions, including purchases, validating tickets, and transmitting reports.

(15) [(16)] "Winning numbers" means the six (6) numbers, the first five (5) from a field of fifty-nine (59) numbers and the last one (1) from a field of thirty-five (35) numbers, randomly selected at each drawing, which shall be used to determine winning plays contained on a game ticket.

(c) Game Description.

(1) Powerball is a five (5) out of fifty-nine (59) plus one (1) out of thirty-five (35) on-line lottery game, drawn every Wednesday and Saturday, which pays the Grand Prize, at the election of the player made in accordance with this rule or by a default election made in accordance with this rule, either on an annuitized pari-mutuel basis or as a cash lump sum payment of the total cash held for this prize pool on a pari-mutuel basis. Except as provided in this section, all other prizes are paid on a set cash basis. To play Powerball, a player shall select five (5) different numbers, from one (1) through fifty-nine (59), and one (1) additional number from one (1) through thirty-five (35), for input into a terminal. The additional number may be the same as one of the first five numbers selected by the player. Tickets can be purchased for two dollars (U.S. \$2.00), including any specific statutorily-mandated tax of a Party Lottery to be included in the price of a lottery ticket, either from a terminal operated by an agent (i.e., a clerk-activated [clerk activated] terminal) or from a terminal operated by the player (i.e., a player-activated [player activated] terminal). If purchased from an agent, the player may select a set of five numbers and one additional number by communicating the six (6) numbers to the agent, or by marking six (6) numbered squares in any one game board on a playslip [play slip] and submitting the playslip [play slip] to the agent or by requesting Quick Picks ["quick picks"] from the agent. The agent will then issue a ticket, via the terminal, containing the selected, or terminal-generated [terminal generated], set or sets of numbers, each of which constitutes a game play. Tickets can be purchased from a player-activated [player activated] terminal by using the Quick Pick buttons or by inserting a playslip [play slip] into the machine.

(2) Claims. A ticket (subject to the validation requirements set forth in subsection (g) of this section (Ticket Validation)) shall be the only proof of a game play or plays and the submission of a winning ticket to the issuing Party Lottery or its authorized agent shall be the sole method of claiming a prize or prizes. A playslip [play slip] has no pecuniary or prize value and shall not constitute evidence of ticket purchase or of numbers selected. A terminal-produced [terminal produced] paper receipt has no pecuniary or prize value and shall not constitute evidence of ticket purchase or of numbers selected.

(3) Cancellations Prohibited. A ticket may not be voided or canceled by returning the ticket to the selling agent or to the lottery, including tickets that are printed in error. No ticket which can be used to claim a prize shall be returned to the lottery for credit. Tickets accepted by retailers as returned tickets and which cannot be re-sold shall be deemed owned by the bearer thereof.

(4) Player Responsibility. It shall be the sole responsibility of the player to verify the accuracy of the game play or plays and other data printed on the ticket. The placing of plays is done at the player's own risk through the on-line [on line] agent who is acting on behalf of the player in entering the play or plays.

(5) Entry of Plays. Plays may only be entered manually using the lottery retailer terminal touch screen or by means of a playslip [play slip] provided by the Party Lottery and hand-marked by the player or by such other means approved by the Party Lottery. Retailers shall not permit the use of facsimiles of playslips [play slips], copies of playslips [play slips], or other materials that are inserted into the terminal's playslip [play slip] reader that are not printed or approved by the

Party Lottery. Retailers shall not permit any device to be connected to a lottery terminal to enter plays, except as approved by the Party Lottery.

(6) Subscription sales. A subscription sales program may be offered, at the discretion of the executive director.

(d) Prize Pool.

(1) Prize Pool.

(A) For the MUSL Powerball Group Lotteries, the [The] prize pool for all prize categories shall consist of fifty percent of each drawing period's sales, including any specific statutorily-mandated tax of a Party Lottery to be included in the price of a lottery ticket, after the prize pool accounts and prize reserve accounts are funded to the amounts set by the Product Group. Any amount remaining in the prize pool at the end of this game shall be returned to all lotteries participating in the prize pool at the end of all claim periods of all Party Lotteries, carried forward to a replacement game, or expended in a manner as directed by the Members of the Powerball Group in accordance with jurisdiction statute. [state law.]

(B) For the Party Lotteries which are not a member of the MUSL Powerball Group, the prize pool for all prize categories shall consist of fifty percent of each drawing period's sales, including any specific statutorily mandated tax of a Party Lottery to be included in the price of a lottery ticket. Any amount remaining in the prize pool at the end of this game shall be carried forward to a replacement game or expended in a manner as directed by the Powerball Group in accordance with state law.

(2) Expected Prize Payout Percentages. The Grand Prize shall be determined on a pari-mutuel basis. Except as provided in this section, all other prizes awarded shall be paid as set cash prizes with the following expected prize payout percentages:  
Figure: 16 TAC §401.317(d)(2) (No change.)

(A) The prize money allocated to the Grand Prize category shall be divided equally by the number of plays [game boards] winning the Grand Prize. If sales proceeds are not sufficient to pay a Grand Prize [jackpot prize], the Commission shall use funds from other authorized sources, including the State Lottery Account as identified in Government Code, §466.355.

(B) For the MUSL Powerball Group Lotteries, the [The prize pool percentage allocated to the Set Prizes] Set Prize Pool (for [(the) cash prizes of \$1,000,000 or less) shall be carried forward to subsequent draws if all or a portion of it is not needed to pay the Set Prizes awarded in the current draw. If the total of the Set Prizes awarded in a drawing exceeds the percentage of the prize pool allocated to the Set Prizes, then the amount needed to fund the Set Prizes, including the Power Play prizes, awarded shall be drawn first from the amount allocated to the Set Prizes, and carried forward from previous draws, if any, and second from the Powerball Group's Set Prizes Reserve Account, if available, not to exceed forty million dollars (\$40,000,000.00) per drawing. [from the following source: the amount allocated to the Set Prizes and carried forward from previous draws, if any.]

(C) For the Party Lotteries which are not a member of the MUSL Powerball Group, the prize pool percentage allocated to the Set Prizes (the cash prizes of \$1,000,000 or less) shall be carried forward to subsequent draws if all or a portion of it is not needed to pay the Set Prizes awarded in the current draw. If the total of the Set Prizes awarded in a drawing exceeds the percentage of the prize pool allocated to the Set Prizes, then the amount needed to fund the Set Prizes awarded shall be drawn from the amount allocated to the Set Prizes and carried forward from previous draws, if any.

(D) [(C)] If, after these sources are [this source is] depleted, there are not sufficient funds to pay the Set Prizes awarded, including Power Play Prizes, then the highest Set Prize [set prize] shall become a pari-mutuel prize. If the amount of the highest Set Prize [set prize], when paid on a pari-mutuel basis, drops to or below the next highest Set Prize [set prize] and there are still not sufficient funds to pay the remaining Set Prizes awarded, then the next highest Set Prize [set prize] shall become a pari-mutuel prize. This procedure shall continue down through all Set Prize [set prize] levels, if necessary, until all Set Prize [set prize] levels become pari-mutuel prize levels. [In that instance, the money available from the funding sources listed in this rule shall be divided among the winning plays in proportion to their respective prize percentages.]

(E) The Party Lotteries which are not a member of the MUSL Powerball Group shall independently calculate their set pari-mutuel prize amounts. Both groups, the non-member Party Lotteries and the MUSL Powerball Group, shall then agree to set the pari-mutuel prize amounts for all lotteries selling the game at the lesser of the independently-calculated prize amounts.

(e) Probability of Winning Plays. The following table sets forth the probability of winning plays and the probable distribution of winning plays [winners] in and among each prize category, based upon the total number of possible combinations in Powerball.  
Figure: 16 TAC §401.317(e) (No change.)

(f) Prize Payment.

(1) Grand Prizes. The advertised Grand Prize in a Powerball game is not a guaranteed amount; it is an estimated amount, and all advertised prizes, even advertised Set Prizes, are estimated amounts. At the time of ticket purchase, a person may select the option for payment of the cash value or annuitized payments of a share of the Grand Prize if the play is a winning play.

(A) If no payment option is selected--With the exception of a ticket purchase using the GT Mini terminal, which has no default, the default payment option, where an option is not chosen by the player, will be the cash value option.

(B) Selection of the option for payment of the cash value or annuitized payments of a share of the Grand Prize if the play is a winning play is a selection made at the time of purchase and is final and cannot be revoked, withdrawn, or otherwise changed. Shares of the Grand Prize shall be determined by dividing the cash available in the Grand Prize Pool equally among all winning plays [winners] of the Grand Prize. A player(s) who elects [Winner(s) who elect] a cash payment shall be paid his/her [their] share(s) in a single cash payment. The annuitized option prize shall be determined by multiplying the winning play's [a winner's] share of the Grand Prize Pool by the annuity factor established in accordance with Texas law and the rules of the Texas Comptroller of Public Accounts. The annuity factor is determined by the best total securities price obtained through a competitive bid of qualified, pre-approved brokers made after it is determined that the prize is to be paid as an annuity prize. Neither MUSL nor any Party Lottery shall be responsible or liable for changes in the advertised or estimated annuity prize amount and the actual amount purchased after the prize payment method is actually known to MUSL. In certain instances announced by the Powerball Group, the Grand Prize shall be a guaranteed amount and shall be determined pursuant to paragraph (6) [(5)] of this subsection. If individual shares of the cash held to fund an annuity is less than \$250,000, the Powerball Group, in its sole discretion, may elect to pay the winners their share of the cash held in the Grand Prize Pool. All annuitized prizes shall be paid annually in thirty (30) payments with the initial payment being made in cash, to be followed by twenty-nine (29) payments funded

by the annuity. All annuitized prizes shall be paid annually in thirty (30) graduated payments, as provided by the MUSL rules, (increasing each year) at a rate as determined by the MUSL Product Group. Prize payments may be rounded down to the nearest one thousand dollars (\$1,000). Annual payments after the initial payment shall be made by the lottery on the anniversary date or if such date falls on a non-business day, then the first business day following the anniversary date of the selection of the jackpot winning numbers. Funds for the initial payment of an annuitized prize or the lump sum cash prize shall be made available by MUSL for payment by the Party Lottery no earlier than the fifteenth calendar day (or the next banking day if the fifteenth day is a holiday) following the drawing. If necessary, when the due date for the payment of a prize occurs before the receipt of funds in the prize pool trust sufficient to pay the prize, the transfer of funds for the payment of the full lump sum cash amount may be delayed pending receipt of funds from the party lotteries. The identification of the securities to fund the annuitized prize shall be at the sole discretion of the State of Texas. If the State of Texas purchases the securities, or holds the prize payment annuity for a Powerball prize won in this state, the prize winner will have no recourse on the MUSL or any other Party Lottery for payment of that prize.

(2) Payment of Prize Payments upon the Death of a Prize Winner. In the event of the death of a prize winner, payments ~~may~~ will be made in accordance with §401.310 of this chapter (relating to Payment of Prize Payments Upon Death of Prize Winner), otherwise, payment of prize payments will be made to the estate of a deceased prize winner in accordance with Texas Government Code §466.406.

(3) Low-Tier Cash Prize Payments. All low-tier cash prizes (all prizes except the Grand Prize) shall be paid in cash or warrants through the Party Lottery which sold the winning ticket(s). A Party Lottery may begin paying low-tier cash prizes after receiving authorization to pay from the MUSL central office.

(4) Prizes Rounded. Annuitized payments of the Grand Prize or a share of the Grand Prize may be rounded to facilitate the purchase of an appropriate funding mechanism. Breakage on an annuitized Grand Prize win shall be added to the first cash payment to the winner or winners. Prizes other than the Grand Prize, which, under this section, may become single-payment, pari-mutuel prizes, may be rounded down so that prizes can be paid in multiples of whole dollars. Breakage resulting from rounding these prizes shall be carried forward to the prize pool for the next drawing.

(5) Rollover. If the Grand Prize is not won in a drawing, the prize money allocated for the Grand Prize shall roll over and be added to the Grand Prize Pool for the following drawing.

(6) Funding of Guaranteed Prizes. The Powerball Group may offer guaranteed minimum Grand Prize amounts or minimum increases in the Grand Prize amount between drawings or make other changes in the allocation of prize money where the Powerball Group finds that it would be in the best interest of the game. If a minimum Grand Prize amount or a minimum increase in the Grand Prize amount between drawings is offered by the Powerball Group, then the Grand Prize shares shall be determined as follows. If there are multiple Grand Prize winning plays ~~[winners]~~ during a single drawing, each selecting the annuitized option prize, then a winning play's [winners] share of the guaranteed annuitized Grand Prize shall be determined by dividing the guaranteed annuitized Grand Prize by the number of winning plays [winners]. If there are multiple Grand Prize winning plays [winners] during a single drawing and at least one of the Grand Prize ticket holders ~~[winners]~~ has elected the annuitized option prize, then the best bid submitted by MUSL's pre-approved qualified brokers shall determine the cash pool needed to fund the guaranteed annuitized Grand Prize. If no claimant [winner] of the Grand Prize during a single drawing

has elected the annuitized option prize, then the amount of cash in the Grand Prize Pool shall be an amount equal to the guaranteed annuitized amount divided by the average annuity factor of the most recent three best quotes provided by MUSL's pre-approved qualified brokers submitting quotes. In no case, shall quotes be used which are more than two weeks old and if less than three quotes are submitted, then MUSL shall use the average of all quotes submitted. Changes in the allocation of prize money shall be designed to retain approximately the same prize allocation percentages, over a year's time, set out in the Powerball Group Rules [these rules]. Minimum guaranteed prizes or increases may be waived if the alternate funding mechanism set out in subsection (d)(2)(B) of this section becomes necessary.

(7) Limited to Highest Prize Won. The holder of a winning ticket may win only one prize per board in connection with the winning numbers drawn, and shall be entitled only to the prize won by those numbers in the highest matching prize category.

(8) Prize Claim Period. Prizes must be claimed no later than 180 days after the draw date. [Prize claims shall be submitted within the period set by the Party Lottery selling the ticket. If no such claim period is established, all grand prize claims shall be made within 180 days after the drawing date.]

(g) Ticket Validation. To be a valid ticket and eligible to receive a prize, a ticket shall satisfy all the requirements established by the Commission for validation of winning tickets sold through its on-line [on line] system and any other validation requirements adopted by the Powerball Group and the MUSL Board. The MUSL and the Party Lotteries shall not be responsible for tickets which are altered in any manner.

(h) Ticket Responsibility.

(1) Signature. Until such time as a signature is placed upon a ticket in the area designated for signature, a ticket shall be owned by the bearer of the ticket. When a signature is placed on the ticket in the place designated, the person whose signature appears in such area shall be the owner of the ticket and shall be entitled (subject to the validation requirements in subsection (g) of this section (Ticket Validation) and state or district law) to any prize attributable thereto.

(2) Multiple Claimants. The issue of multiple claimants shall be handled in accordance with Texas Government Code Chapter 466 and §401.304 of this chapter.

(3) Stolen Tickets. The Powerball Group, the MUSL and the Party Lotteries shall not be responsible for lost or stolen tickets.

(4) Prize Claims. Prize claim procedures shall be governed by the rules of the Commission as set out in §401.304 of this subchapter and any internal procedures used by the Commission. The MUSL and the Party Lotteries shall not be responsible for prizes that are not claimed following the proper procedures as determined by the selling lottery.

(i) Ineligible Players.

(1) A ticket or share for a MUSL game issued by the MUSL or any of its Party Lotteries shall not be purchased by, and a prize won by any such ticket or share shall not be paid to:

(A) a MUSL employee, officer, or director;

(B) a contractor or consultant under agreement with the MUSL to review the MUSL audit and security procedures;

(C) an employee of an independent accounting firm under contract with MUSL to observe drawings or site operations and actually assigned to the MUSL account and all partners, shareholders, or owners in the local office of the firm; or

(D) an immediate family member (parent, stepparent, child, stepchild, spouse, or sibling) of an individual described in subparagraphs (A), (B), and (C) of this paragraph and residing in the same household.

(2) Those persons designated by a Party Lottery's law as ineligible to play its games shall also be ineligible to play the MUSL game in that Party Lottery's jurisdiction.

(j) Applicable Law. In purchasing a ticket, the purchaser agrees to comply with and abide by all applicable laws, rules, regulations, procedures, and decisions of the Party Lottery where the ticket was purchased.

(k) Powerball Special Game Rules: Powerball Power Play.

(1) Power Play Description. The Powerball Power Play is a limited extension of the Powerball game and is conducted in accordance with the Powerball game rules and other lottery rules applicable to the Powerball game except as may be amended herein. Power Play will begin at a time announced by the Party Lottery and will continue until discontinued by the lottery. Power Play will offer to the owners of a qualifying play a chance to increase the amount of any of the eight lump sum Set Prizes (the lump sum prizes normally paying \$4 to \$1,000,000) won in a drawing held during Power Play. The Grand Prize jackpot is not a Set Prize and will not be increased.

(2) Qualifying Play. A qualifying play is any single Powerball play for which the player pays an extra dollar for the Power Play option play and which is recorded at the Party Lottery's central computer as a qualifying play.

(3) Prizes to be Increased. Except as provided in these rules, a qualifying play which wins one of the seven [eight] lowest lump sum Set Prizes (excluding the Match 5 + 0) will be multiplied by the number drawn, either two, three, four, or five, in a separate random Power Play drawing announced during the official Powerball drawing show. The announced Match 5+0 prize, for players selecting the Power Play option, shall be paid two million dollars (\$2,000,000.00) unless a higher limited promotional dollar amount is announced by the Powerball Group. [Grand Prize] shall be paid as follows: Figure: 16 TAC §401.317(k)(3)

(4) Prize Pool.

(A) Power Play Prize Pool. The prize pool for all prize categories shall consist of up to forty-nine and thirty-six one-hundredths percent (49.36%) of each drawing period's sales, including any specific statutorily mandated tax of a Party Lottery to be included in the price of a lottery ticket.

(i) For the MUSL Powerball Group Lotteries, the Power Play Prize Pool shall continue to be carried forward to subsequent draws if all or a portion of it is not needed to pay the Power Play prizes awarded in the current draw and held in the Power Play Pool Account.

(ii) For the Party Lotteries which are not a member of the MUSL Powerball Group, any amount remaining in the prize pool at the end of this game shall be carried forward to a replacement game or expended in a manner as directed by the Powerball Group in accordance with state law.

~~(A) Prize Pool. The prize pool for all prize categories shall consist of up to forty-nine and ninety-six one-hundredths percent (49.96%) of each drawing period's sales, including any specific statutorily mandated tax of a Party Lottery to be included in the price of a lottery ticket. Any amount remaining in the prize pool at the end of this game shall be carried forward to a replacement game or expended in~~

~~a manner as directed by the Powerball Group in accordance with state law.]~~

(B) Expected Prize Payout. Except as provided in this section, all prizes awarded shall be paid as lump sum Set Prizes. Instead of the Powerball Set Prize [set prize] amounts, qualifying Power Play plays will pay the amounts shown in paragraph (3) of this subsection.

(C) In certain rare instances, the Powerball Set Prize [set prize] amount may be less than the amount shown in Figure: 16 TAC §401.317(d)(2). In such case, the eight lowest Power Play prizes will be changed to an amount announced after the draw. For example, if the Match 4+1 Powerball Set Prize [set prize] amount of \$10,000 becomes \$5,000 under the rules of the Powerball game, and a 5x Power Play Multiplier is drawn, then a Power Play [player] winning play [that] prize amount would win \$25,000 [set prize].

(D) Probability of Power Play Numbers Being Drawn. The following table sets forth the probability of the various Power Play numbers being drawn during a single Powerball Power Play drawing. The Powerball Group may elect to run limited promotions that may modify the multiplier features. Power Play does not apply to the Powerball Grand Prize. Except as provided in subparagraph (C) of this paragraph, a Power Play Match 5 + 0 prize is set at two million dollars (\$2,000,000.00), regardless of the multiplier selected. Figure: 16 TAC §401.317(k)(4)(D)

(5) Limitations on [Limitation of] Payment of Power Play Prizes.

(A) Prize Pool Carried Forward. The prize pool percentage allocated to the Power Play Set Prizes shall be carried forward to subsequent draws if all or a portion of it is not needed to pay the Set Prizes awarded in the current draw.

(B) Pari-Mutuel Prizes--All Prize Amounts.

(i) For MUSL Powerball Group Lotteries, if the total of the original Powerball Set Prizes and the Power Play Prizes awarded in a drawing exceeds the percentage of the prize pools allocated to the Set Prizes, then the amount needed to fund the Set Prizes (including the Power Play prize amounts) awarded shall first come from the amount allocated to the Set Prizes and carried forward from previous draws, if any, and second from the Powerball Group's Set Prizes Reserve Account, if available, not to exceed forty million dollars (\$40,000,000.00) per drawing.

(ii) For the Party Lotteries which are not members of the MUSL Powerball Group, if the total of the original Powerball Set Prizes and the Power Play Prizes awarded in a drawing exceeds the percentage of the prize pools allocated to the Set Prizes, then the amount needed to fund the Set Prizes (including the Power Play prize amounts) awarded shall be the amount allocated to the Set Prizes and carried forward from previous draws, if any.

~~(B) Pari-Mutuel Prizes--All Prize Amounts. If the total of the original Powerball Set Prizes and the Power Play Prizes awarded in a drawing exceeds the percentage of the prize pools allocated to the Set Prizes, then the amount needed to fund the Set Prizes (including the Power Play prize amounts) awarded shall be the amount allocated to the Set Prizes and carried forward from previous draws, if any.]~~

(C) If, after these sources are [this source is] depleted, there are not sufficient funds to pay the Set Prizes awarded (including Power Play prize amounts), then the highest Set Prize [set prize] (including the Power Play prize amounts) shall become a pari-mutuel prize. If the amount of the highest Set Prize [set prize], when paid on a pari-mutuel basis, drops to or below the next highest Set Prize [set prize] and there are still not sufficient funds to pay the remaining Set

Prizes awarded, then the next highest Set Prize [set prize], including the Power Play prize amount, shall become a pari-mutuel prize. This procedure shall continue down through all Set Prizes levels, if necessary, until all Set Prize [set prize] levels become pari-mutuel prize levels. In that instance, the money available from the funding sources listed in this section shall be divided among the winning plays in proportion to their respective prize percentages. In rare instances, where the Powerball Set Prize [set prize] amount may be funded but the money available to pay the full Power Play prize amount may not be available due to an unanticipated number of winning plays [winners], the Powerball Group may announce pari-mutuel shares of the available pool for the Power Play payment only.

(D) The Party Lotteries which are not members of the MUSL Powerball Group shall independently calculate the set pari-mutuel prize amounts, including the Power Play prize amounts. Both groups, the non-member Party Lotteries and the MUSL Powerball Group, shall then agree to set the pari-mutuel prize amounts for all lotteries selling the game at the lesser of the independently calculated prize amounts.

(6) Prize Payment.

(A) Prize Payments. All Power Play prizes shall be paid in one lump sum through the Party Lottery that sold the winning ticket(s). A Party Lottery may begin paying Power Play prizes after receiving authorization to pay from the MUSL central office.

(B) Prizes Rounded. Prizes, which, under these rules, may become pari-mutuel prizes, may be rounded down so that prizes can be paid in multiples of whole dollars. Breakage resulting from rounding these prizes shall be carried forward to the prize pool for the next drawing.

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 20, 2013.

TRD-201304141

Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5275



**16 TAC §401.321**

The Texas Lottery Commission (Commission) proposes new §401.321, concerning Instant Game Tickets Containing Non-English Words. The purpose of the proposed new section is to implement changes to Texas Government Code Chapter 466, made pursuant to §7 of Tex. H.B. 2197, 83rd Leg., R.S. (2013). Specifically, the Legislature directs the Commission in this provision to establish, by rule, that a ticket containing a certain number of words in a language other than English must include disclosures in the same language. Section 45 of H.B. 2197 provides that not later than January 1, 2014, the Texas Lottery Commission shall adopt all rules, policies, and procedures required by the changes in law made by this Act.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there is no significant fiscal impact to the state as a result of the proposed

new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Michael Anger, Director of Lottery Operations, has determined that for each year of the first five years the proposed new rule will be in effect, the anticipated public benefit will be that games produced meeting the criteria in the rule will contain disclosures, including 'how to play' instructions, both in English and the non-English language utilized in the game.

The Commission requests comments on the proposed new section from any interested person. Comments on the proposal may be submitted to Lea Burnett, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under §466.015 of the Texas Government Code, which authorizes the Commission to adopt rules governing the operation of the lottery, and under §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction. The new rule is also proposed pursuant to new §466.252(c) of the Texas Government Code, which requires the Commission to establish, by rule, that a ticket containing a certain number of words in a language other than English must include disclosures in the same non-English language.

The proposed new rule implements changes to Chapter 466 of the Texas Government Code.

§401.321. Instant Game Tickets Containing Non-English Words.

If an instant game ticket features five or more words in a language other than English, then the ticket must include disclosures in the same non-English language used in addition to any other disclosures provided.

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

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Bob Biard

General Counsel

Texas Lottery Commission

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For further information, please call: (512) 344-5275



**CHAPTER 402. CHARITABLE BINGO  
OPERATIONS DIVISION  
SUBCHAPTER B. CONDUCT OF BINGO  
16 TAC §402.200**

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.200, General Restrictions on the Conduct of Bingo. The purpose of the proposed amendments is to implement changes to §2001.420 of the Texas Occupations Code, made pursuant to Texas House Bill (HB) 394, 83rd Leg., R.S. (2013), and to clarify how certain game information must be conveyed to bingo players. Section 2001.420 generally prohibits a person from offering or awarding, on a single bingo occasion, prizes with an aggregate value of more than \$2,500. Pull-tab bingo games are exempt from the \$2,500 prize cap. With the passage of HB 394, bingo games that award individual prizes of \$50 or less are now also exempt from the \$2,500 prize cap. The proposed amendments would clarify the requirements necessary for a bingo game to qualify for the exemption from the \$2,500 prize cap.

The proposed amendments would require bingo conductors to make a written game schedule available to all patrons prior to the start of the bingo occasion. That game schedule must contain information such as a list of all the bingo games to be played during that occasion and the prize(s) to be paid for each game. Currently, bingo conductors are required to make this information available to all patrons, but the proposed amendments clarify that the information must be provided in writing on a game schedule. The proposed amendments would also require any changes to the game schedule to be made in writing and require that the game schedule be retained by the bingo conductor for four years. Finally, the proposed amendments also clarify that for a bingo game to qualify for the exemption from the \$2,500 prize cap, that bingo game's prize(s) must be listed on the requisite game schedule as not exceeding \$50. For example, if a bingo game prize is listed as \$100 on the game schedule, but the actual prize awarded is only \$50, that bingo game would not qualify for the exemption from the \$2,500 prize cap because the prize listed on the schedule exceeded \$50.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit of the proposed amendments would be to put the Commission in a better position to fairly enforce §2001.420 of the Texas Occupations Code and to ensure that bingo games are being fairly conducted.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to James Person, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at [legal.input@lottery.state.tx.us](mailto:legal.input@lottery.state.tx.us). Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The amendments are proposed under §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Chapter 2001 of the Texas Occupations Code.

§402.200. *General Restrictions on the Conduct of Bingo.*

(a) - (g) (No change.)

(h) The licensed authorized organization is responsible for ensuring the following minimum requirements are met to conduct a bingo occasion in a manner that is fair:

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

(4) Prior to the start of a bingo occasion, the licensed authorized organization shall make a written game schedule available to all patrons. The game schedule must contain the following information: [The following information shall be available to all patrons:]

(A) all [the] games to be played;

(B) - (C) (No change.)

(D) the prize(s) to be paid for each game, including the current retail price of any non-cash prize(s);

(E) - (G) (No change.)

(5) Any changes to the game schedule provided for in paragraph (4) of this subsection shall be announced to the players and documented, in writing, on the game schedule. The game schedule, including any changes to the schedule, shall be maintained pursuant to §402.500(a) of this title (relating to General Records Requirements). [The operator or caller shall announce to players any change to information required by paragraph (4) of this subsection.]

(i) - (m) (No change.)

(n) In order for a bingo game to qualify for the exemption in §2001.420(b)(2) of the Occupations Code, the total amount of the prize(s) to be paid for that game, as it is listed in the game schedule provided for in subsection (h)(4) of this section, must not exceed \$50. The exemption in §2001.420(b)(2) of the Occupations Code does not apply to any bingo game whose prize(s) is not properly listed on that game schedule.

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

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Bob Biard

General Counsel

Texas Lottery Commission

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For further information, please call: (512) 344-5012

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SUBCHAPTER D. LICENSING REQUIREMENTS

## 16 TAC §402.400

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.400, General Licensing Provisions. The purpose of the proposed amendments is to incorporate recent adopted amendments to another Commission rule and to remove obsolete language.

Under current §402.400(n)(3), a bingo conductor who requests a determination of eligibility status from the Commission must submit an application and a fee of \$100, which will be applied toward the conductor's license fee. This fee was set at \$100 because that was the fee for the lowest class of bingo conductor licenses. Recent amendments to §402.404, however, have raised the fee for the lowest class of bingo conductor licenses from \$100 to \$132. In order to continue having the eligibility status fee in §402.400(n)(3) mirror the fee for the lowest class of bingo conductor licenses, the Commission proposes to increase the fee to \$132. Because the entire \$132 fee will ultimately be applied toward the bingo conductor license fee that the conductor must pay, the proposed fee increase will not have an overall negative fiscal impact on bingo conductors.

In 2009, House Bill 1474 of the 81st Legislative Session was passed and signed into law. Among other things, that bill amended the Bingo Enabling Act to remove a reference to system service providers. Consequently, the Commission no longer licenses system service providers. The proposed amendment to §402.400(l) would remove a reference to system service providers as it is obsolete.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to James Person, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at [legal.input@lottery.state.tx.us](mailto:legal.input@lottery.state.tx.us). Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The amendments are proposed under §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Chapter 2001 of the Texas Occupations Code.

### §402.400 General Licensing Provisions.

(a) - (k) (No change.)

(l) Each person required to be named in an application for license under the Bingo Enabling Act other than a temporary license will have a criminal record history inquiry at state and/or national level conducted. Such inquiry may require submission of fingerprint card(s). FBI fingerprint cards are required for an individual listed in an application for a distributor[, system service provider,] or manufacturer's license and for an individual listed on an application who is not a Texas resident. A criminal record history inquiry at the state and/or national level may be conducted on the operator and officer or director required to be named in an application for a non-annual temporary license under the Bingo Enabling Act.

(m) (No change.)

(n) Eligibility determination pending identification of playing location, days, times, and starting date.

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

(3) An organization requesting a determination of eligibility status must submit with its application \$132 [~~\$100~~] to be applied towards the organization's license fee.

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

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

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Bob Biard

General Counsel

Texas Lottery Commission

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For further information, please call: (512) 344-5012



## 16 TAC §402.402

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.402 (Registry of Bingo Workers). The purpose of the proposed amendments is to implement changes to Occupations Code, Chapter 2001, made pursuant to §§18, 21, and 32 of Texas House Bill (HB) 2197, 83rd Leg., R.S. (2013). Sections 18 and 21 of HB 2197 amended Occupations Code, Chapter 2001, to change the statutory parameters governing licensure or registration following criminal conviction. Section 32 of HB 2197 amended Occupations Code, §2001.313, by authorizing the Commission to set and charge a bingo worker registration application fee. Section 45 of HB 2197 provides that not later than January 1, 2014, the Texas Lottery Commission shall adopt all rules, policies, and procedures required by the changes in law made by this Act.

Specifically, the amendments to §402.402 seek to conform the section to those changes made in HB 2197 relating to charging fees, and licensure or registration following criminal conviction. The amendments make references to implement the requirements of new Occupations Code, §2001.0541, which states the commission shall adopt rules and guidelines to comply with

Occupations Code, Chapter 53, in using criminal history information to issue or renew bingo licenses, or to list or renew bingo registry workers. HB 2197 also made changes to Occupations Code, §2001.105, limiting the statutorily-defined categories of convictions for which the Commission shall absolutely prohibit listing as a bingo registry worker.

In addition, the rule refers to application fees that the Commission may set and charge an individual seeking listing as a bingo registry worker, which are authorized under §32 of HB 2197. The Commission currently sets a bingo worker registration application fee under §402.404(m). For clarity, the Commission is proposing to move references to that fee from §402.404(m) to §402.404(l), in a separate and simultaneous proposal. To clarify a bingo registry worker's obligation to pay a registration application fee, the commission proposes additional changes referencing the fee in §402.402(c), (g), and (h). Thus, overall, this proposal attempts to harmonize various statutory changes to provide a comprehensive description of the process for the examination and listing of bingo registry workers.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Lea Burnett, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The amendments are proposed under §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction. The amendments are also proposed pursuant to new §2001.0541, which requires the Commission to adopt rules to comply with Occupations Code, Chapter 53, when using criminal history information to issue or renew a bingo license or to list or renew a bingo registry worker.

The proposed amendments implement Chapter 2001 of the Texas Occupations Code.

§402.402. *Registry of Bingo Workers.*

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

(c) Each individual must submit a completed Texas Application for Registry of Approved Bingo Workers as prescribed by the Commission and the requisite fee set in §402.404(l) of this title (relating to License and Registry Fees) to remain on the Registry of Approved Bingo Workers.

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

(g) A registered worker who fails to timely submit the prescribed form to renew listing on the registry, along with the requisite fee set in §402.404(l) of this title, may not be involved in the conduct of bingo until the individual is again added to the registry. Payment for the employment of a provisional employee as outlined in subsection (a)(8) of this section is an authorized bingo expense; however payment for non-registered workers is not an authorized bingo expense. It is the responsibility of the licensed authorized organization to review the registry to confirm that the individual's registration is current.

(h) How to be listed on the Registry of Approved Bingo Workers. For an individual to be listed on the Registry of Approved Bingo Workers, an individual must:

(1) (No change.)

(2) submit any required fee [~~for the cost of the card or form~~];

(3) (No change.)

(4) be determined by the Commission to not be ineligible under Texas Occupations Code, §2001.105(a)(6) or the Commission's Rules.

(i) - (k) (No change.)

(l) How to Obtain Additional Approved Identification Cards.

(1) A completed identification card may be obtained from the Commission by submitting [~~the required fee and submitting~~] the required form.

~~[(2) The fee for an identification card or identification card form may not exceed \$5.00.]~~

~~(2) [(3)]~~ An individual who has been approved to work in charitable bingo may complete an identification card form provided by the Commission for use while on duty. Blank identification card forms may be obtained from the Commission. The individual requesting the identification card form(s) must submit any required fee and the required form for the blank identification card form.

~~(3) [(4)]~~ The identification card prepared by the individual may only be on a prescribed Commission card form and must be legible and include the individual's name, unique registration number, and registry expiration date.

(m) - (p) (No change.)

(q) An individual who has been denied or removed from the registry because of a conviction for an offense listed under [Texas] Occupations Code, §2001.105(b), will not be eligible to [may only] reapply to be listed [ten years after the termination date of a sentence, parole, mandatory supervision, or community supervision served for the offense. Applications received earlier will not be processed]. An individual who has been denied or removed from the registry because of a disqualifying criminal conviction not listed under Occupations Code, §2001.105(b), may reapply to be listed no earlier than five years after the commission of the offense, or as otherwise allowed under the Commission's Rules regarding criminal convictions.

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

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

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Bob Biard

General Counsel

Texas Lottery Commission

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### 16 TAC §402.403, §402.411

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.403, concerning Licenses for Conduct of Bingo Occasions and to Lease Bingo Premises, and 16 TAC §402.411, concerning Late License Renewal. The purpose of the proposed amendments is to implement new §2001.061 of the Texas Occupations Code, made pursuant to §19 of Texas House Bill (HB) 2197, 83rd Leg., R.S. (2013). The amendments are also proposed to comply with §45(a) of HB 2197, which requires the Commission to adopt all necessary rules, policies, and procedures no later than January 1, 2014.

Section 2001.061 of the Texas Occupations Code requires the Commission to adopt rules governing each part of the license renewal process for all licenses issued under the Bingo Enabling Act. The legislation also requires a licensee seeking renewal to submit to the Commission the same information that is required in the initial license application. The proposed amendments fulfill these requirements. The title of §402.411 will be changed from "Late License Renewal" to "License Renewal" in order to reflect the fact that this rule will now govern all license renewals, not just late renewals. Furthermore, the amendments specify that licensees seeking a renewal must comply with the general licensing provisions found in §402.400 as if the renewal application was an initial license application. The Commission will also comply with those general licensing provisions when reviewing a renewal application.

The proposed amendments also delete §402.403(a)(3) and (4). Section 402.403(a)(3) stipulates that when a bingo conductor seeks a license renewal, that conductor need only submit additional documentation to the Commission if the Commission cannot independently verify that the conductor meets all qualifications and requirements for licensure. Section 402.403(a)(4) requires that when a bingo conductor is seeking a license renewal, that conductor must provide the Commission with copies of any changes to previously submitted organizing instruments. As previously explained in this preamble, §2001.061 of the Texas Occupations Code now requires a licensee seeking renewal to submit to the Commission up-to-date versions of the same information that is required in the initial license application. Therefore, §402.403(a)(3) and (4) are obsolete and proposed for deletion. However, in order to reduce paperwork and to lessen the impact on renewal applicants, the proposed new §402.411(k)(2) states that if any information previously submitted to the Commission with the initial license application or a previous renewal application has not changed since the information was last submitted to the Commission, the renewal applicant need not provide that

information again if the applicant certifies that no changes have been made to that specific information.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to James Person, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The amendments are proposed under: (1) §2001.061 of the Texas Occupations Code, which requires the Commission to adopt rules governing each part of the license renewal process for all licenses issued under the Bingo Enabling Act; (2) §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and (3) §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Chapter 2001 of the Texas Occupations Code.

*§402.403. Licenses for Conduct of Bingo Occasions and to Lease Bingo Premises.*

(a) License for Conduct of Bingo.

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

~~{(3) For a license renewal, additional documentation need only be submitted if the Commission is unable to independently verify the licensed authorized organization meets all qualifications and the requirements for licensure.}~~

~~{(4) For a license renewal, a licensed authorized organization must provide copies of any changes to previously submitted organizing instruments, including bylaws, constitution, charter, and articles of incorporation at the time of license renewal.}~~

(b) (No change.)

*§402.411. [Late] License Renewal.*

(a) Any license issued under the Bingo Enabling Act [A regular bingo license] expires one calendar year or two calendar years from the first date of the license period, as specified on the license.

(b) In order to renew a license issued under the Bingo Enabling Act, a licensee must timely file an application for renewal with the Commission. The renewal application must be on a form prescribed by the Commission. The Commission will not approve a renewal application until the application is complete and the licensee submits the requisite fee pursuant to §402.404 of this title (relating to License and Registry Fees). A licensee is solely responsible for the timely filing of an application for renewal of its regular license.

(c) The Commission may notify licensees regarding the expiration of their license(s) and the potential for renewal. Failure of the licensee to receive the renewal notice(s) mailed by the Commission is not a mitigating circumstance for untimely filing of a renewal application.

(d) (No change.)

(e) Notwithstanding subsection (b) of this section, if a renewal application is not timely filed, a licensee may renew their license by filing a complete application for renewal with the Commission and submitting the requisite license fee and late license renewal fee. The late license renewal fee is based on the estimated license fee for the renewal period. Penalty amounts are calculated as follows:  
Figure: 16 TAC §402.411(e) (No change.)

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

(k) To be complete, an application for renewal must contain all information that is required to be provided in or with the initial license application, as well as any other information required by the Commission.

(1) All information submitted to the Commission must be legible, correct, and complete.

(2) If any information previously submitted to the Commission with the licensee's initial license application or a previous renewal application has not changed since the information was last submitted to the Commission, the renewal applicant need not provide that information again. The applicant must certify on the renewal application that no changes have been made to the specific information since it was last submitted to the Commission.

(l)Unless otherwise provided by law or rule, the general licensing provisions in §402.400 of this title (relating to General Licensing Provisions) shall govern the license renewal process, including the submission and review of the renewal application, as if the renewal application was an initial license application.

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

Filed with the Office of the Secretary of State on September 20, 2013.

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Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5012



## 16 TAC §402.404

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.404, concerning License and Registry Fees. The purpose of the proposed amendments to

§402.404(a)(3)(B)(ii) is to bring that provision into compliance with §2001.158 of the Texas Occupations Code, to ensure the Commission can fairly and effectively regulate charitable bingo activities in Texas, and to comply with a requirement of state law that necessitates action by the Commission to effectuate the provisions of the 2014-2015 General Appropriations Act relating to funding for the Commission's Charitable Bingo Operations Division. Pursuant to §2001.034 of the Texas Government Code, the proposed amendments to §402.404(a)(3)(B)(ii) were adopted by the Commission on an emergency basis at the Commission's August 14, 2013, public meeting. The Commission now proposes those amendments for public comment and permanent adoption. The purpose of the remaining proposed amendments to §402.404 is to implement changes to Occupations Code, Chapter 2001, made pursuant to §§20, 23, 26, 29, and 31 of Texas House Bill (HB) 2197, 83rd Leg., R.S. (2013). These amendments are also proposed to comply with §45(a) of HB 2197, which requires the Commission to adopt all necessary rules, policies, and procedures no later than January 1, 2014.

Section 2001.158 of the Texas Occupations Code establishes classes of commercial lessor licenses and sets the minimum fee for each license class. The class of a license is determined by the lessor's annual gross rentals collected from bingo conductors. For example, under the statute, a licensee with annual gross rentals of not more than \$12,000 has a Class A license while a licensee with annual gross rentals of more than \$12,000 but not more than \$20,000 has a Class B license. The classes of licenses range from Class A to Class J and the amount of a license fee is dependent on the class of the license (Class A license fees being the lowest and Class J license fees being the highest).

While §2001.158 establishes the minimum fee for each license class, the statute authorizes the Commission to raise the fees to an amount reasonable to defray administrative costs. Section 2001.158 does not, however, authorize the Commission to alter the annual gross rental parameters that determine the classes of commercial lessor licenses. In recent amendments to §402.404(a)(3)(B)(ii), the Commission mistakenly and unintentionally altered the annual gross rental parameters that determine the classes of commercial lessor licenses. If this mistake is not corrected, the rule would appear to allow some commercial lessors to pay license fees that are below the minimum statutory amounts, placing §402.404(a)(3)(B)(ii) in direct conflict with §2001.158. The proposed amendments to §402.404(a)(3)(B)(ii) bring that section into compliance with §2001.158 by changing the annual gross rental parameters to match those in the statute. The proposed amendments do not alter the amount of the fees for commercial lessor licenses currently set in the rule.

As explained in recent rulemaking actions involving §402.404, see July 26, 2013, and May 24, 2013, issues of the *Texas Register* (38 TexReg 4744 and 3235), the final General Appropriations Act passed by the 83rd Legislature and signed by the governor included a provision making appropriations to the Commission to fund the restoration of employees to the Commission's Charitable Bingo Operations Division contingent on the Commission assessing or increasing fees sufficient to generate a specified amount of revenue. If §402.404(a)(3)(B)(ii) is not amended, the Commission may fail to raise the requisite revenue required by the General Appropriations Act. Should that occur, and the employees not be restored to the Charitable Bingo Operations Division, the Commission's ability to fairly enforce all bingo related statutes and regulations, to determine all pro-

ceeds derived from bingo are used for an authorized purpose, and to ultimately maintain the integrity of charitable bingo activities throughout the State of Texas, may be compromised. See Sunset Advisory Commission, *Texas Lottery Commission: Report to the 83rd Legislature* at 107-108 (February 2013) ("The ability of the agency's Charitable Bingo Operations Division to prevent theft and fraud in the \$700 million-per-year bingo industry is severely hindered by insufficient funding and an inefficient audit and inspection process.").

Viewed in isolation, the proposed amendments to §402.404(a)(3)(B)(ii) would appear to have a negative fiscal impact on some commercial lessors. The proposed rule amendments give the impression that some commercial lessors may be required to pay for a higher license class than they would under the current rule language. For example, under the current rule language, a commercial lessor with annual gross rentals of \$15,000 would pay a Class A license fee of \$132. But under the proposed rule amendments, that same lessor would pay a Class B license fee of \$264. However, when current §402.404(a)(3)(B)(ii) is read together with §2001.158 of the Texas Occupations Code, the conflict between the current rule and statute is apparent. An administrative rule is invalid if it conflicts with a statute. See *CenterPoint Energy, Inc. v. Public Util. Comm'n*, 143 S.W.3d 81, 85 (Tex. 2004) (observing that an administrative rule is invalid if it violates statutory provision); Tex. Att'y Gen. Op. No. GA-649 (2008) ("an administrative agency may not adopt a rule that is inconsistent with the statute"). Therefore, because the statutory parameters that determine the class of commercial lessor licenses would control over the current parameters found in the rule, the commercial lessor in our scenario would pay for a Class B license regardless of the current rule language indicating otherwise. The amendments to §402.404(a)(3)(B)(ii) would not have a negative fiscal impact because they are merely incorporating statutory parameters that would have applied regardless of the rule's current language. Furthermore, when the commercial lessor license fees were raised to their current levels by rule, the Commission made it clear that *all* commercial lessor license fees were being raised 32%. See 38 TexReg 4744 and 3235. The Commission provided a thorough fiscal impact statement when proposing the fee increase. The commercial lessors were on notice of that fee increase, yet if the current parameters in the rule prevailed, some lessors' fees would actually be lowered. This contradiction highlights the conflict between the statute and rule and supports the Commission's conclusion that the proposed amendments would not have a negative fiscal impact.

Previously, §2001.104 and §2001.158 of the Texas Occupations Code permitted applicants for a two-year bingo conductor or commercial lessor license to pay the requisite license fee in two annual installments. With the passage of House Bill 2197, applicants for a two-year license must pay the requisite fee for both years upon submission of the license application. The proposed amendments to §402.404(d)(3) and §402.404(e) and (g) reflect that statutory change. However, current rule language in §402.404(e) concerning the payment of two-year license fees in annual installments must remain in effect in order to govern those two-year licenses issued before September 1, 2013, which is the effective date of the relevant statutory amendments.

Previously, §2001.205 of the Texas Occupations Code set the annual manufacturer license fee at \$3,000, while §2001.209 set the annual distributor license fee at \$1,000. With the passage of House Bill 2197, the annual fees for manufacturer and distributor licenses will now be set by the Commission in an amount

reasonable to defray administrative costs. The proposed new §402.404(a)(3)(C) and (D) will keep the annual fee rate for manufacturer licenses at \$3,000 and the annual fee rate for distributor licenses at \$1,000. The Commission has determined that those fee rates are reasonable to defray current administrative costs. As previously explained in recent rulemaking actions involving §402.404, see 38 TexReg 4744 and 3235, the final General Appropriations Act passed by the 83rd Legislature and signed by the governor included a provision making appropriations to the Commission to fund the restoration of employees to the Commission's Charitable Bingo Operations Division contingent on the Commission assessing or increasing fees sufficient to generate a specified amount of revenue. However, any revenue generated from manufacturer and distributor license fees cannot be counted toward the amount of revenue that must be raised by the Commission in order to receive appropriations for the employee restoration. As written, the General Appropriations Act only allows the Commission to raise the requisite revenue from Object Code 3152, which does not include fees for manufacturer and distributor licenses. In the next budget cycle, the Commission anticipates working with representatives of the bingo community to request that the legislature allow manufacturer and distributor license fees to be counted toward the amount of revenue that must be raised by the Commission in order to receive appropriations to continue funding the restored employees. If that request is successful, the Commission may subsequently raise the annual fees for manufacturer and distributor licenses and lower the annual fees for bingo conductor and commercial lessor licenses so that manufacturers and distributors can share in the cost of funding the regulation and administration of bingo.

Current §402.404(k) states that a licensed bingo conductor must pay a \$10 fee when the conductor notifies the Commission of a change to the time or date of a bingo game. That rule was in compliance with §2001.306 of the Texas Occupations Code, which had set the fee to amend a license issued under the Bingo Enabling Act at \$10. However, House Bill 2197 amended §2001.306 to allow the Commission to determine the amount of license amendment fees. In a simultaneous rulemaking action, the Commission is proposing amendments to §402.410 to set the amount of license amendment fees. The proposed amendments to §402.410 will render §402.404(k) obsolete. Therefore, the Commission proposes to delete current §402.404(k).

Under current §402.404(d)(4) and (e)(2), the fee to renew a license in administrative hold and the license fee for the second year of a two-year license in administrative hold are both \$100. These fees were set at a \$100 because that was the fee for the lowest class of bingo conductor and commercial lessor licenses. Recent amendments to §402.404, however, have raised the fee for the lowest class of bingo conductor and commercial lessor licenses from \$100 to \$132. Therefore, in order to continue having the fee to renew a license in administrative hold and the license fee for the second year of a two-year license in administrative hold mirror the fee for the lowest class of bingo conductor and commercial lessor licenses, the Commission proposes to increase the fees in current §402.404(d)(4) and (e)(2) to \$132. This fee increase is necessary in order for the Commission to raise a sufficient amount of revenue so that the employees may be restored to the Charitable Bingo Operations Division. Furthermore, the fee increase is minimal and will not significantly impact licensees. For example, as previously explained in this preamble, applicants for a two-year license issued on or after September 1, 2013, must now pay the full license fee for both years upon submission of the license application. Therefore, the

fee increase proposed in §402.404(e)(2) will only affect a small number of licensees with a two-year license on administrative hold that was issued before September 1, 2013.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be minimal economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to James Person, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The amendments are proposed under §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Chapter 2001 of the Texas Occupations Code.

*§402.404. License and Registry Fees.*

(a) Definitions.

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

(3) Regular License Fee Amount:

(A) (No change.)

(B) Commercial Lessor License:

(i) (No change.)

(ii) The annual fee for a commercial lessor license that becomes effective on or after September 1, 2013 shall be as follows:

(I) Class A (annual gross rentals from licensed organizations of not more than \$12,000 [~~of \$25,000 or less~~]) - \$132;

(II) Class B (annual gross rentals from licensed organizations of more than \$12,000 [~~\$25,000~~] but not more than \$20,000 [~~\$50,000~~]) - \$264;

(III) Class C (annual gross rentals from licensed organizations of more than \$20,000 [~~\$50,000~~] but not more than \$30,000 [~~\$75,000~~]) - \$396;

(IV) Class D (annual gross rentals from licensed organizations of more than \$30,000 [~~\$75,000~~] but not more than \$40,000 [~~\$100,000~~]) - \$528;

(V) Class E (annual gross rentals from licensed organizations of more than \$40,000 [~~\$100,000~~] but not more than \$50,000 [~~\$150,000~~]) - \$792;

(VI) Class F (annual gross rentals from licensed organizations of more than \$50,000 [~~\$150,000~~] but not more than \$60,000 [~~\$200,000~~]) - \$1,188;

(VII) Class G (annual gross rentals from licensed organizations of more than \$60,000 [~~\$200,000~~] but not more than \$70,000 [~~\$250,000~~]) - \$1,584;

(VIII) Class H (annual gross rentals from licensed organizations of more than \$70,000 [~~\$250,000~~] but not more than \$80,000 [~~\$300,000~~]) - \$1,980;

(IX) Class I (annual gross rentals from licensed organizations of more than \$80,000 [~~\$300,000~~] but not more than \$90,000 [~~\$400,000~~]) - \$2,640;

(X) Class J (annual gross rentals from licensed organizations of more than \$90,000 [~~\$400,000~~]) - \$3,300.

(C) Manufacturer's License. The annual fee for a manufacturer's license shall be \$3,000.

(D) Distributor's License. The annual fee for a distributor's license shall be \$1,000.

(b) (No change.)

(c) Changes Within Six Months of a Licensed Authorized Organization's [the] License Term.

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

(d) License Renewal Fee.

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

~~{(3) If the recalculated license fee amount calculation for the first year of a two year license reflects an underpayment of license fee amount for the first year, the incremental difference must be submitted by the organization within 30 days of the first anniversary of the date the license became effective.}~~

(3) [(4)] Upon written request by an organization to renew its license to conduct bingo or license to lease bingo premises that is in administrative hold, the organization may submit a renewal fee of \$132 [~~\$100~~] in lieu of the recalculated fee amount from the preceding license period.

(4) [(5)] The Commission may require an amount of license fee in addition to the recalculated fee at renewal if there is a change in:

(A) playing location;

(B) rental amount per occasion; or

(C) increase in the number of occasions bingo is conducted.

(5) [(6)] If an organization requests its license be placed in administrative hold upon the renewal of the license and submits an estimated Class A license fee, the Commission may require an organization to submit an additional license fee when it files an application to amend a license to conduct charitable bingo if the organization amends its license to begin conducting bingo within the first six months of the license term.

(6) [(7)] If a commercial lessor or a licensed authorized [an] organization which leases bingo premises requests its license be placed in administrative hold upon the renewal of its lessor license and submits an estimated Class A license fee, the Commission may require the commercial lessor or licensed authorized [an] organization to submit an additional license fee when it files the application to amend a commercial license to lease bingo premises if the commercial lessor or licensed authorized organization amends its license to begin leasing bingo premises within the first six months of the license term.

(e) Two-Year License Fee Payments.

(1) An applicant for a license issued under the Bingo Enabling Act that is effective for two years must pay an amount equal to two times the amount of the annual license fee, as set in §402.404(a)(3).

(2) Two-Year License to Conduct Bingo or to Lease Bingo Premises Issued Before September 1, 2013:

(A) [(H)] To be timely received, the full license fee payment for the second year of a two year license must be postmarked no later than the first anniversary of the date the license became effective. A license fee payment bearing no legible postmark, postal meter date, or date of delivery to the common carrier may be considered to have been sent seven calendar days before receipt by the Agency, or on the date of the check, if the check date is less than seven days earlier than date of receipt. If the first anniversary of the date the license became effective falls on a Saturday, Sunday, or legal holiday, the payment will be due the next day which is not a Saturday, Sunday, or legal holiday.

(B) [(2)] An organization that places its license on administrative hold during the first year of a two year license period and elected to pay the second year by the first anniversary of the license effective date may pay an estimated license fee of §132 [~~§100~~] for the second year of the license period.

(C) [(3)] If the first anniversary of the date a two-year license became effective falls on or after September 1, 2013, the fee amount due for the second year of that license will be the amount set in §402.404(a)(3)(A)(ii) or §402.404(a)(3)(B)(ii).

(f) (No change.)

(g) Overpayment of License Fee.

(1) An overpayment of a regular license fee based on the previous license period's recalculation is a credit and shall be applied to the license renewal license fee for the next license period [~~or the second year of a two year license, as applicable~~].

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

(h) - (j) (No change.)

[(k) An organization must submit a fee of \$10.00 to the Commission at the time the licensed organization notifies the Commission of a change in the time or date of a game for a regular license to conduct bingo.]

(k) [(H)] Temporary Authorization to Conduct Bingo.

(1) The amount of gross receipts collected in connection with a temporary authorization is used to recalculate the regular license fee.

(2) An organization conducting bingo pursuant to a temporary authorization must comply with the same statutory and administrative rule requirements, annual gross receipts fee schedule, and quarterly return filing requirements as an organization which has a regular license to conduct bingo.

(3) If an organization conducting bingo pursuant to a temporary authorization does not become licensed to conduct bingo, the fee for the temporary authorization will be determined by the fee schedule for a license to conduct bingo set out in Occupations Code, §2001.104(a).

(l) [(m)] Registry of Approved Bingo Workers. A fee of \$25 must accompany each Texas Application for Registry of Approved Bingo Workers, and each application to renew listing on the registry, submitted to the Commission on or after September 1, 2013. The Commission will not consider or act upon an application until the requisite fee is paid.

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 20, 2013.

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Bob Biard

General Counsel

Texas Lottery Commission

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For further information, please call: (512) 344-5012



### 16 TAC §402.410

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.410, concerning Amendment of a License - General Provisions. The purpose of the proposed amendments is to implement changes to §2001.306 of the Texas Occupations Code, made pursuant to §31 of Texas House Bill (HB) 2197, 83rd Leg., R.S. (2013). The amendments are also proposed to comply with §45(a) of HB 2197, which requires the Commission to adopt all necessary rules, policies, and procedures no later than January 1, 2014.

Previously, under §2001.306 of the Texas Occupations Code, the fee to amend a license issued under the Bingo Enabling Act was set at \$10. With the passage of HB 2197, §2001.306 of the Texas Occupations Code now requires the Commission to set the amount of a fee to amend a license issued under the Bingo Enabling Act. The proposed amendments would keep the license amendment fee at \$10.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission Rules.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to James Person, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at [legal.input@lottery.state.tx.us](mailto:legal.input@lottery.state.tx.us). Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The amendments are proposed under: (1) §2001.306 of the Texas Occupations Code, which requires the Commission to set the amount of a fee to amend a license issued under the Bingo Enabling Act; (2) §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and (3) §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Chapter 2001 of the Texas Occupations Code.

*§402.410. Amendment of a License - General Provisions.*

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

(e) The fee to amend any license issued under the Bingo Enabling Act shall be \$10.

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 20, 2013.

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Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5012



**16 TAC §402.420**

The Texas Lottery Commission (Commission) proposes amendments to 16 TAC §402.420, concerning Qualifications and Requirements for Conductor's License. The purpose of the proposed amendments is to implement changes to Occupations Code, Chapter 2001, made pursuant to Sections 18 and 21 of Texas House Bill (HB) 2197, 83rd Leg., R.S. (2013). Section 18 of HB 2197 requires that the Commission adopt rules to comply with Occupations Code, Chapter 53, related to using criminal history information to issue or renew bingo licenses or to list or renew bingo registry workers. Section 21 of HB 2197 amended Occupations Code, §2001.105, by altering the language that defines the ability of an individual, or an entity involved with the individual, to apply for a new or renewal license following a criminal conviction. Section 45 of HB 2197 provides that not later than January 1, 2014, the Texas Lottery Commission shall adopt all rules, policies, and procedures required by the changes in law made by this Act.

Specifically, the proposed amendments remove references to crimes of moral turpitude and seek to align the section with new

statutory parameters governing licensure following criminal conviction.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit is more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to Lea Burnett, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at [legal.input@lottery.state.tx.us](mailto:legal.input@lottery.state.tx.us). Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The amendments are proposed under §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction. The amendments are also proposed pursuant to new §2001.0541, which requires the Commission to adopt rules to comply with Occupations Code, Chapter 53, when using criminal history information to issue or renew a bingo license or to list or renew a bingo registry worker.

The proposed amendments implement Chapter 2001, Occupations Code.

*§402.420. Qualifications and Requirements for Conductor's License.*

An applicant must provide with its application documentation demonstrating that it meets all qualifications and requirements for a license to conduct bingo based on the type of organization it is. The qualifications, requirements, and necessary documentation for different types of organizations are shown in the chart below.

Figure: 16 TAC §402.420

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

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Bob Biard  
General Counsel  
Texas Lottery Commission  
Earliest possible date of adoption: November 3, 2013  
For further information, please call: (512) 344-5012



## SUBCHAPTER G. COMPLIANCE AND ENFORCEMENT

### 16 TAC §402.700

The Texas Lottery Commission (Commission) proposes amendments to §402.700, concerning Denials; Suspensions; Revocations; Hearings. The purpose of the proposed amendments is to implement changes to §2001.355 of the Texas Occupations Code, made pursuant to §36 of Tex. H.B. 2197, 83rd Leg., R.S. (2013). The amendments are also proposed to comply with §45(a) of H.B. 2197, which requires the Commission to adopt all necessary rules, policies, and procedures no later than January 1, 2014.

Section 2001.355 of the Texas Occupations Code authorizes the Commission to temporarily suspend a license issued under the Bingo Enabling Act for failure to comply with the Bingo Enabling Act or the Charitable Bingo Administrative Rules. Section 2001.355 also requires the Commission to adopt rules to govern the temporary suspension of a license. Current Commission rule §402.700 satisfies this statutory requirement. The proposed rule amendments are only intended to clarify that the rule applies to temporary suspensions.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed amendments. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the amendments as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed amendments will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed amendments will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the proposed amendments from any interested person. Comments on the proposed amendments may be submitted to James Person, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The amendments are proposed under: (1) §2001.355 of the Texas Occupations Code, which requires the Commission to adopt rules to govern the temporary suspension of a license; (2) §2001.054 of the Texas Occupations Code, which authorizes

the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and (3) §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed amendments implement Chapter 2001 of the Texas Occupations Code.

§402.700. *Denials; Suspensions; Revocations; Hearings.*

(a) Denial of application. If the Director of the Charitable Bingo Operations Division determines that an applicant is not eligible for a license on statutory or regulatory grounds, or that the license should be denied on statutory or regulatory grounds which would justify temporary suspension or revocation of an existing license, he/she will notify the applicant in writing that the application has been denied and will state such grounds for the denial. If the applicant desires to contest the denial, the applicant must, within 30 days of the date of the notice of denial, make a written request for a hearing to contest the denial.

(b) Suspension and revocation.

(1) Grounds. The Commission may temporarily suspend or revoke a license or temporary authorization in accordance with the Bingo Enabling Act, §2001.355. If the Commission proposes to revoke or suspend a license it will notify the licensee in writing and will state the grounds for the proposed action.

(2) Temporary [Summary] suspension. Grounds for temporary [summary] suspension of licenses, provisions for service of notice to licensees and show-cause hearings, and the time period for requesting final hearings on suspension or revocation of licenses, and other related matters are contained in the Bingo Enabling Act.

(c) Hearings.

(1) (No change.)

(2) After a hearing on the alleged violation and upon finding that a violation did occur, the Commission may temporarily suspend a license or temporary authorization for a period not to exceed one year or may revoke a license or temporary authorization. The period of a suspension begins on the date of the order invoking the suspension, or the date of the order overruling the motion for rehearing, if one was filed.

(3) (No change.)

(d) (No change.)

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

Filed with the Office of the Secretary of State on September 30, 2013.

TRD-201304137

Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5012



### 16 TAC §402.702

The Texas Lottery Commission (Commission) proposes new rule §402.702, concerning Disqualifying Convictions. The purpose

of the new rule is to implement changes to Occupations Code, Chapter 2001, made pursuant to §§18, 21, 22, 24, 25, 27, 28, and 38 of Tex. H.B. 2197, 83rd Leg., R.S. (2013). Section 18 of H.B. 2197 amended Occupations Code, Chapter 2001, by adding new §2001.0541, concerning Rules on Consequences of Criminal Convictions. The remainder of the listed sections made amendments to the Bingo Enabling Act that change the parameters for which applicants under the Act are automatically deemed ineligible for a license. Occupations Code, Chapter 2001, previously deemed any applicant or potential Bingo Registry Worker ineligible if such person or entity had been convicted of a felony, gambling offense, criminal fraud, or a crime of moral turpitude if less than ten years had elapsed since the termination of punishment. The legislature amended those statutory provisions, such that the only categories of absolute prohibition for listing or licensing are individuals convicted of gambling, gambling-related offenses, or criminal fraud. Section 45 of H.B. 2197 provides that not later than January 1, 2014, the Texas Lottery Commission shall adopt all rules, policies, and procedures required by the changes in law made by this Act.

Specifically, the proposed new rule implements the requirements under Occupations Code, §2001.0541, which states the commission shall adopt rules and guidelines that comply with Occupations Code, Chapter 53, in using criminal history information to issue or renew Bingo licenses, or to list or renew Bingo Registry Workers. Also, it incorporates the changes made to the Bingo Enabling Act that limit the statutorily defined categories of convictions for which the Commission shall absolutely prohibit licensure or listing. The proposed new rule attempts to harmonize the statutory changes and provide a comprehensive process for the examination of those applicants and potential Bingo Registry Workers.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed new rule may be submitted to Lea Burnett, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The new rule is proposed under §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act, and under §467.102 of the Texas Government Code, which authorizes the

Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction. The rule is also proposed pursuant to new §2001.0541, which requires the Commission to adopt rules to comply with Occupations Code, Chapter 53, when using criminal history information to issue or renew a bingo license or to list or renew a bingo registry worker.

The proposed new rule implements Chapter 2001 of the Texas Occupations Code.

§402.702. Disqualifying Convictions.

(a) The Commission shall determine, consistent with the requirements of Chapters 53 and 2001, Occupations Code, whether criminal convictions affect the eligibility of an applicant for a new or renewal license under the Bingo Enabling Act.

(b) If an individual applicant, bingo registry worker, or the director, officer, or operator of an applicant organization has been convicted of gambling, a gambling-related offense, or criminal fraud, then the individual, worker, or organization will not be eligible for a new or renewal license under the Bingo Enabling Act, or to be listed in the Registry of Bingo Workers.

(1) The Commission deems any gambling or gambling-related offense to be those offenses including, but not limited to, any offense listed in Penal Code, Chapter 47, Gambling.

(2) The Commission deems any offense involving criminal fraud to be those offenses including, but not limited to, any offense listed in:

(A) Penal Code, Chapter 32, Fraud;

(B) Penal Code, Chapter 33A, Telecommunications

Crimes;

(C) Penal Code, Chapter 35, Insurance Fraud; or

(D) Penal Code, Chapter 35A, Medicaid Fraud.

(c) For criminal convictions that do not fall under the categories addressed in subsection (b) of this section, the Commission may determine an applicant to be ineligible for a new or renewal license or a registry listing request based on criminal conviction if:

(1) an offense is directly relating to the duties and responsibilities of the new or renewal license the applicant seeks;

(2) the offense was committed less than five years before the date of application; or

(3) the offense falls under §3g, Article 42.12, or, Article 62.001 of the Code of Criminal Procedure.

(d) For criminal convictions that do not fall under subsection (b) or (c) of this section, and for other offenses, such as those offenses for which a person pleaded nolo contendere, or received deferred adjudication and court supervision, the Commission may apply the requirements of Chapter 53, Occupations Code, to determine whether the applicant is not eligible for a new or renewal license, or registry listing, under the Bingo Enabling Act.

(e) Because the Commission is tasked with regulating the conduct of Charitable Bingo to ensure that the funds raised during Bingo events reach the charities to which they are pledged, the Commission finds that convictions for offenses that call into question an applicant's honesty, integrity, or trustworthiness in handling funds or dealing with the public will directly affect the duties and responsibilities of licensees, or registered bingo workers, under the Bingo Enabling Act, triggering greater scrutiny during the licensing or listing process. Thus, the Commission deems certain misdemeanor and felony offenses

or other acts will directly relate to the fitness of a new or renewal applicant for a license or registry listing under this Chapter; these include but are not limited to:

- (1) Penal Code, §25.07, Violation of Certain Court Orders or Conditions of Bond in a Family Violence Case;
- (2) Penal Code, Chapter 30, Burglary and Criminal Trespass;
- (3) Penal Code, Chapter 31, Theft;
- (4) Penal Code, Chapter 33, Computer Crimes;
- (5) Penal Code, Chapter 34, Money Laundering;
- (6) Penal Code, Chapter 36, Bribery and Corrupt Influence;
- (7) Penal Code, Chapter 37, Perjury and Other Falsification;
- (8) Penal Code, Chapter 39, Abuse of Office;
- (9) Penal Code, Chapter 71, Organized Crime; or
- (10) any prohibited act under Government Code, Chapters 466 or 467; or Occupations Code, Chapter 2001.

(f) In determining whether a criminal conviction directly relates to the duties and responsibilities of the license or listing, the following factors will be considered:

- (1) the nature and seriousness of the crime;
- (2) the relationship of the crime to the purposes for which the individual seeks to engage in the regulated conduct;
- (3) the extent to which the regulated conduct might offer an opportunity to engage in further criminal activity of the same type as the previous conviction;
- (4) the relationship of the conviction to the capacity required to perform the regulated conduct; and
- (5) any other factors under appropriate under Chapters 53 or 2001, Occupations Code.

(g) Upon the Commission's determination that an applicant is not eligible for a new or renewal license or registry listing because of a disqualifying criminal conviction or other criminal offense, the Commission shall take action authorized by statute or Commission rule.

(h) Denials or suspensions of new or renewal applications under this section may be contested pursuant to §402.700 of this chapter (relating to Denials; Suspensions; Revocations; Hearings).

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

Filed with the Office of the Secretary of State on September 20, 2013.

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Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5012



**16 TAC §402.703**

The Texas Lottery Commission (Commission) proposes new rule §402.703, concerning Audit Policy. The purpose of the proposed new rule is to implement changes to §2001.560 of the Texas Occupations Code, made pursuant to §40 of Tex. H.B. 2197, 83rd Leg., R.S. (2013). The new rule is also proposed to comply with §45(a) of H.B. 2197, which requires the Commission to adopt all necessary rules, policies, and procedures no later than January 1, 2014.

Section 2001.560 of the Texas Occupations Code was amended to require the Commission to develop a policy for auditing licensees under the Bingo Enabling Act. The statute requires the Commission to use audit risk analysis procedures to identify which licensees are most at risk of violating the Bingo Enabling Act or the Commissions rules. The Commission must also use the same audit risk analysis procedures to develop a plan for auditing the identified licensees. The proposed new rule is the Commissions policy for auditing license holders. The proposed new rule outlines the Commissions authority to initiate audits and how licensees will be selected for audit. The proposed new rule also specifies how selected licensees will be notified of an audit, how the Commission will conduct audit entrance and exit conferences, and how the Commission will issue audit reports. The proposed new rule also states that the Commission may invoice a licensee for any cost related to an audit of that licensee that was incurred by the Commission, which is authorized under §2001.560(d) of the Texas Occupations Code.

Kathy Pyka, Controller, has determined that for each year of the first five years the proposed new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the proposed new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the proposed new rule will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the proposed new rule will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed new rule may be submitted to James Person, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The new rule is proposed under: (1) §2001.560 of the Texas Occupations Code, which requires the Commission to develop a policy for auditing licensees under the Bingo Enabling Act; (2) §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and (3) §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The proposed new rule implements Chapter 2001 of the Texas Occupations Code.

§402.703. Audit Policy.

(a) Definitions.

(1) Audit--The formal examination of a licensee's accounts, records, and/or business activities by designated employees or representatives of the Commission.

(2) Audit fieldwork--Includes, but is not limited to, the physical inspection of bingo premises, the observation of a bingo game, the inquiry of management and staff, the review of financial accounts, records or business processes, the assessment of the adequacy of any internal controls, or any other activity necessary to meet audit objectives.

(3) Licensee--Includes any individual, partnership, corporation, group, or entity licensed under the Bingo Enabling Act and any group of licensed authorized organizations operating under a unit agreement.

(b) Audit Determination.

(1) In order to determine whether a licensee is, has been, and/or will remain in compliance with the Bingo Enabling Act or the Charitable Bingo Administrative Rules, the Commission may audit the licensee at any time.

(2) Those licensees who are most at risk of violating the Bingo Enabling Act or the Charitable Bingo Administrative Rules will be identified and selected for audit based on risk factors established by the Commission. Risk factors may be based on, among other things, a licensee's gross receipts, gross rentals, bingo expenses, net proceeds, and/or charitable distributions, or the number or severity of complaints made against the licensee.

(3) Notwithstanding paragraph (2) of this subsection, the Commission may audit any licensee if the Commission reasonably believes the licensee may violate, or may have violated, the Bingo Enabling Act or the Charitable Bingo Administrative Rules.

(c) Notification.

(1) If a licensee is selected for an audit pursuant to subsection (b) of this section, a Commission auditor will so notify that licensee's bingo chairperson, director, business contact, officer, unit manager, or designated agent in writing. The written notification constitutes the beginning of the audit.

(2) The written notification will identify the time period to be audited and any records or other information that must be made available for Commission review. Various forms, including questionnaires and physical inventory requests, may be included with the written notification. Licensees must complete any forms in the manner, and in the time period, specified by the Commission.

(d) Entrance Conference.

(1) Within ten (10) calendar days of sending the written notification under subsection (c) of this section, an auditor will attempt to contact the selected licensee's bingo chairperson, director, business contact, officer, unit manager, or designated agent to schedule an audit entrance conference. Unless otherwise provided by the Commission, the audit entrance conference will be held within fourteen (14) calendar days from the auditor's contact with the licensee. The licensee may submit a written request to the Commission to delay the audit entrance conference. The written request must include the reasons for the requested delay. After reviewing a properly submitted written request to delay, the Commission may either approve or deny the request or notify

the licensee that additional information is needed before a decision is made. If the Commission and licensee are unable to agree on the date, time, and place of the audit entrance conference, or if the Commission auditor is unable to contact the licensee's bingo chairperson, director, business contact, officer, unit manager, or designated agent, the auditor shall schedule the audit entrance conference and send the licensee written notice of that fact at least ten (10) calendar days prior to the scheduled audit entrance conference.

(2) The purpose of an audit entrance conference is to allow the auditor(s) to meet with the selected licensee's bingo chairperson, director, business contact, officer, unit manager, or designated agent to collect any records or other information identified in the written notification under subsection (c) of this section, to discuss the audit process, and to answer any questions the licensee may have regarding the audit. There is no standard timeline by which an audit will be completed, but an audit must be completed by the fifth anniversary of the date the licensee was identified and selected for audit.

(3) The Commission may require the attendance at the audit entrance conference of any person familiar with the licensee's operations. If any required attendees fail to attend the audit entrance conference, the Commission may impose sanctions against the licensee or absent attendees. In addition to any required attendees, the licensee may allow any other individuals to attend the audit entrance conference.

(e) Audit Fieldwork. Any time after the conclusion of the audit entrance conference, the auditor(s) may initiate the audit fieldwork at a location designated by the auditor(s). When conducting audit fieldwork, the auditor(s), at their discretion, may use a detailed auditing procedure or a sample and projection auditing method. A sample and projection auditing method may include, but is not limited to, manual sampling techniques, computer-assisted audit techniques, analytical procedures, financial projections, and auditor recompilation from reliable independent sources.

(f) Exit Conference.

(1) Any time after the completion of the audit fieldwork, an auditor will attempt to contact the selected licensee's bingo chairperson, director, business contact, officer, unit manager, or designated agent to schedule an audit exit conference. If the auditor and licensee are unable to agree on the date, time, and place of the audit exit conference, or if the auditor is unable to contact the licensee's bingo chairperson, director, business contact, officer, unit manager, or designated agent, the auditor shall schedule the audit exit conference and send the licensee written notice of that fact at least ten (10) calendar days prior to the scheduled audit exit conference.

(2) The purpose of an audit exit conference is to allow the auditor(s) to meet with the selected licensee's bingo chairperson, director, business contact, officer, unit manager, or designated agent to discuss the results of the audit and the draft audit report.

(3) The Commission may require the attendance at the audit exit conference of any person familiar with the licensee's operations. If any required attendees fail to attend the audit exit conference, the Commission may impose sanctions against the licensee or absent attendees. In addition to the required attendees, the licensee may allow any other individuals to attend the audit exit conference.

(g) Audit Report.

(1) Upon completion of the audit, the auditor(s) will prepare a draft audit report containing their findings and conclusions. A copy of the draft audit report will be provided to the licensee at the audit exit conference.

(2) A licensee may, but is not required to, respond to the draft audit report by providing written comments and any supporting documentation to the auditor(s) within twenty (20) calendar days of receiving the draft audit report. Written comments should include a statement of agreement or disagreement with the draft audit report findings and, if applicable, a list of any corrective measures that will be taken to ensure compliance with the Bingo Enabling Act and Charitable Bingo Administrative Rules. Any properly submitted comments and supporting documents will be reviewed by the auditor(s) and placed in the final audit report. The auditor(s) may revise the draft audit report in response to any properly submitted comments or supporting documents.

(3) Any time after the twenty (20) calendar day deadline, the auditor(s) may issue the final audit report. A copy of the report will be provided to the licensee.

(h) The Commission may invoice a licensee for any cost related to an audit of that licensee that was incurred by the Commission, including travel costs, audit and investigation time, and supplies.

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 20, 2013.

TRD-201304139

Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5012



### 16 TAC §402.705

The Texas Lottery Commission (Commission) proposes new rule §402.705, concerning Inspection of Premises. The purpose of the proposed new rule is to implement changes to §2001.557 of the Texas Occupations Code, made pursuant to §39 of Tex. H.B. 2197, 83rd Leg., R.S. (2013). The new rule is also proposed to comply with § 45(a) of H.B. 2197, which requires the Commission to adopt all necessary rules, policies, and procedures no later than January 1, 2014.

Section 2001.557 of the Texas Occupations Code requires the Commission by rule to develop and implement policies and procedures related to the inspection of premises where bingo is being conducted or intended to be conducted, or where equipment used or intended for use in bingo is found. The proposed new rule would satisfy this requirement by outlining the Commission's authority to inspect premises and list some of the factors that the Commission will use to determine the priority of inspections.

Kathy Pyka, Controller, has determined that for each year of the first five years the new rule will be in effect, there will be no significant fiscal impact for state or local governments as a result of the new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic cost to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in §2006.001(2) of the Texas Government Code.

Sandra Joseph, Director of the Charitable Bingo Operations Division, has determined that for each year of the first five years the new rule will be in effect, the anticipated public benefit is the more efficient regulation of charitable bingo and increased compliance with the Bingo Enabling Act and Commission rules.

The Commission requests comments on the new rule from any interested person. Comments on the new rule may be submitted to James Person, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered. The Commission will hold a public hearing on this proposal at 10:00 a.m. on Wednesday, October 16, 2013, at 611 E. 6th Street, Austin, Texas 78701.

The new rule is proposed under: (1) §2001.557 of the Texas Occupations Code, which requires the Commission by rule to develop and implement policies and procedures related to the inspection of premises; (2) §2001.054 of the Texas Occupations Code, which authorizes the Commission to adopt rules to enforce and administer the Bingo Enabling Act; and (3) §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of this chapter and the laws under the Commission's jurisdiction.

The new rule implements Chapter 2001 of the Texas Occupations Code.

#### §402.705. Inspection of Premises.

(a) The Commission may conduct inspections of premises where bingo is being conducted or is intended to be conducted, or where equipment used or intended for use in bingo is found. The Commission will prioritize premises inspections based on risk factors the Commission considers important, including the following:

(1) the amount of money derived from the conduct of bingo and/or the use of bingo equipment at the premises;

(2) the compliance history of the premises;

(3) the amount of time that has elapsed since the last Commission inspection of that premises; and

(4) the number or severity of complaints from members of the public or governmental entities against the premises.

(b) Notwithstanding subsection (a) of this section, the Commission may inspect any premises where bingo is being conducted or is intended to be conducted, or where equipment used or intended for use in bingo is found, if the Commission reasonably believes a violation of the Bingo Enabling Act or this chapter may occur or may have occurred.

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 20, 2013.

TRD-201304140

Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5012

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CHAPTER 403. GENERAL ADMINISTRATION

16 TAC §403.115

The Texas Lottery Commission (Commission) proposes new rule §403.115, concerning Negotiated Rulemaking and Alternative Dispute Resolution. The purpose of the proposed new rule is to implement changes to Texas Government Code Chapter 467, made pursuant to §17 of Tex. H.B. 2197, 83rd Leg., R.S. (2013). Specifically, §17 of H.B. 2197 amended Government Code, Chapter 467, by adding new §467.109 Negotiated Rulemaking and Alternative Dispute Resolution Policy, which requires the Commission to develop and implement a policy to encourage the use of both negotiated rulemaking and appropriate alternative dispute resolution. Proposed new rule §403.115, therefore, provides for a framework by which negotiated rulemaking and alternative dispute resolution may be undertaken by the Commission. Section 45 of H.B. 2197 provides that not later than January 1, 2014, the Texas Lottery Commission shall adopt all rules, policies, and procedures required by the changes in law made by this Act.

Kathy Pyka, Controller, has determined that for each year of the first five years the new rule will be in effect, there are no foreseeable implications related to cost or revenues to the state as a result of the proposed new rule. There will be no adverse effect on small businesses, micro businesses, or local or state employment. There will be no additional economic costs to persons required to comply with the new rule as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Bob Biard, General Counsel, has determined that for each year of the first five years the new rule will be in effect, the anticipated public benefit will be to improve rulemaking and dispute resolution at the Commission through more open, inclusive, conciliatory, and effective processes designed to build consensus.

The Commission requests comments on the new rule from any interested person. Comments on the new rule may be submitted to Deanne Rienstra, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us. Comments must be received within 30 days after publication of this proposal in order to be considered.

The new rule is proposed under §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction.

The proposed new rule will implement changes to Chapter 467 of the Texas Government Code.

§403.115. Negotiated Rulemaking and Alternative Dispute Resolution.

(a) Policy. It is the Commission's policy to encourage the use of negotiated rulemaking under Government Code, Chapter 2008, and appropriate alternative dispute resolution procedures under Government Code, Chapter 2009.

(b) Negotiated Rulemaking. The Commission, the Executive Director (for lottery rules), or the Charitable Bingo Operations Director (for charitable bingo rules), either on it/his/her own initiative or

in response to a request from an interested person(s), may propose to engage in negotiated rulemaking to obtain assistance in drafting a proposed rule, in accordance with the provisions of Government Code, Chapter 2008. By way of example only, negotiated rulemaking may be appropriate when multiple constituencies are involved; the subject matter is complex or controversial; or the Commission lacks complete information.

(1) When negotiated rulemaking is proposed, the Executive Director (for lottery rules) or the Charitable Bingo Operations Director (for charitable bingo rules), or their designee, shall be the negotiated rulemaking convener.

(A) The convener shall assist in identifying persons who are likely to be affected by a proposed rule, including those who oppose the issuance of a rule. The convener shall discuss with those persons or their representatives the items listed in Government Code §2008.052(c).

(B) The convener shall then recommend to the Commission whether negotiated rulemaking is a feasible method to develop the proposed rule and shall report on the relevant considerations, including the items listed in Government Code §2008.052(d).

(2) Upon consideration of the convener's recommendation, the Commission may approve Commission staff to engage in negotiated rulemaking in accordance with the provisions of Government Code, Chapter 2008. The Commission may authorize the staff to perform the duties and requirements set forth in Chapter 2008, including providing any required notices, establishing a negotiated rulemaking committee and appointing the members of the committee, and appointing a facilitator.

(c) Alternative Dispute Resolution. The Commission encourages the fair and expeditious resolution of internal and external disputes under the Commission's jurisdiction through alternative dispute resolution (ADR) procedures. ADR procedures include any procedure or combination of procedures described by Civil Practice and Remedies Code, Chapter 154. ADR procedures are intended to supplement and not limit other dispute resolution procedures available for use by the Commission.

(1) Any ADR procedure used to resolve disputes under the Commission's jurisdiction shall conform with Government Code, Chapter 2009, and, to the extent possible, the model guidelines for the use of ADR issued by the State Office of Administrative Hearings (SOAH).

(2) The Commission, the Executive Director, or the Charitable Bingo Operations Director, either on it/his/her own initiative or in response to a request from a person involved in a dispute with the Commission, may direct an unresolved internal or external dispute, including but not limited to a lottery or bingo licensing matter, a bingo audit matter, a personnel matter, or a contested case to ADR, and will determine, in consultation with the Legal Services Division staff, which method of ADR is most appropriate.

(3) Breach of Contract Claims. Notwithstanding the foregoing, contract claims asserted by a contractor against the Commission are governed by Government Code, Chapter 2260 and the Commission Rules at §§403.201 - 403.223 of this title (relating to General Administration), and not this section.

(d) The Commission may adopt written procedures to further implement negotiated rulemaking and ADR procedures under this section, including procedures to designate a coordinator to implement the Commission's policy under this section and to collect data concerning the effectiveness of negotiated rulemaking and ADR procedures.

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 20, 2013.

TRD-201304144

Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5275



## 16 TAC §403.600

The Texas Lottery Commission (Commission) proposes new rule §403.600, concerning Complaint Review Process. The purpose of the proposed new rule is to implement changes to Texas Government Code Chapter 467, made pursuant to §17 of Tex. H.B. 2197, 83rd Leg., R.S. (2013); specifically, new §467.111, which provides that the Commission shall maintain a system to promptly and efficiently act on each complaint filed with the Commission, shall by rule adopt and publish procedures governing the entire complaint process, shall analyze the complaints to identify any trends or issues, and shall prepare a report on the trends and issues identified. Section 45 of H.B. 2197 provides that not later than January 1, 2014, the Texas Lottery Commission shall adopt all rules, policies, and procedures required by the changes in law made by this Act.

Kathy Pyka, Controller, has determined that for each year of the first five years the new rule will be in effect, there are no foreseeable implications related to cost or revenues to the state as a result of the proposed new rule. There will be no adverse effect on small businesses, microbusinesses, or local or state employment. There will be no additional economic costs to persons required to comply with the new rules as proposed. Furthermore, an Economic Impact Statement and Regulatory Flexibility Analysis is not required because the new rule will not have an economic effect on small businesses as defined in Texas Government Code §2006.001(2).

Ed Rogers, Director of Enforcement, has determined that for each year of the first five years the proposed new rule will be in effect, the anticipated public benefit will be an increased ability for the public to be informed on the complaint submission process and for the Texas Lottery Commission to track, analyze, and report the sources and types of complaints and the results of investigations, with anticipated results to include a more responsive, timely and efficient complaint process.

The Commission requests comments on the proposed new rule from any interested person. Comments on the proposed new rule may be submitted to Stephen White, Assistant General Counsel, by mail at Texas Lottery Commission, P.O. Box 16630, Austin, Texas 78761-6630; by facsimile at (512) 344-5189; or by email at legal.input@lottery.state.tx.us.

The new rule is proposed pursuant to §466.015 of the Texas Government Code, which authorizes the Commission to adopt rules governing the operation of the lottery, and under §467.102 of the Texas Government Code, which authorizes the Commission to adopt rules for the enforcement and administration of the laws under the Commission's jurisdiction. The new rule is also

proposed pursuant to new §467.111, which requires the Commission by rule to adopt and publish procedures governing the complaint process.

The proposed rule implements changes to Chapter 467 of the Texas Government Code.

### §403.600. Complaint Review Process.

(a) Purpose. This section implements §467.111 of the Texas Government Code, which requires the Texas Lottery Commission (Commission) to maintain a system to promptly and efficiently act on each complaint filed with the Commission and by rule adopt and publish procedures governing the entire complaint process from submission to disposition. The Lottery Operations Division shall manage the process for all complaints relating to any Commission activities, regardless of the affected Commission division or subject matter. The Lottery Operations Division may adopt written procedures to further implement the requirements of §467.111 and this section.

(b) Complaint Intake. Complaints must be submitted by mail, email, in person, or fax.

(1) All complaints shall be monitored through the complaint tracking system and all jurisdictional complaints will be tracked, from initial intake or discovery of the complaint to final disposition. A jurisdictional complaint is a complaint which alleges a violation of the State Lottery Act (Government Code, Chapter 466), the Bingo Enabling Act (Occupations Code, Chapter 2001), Commission rules, or any other applicable provisions of the Texas Government Code or the Texas Administrative Code under which the Commission has the authority to interpret and apply the law.

(2) The Commission shall make available information on how to file a complaint on the Commission's internet web site, intranet, at Commission claim centers, Bingo regional offices, licensed lottery retail locations, bingo playing locations, and the Commission headquarters.

(3) Commission staff shall maintain and monitor a toll-free telephone number during normal working hours to assist complainants.

(c) Complaint Processing. The Commission requires specific information to process and investigate a complaint. Commission staff will review all complaints to ensure they are jurisdictional, in writing, and include the complainant's name, mailing address, and contact phone number. If a complaint is received without all necessary information, the staff will make reasonable efforts to contact the complainant and obtain the necessary information. Non-jurisdictional complaints will be entered in the complaint tracking system as contacts along with an explanation why the complaint is non-jurisdictional, but will not be referred for investigation or follow-up. Staff will notify the complainant verbally or in writing that the complaint is non-jurisdictional.

(d) If the complaint is jurisdictional and contains the required information, the complaint will be entered in the complaint tracking system and referred to the appropriate Commission division or department for investigation or follow-up. Commission staff will provide an acknowledgement notification verbally or in writing to the complainant after the complaint is processed. Commission staff will provide periodic ongoing complaint status updates verbally or in writing. A closing notification will be provided to the complainant verbally or in writing when the complaint is closed.

(e) Complaint Analysis and Reports. The Commission staff will maintain a comprehensive database of complaints in order to identify trends or issues related to violations of state laws under the Commission's jurisdiction.

(1) At least once each biennium, designated Commission staff will generate a trend analysis report. The report will:

(A) categorize complaints based on the type of violation alleged;

(B) track each complaint from submission to disposition;

(C) evaluate the effectiveness of the of the Commission's enforcement process; and

(D) include any additional information the Commission considers necessary.

(2) The trend analysis report shall be made available to the public.

(f) Americans with Disabilities Act Complaints. Notwithstanding the foregoing, all complaints to the Commission regarding Americans with Disabilities Act violations are governed by the provisions of §401.407 of this title (relating to Complaints Relating to Non-accessibility), and not 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 September 20, 2013.

TRD-201304145

Bob Biard

General Counsel

Texas Lottery Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 344-5275



## **TITLE 22. EXAMINING BOARDS**

### **PART 10. TEXAS FUNERAL SERVICE COMMISSION**

#### **CHAPTER 201. LICENSING AND ENFORCEMENT--PRACTICE AND PROCEDURE**

##### **22 TAC §201.3**

The Texas Funeral Service Commission (Commission) proposes an amendment to §201.3, concerning Complaints and Investigations.

The amendments to §201.3 are proposed to add language to include the Staff Attorney and Legal Assistant to the rule.

Donna Potter, Interim Executive Director, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implication for state or local governments as a result of enforcing or administering the proposed amendment.

Ms. Potter further has determined that for each year of the first five-year period the amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be increased efficiency in the handling of complaints and investigations. Ms. Potter has also determined that there will be no effect on large, small or micro-businesses, that there is no anticipated

economic costs to persons who are required to comply with the amendment as proposed, and that there will be no impact on local employment or economies.

Comments on the proposal may be submitted to Ms. Potter at P.O. Box 12217, Capitol Station, Austin, Texas 78711-1440, (512) 479-5064 (fax), or electronically to [info@tfsc.state.tx.us](mailto:info@tfsc.state.tx.us).

The amendment is proposed under Texas Occupations Code, §651.152. The Commission interprets §651.152 as authorizing it to adopt rules as necessary to administer Chapter 651.

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

##### *§201.3. Complaints and Investigations.*

Nothing in this rule shall be deemed to vest substantive or procedural rights in any person. The rule's purpose is twofold: to give affected persons notice of the process the Commission [eommission] follows in the processing of complaints; and to comply with the rulemaking requirements imposed by Texas Occupations Code, §651.202.

(1) Any person may file a complaint with the Commission concerning alleged violations of any statute over which the Commission has regulatory authority as well as Commission rules. Complaints should be addressed to the Commission's address that appears on its website at [www.tfsc.state.tx.us](http://www.tfsc.state.tx.us).

(2) Staff will provide Complaint forms to a person who wishes to file a complaint. Complaint forms may also be printed from the Commission's website in both Word and PDF format. The Commission-approved form provides space for the following information:

(A) the name and business address of the person or establishment Complained of;

(B) the time and place where the acts occurred;

(C) the nature of the acts set out in sufficient detail to enable the Commission to investigate the complaint and the person or entity complained of to identify the incident and prepare a defense; and

(D) the names, addresses, and telephone numbers of any persons who witnessed the acts.

(3) The form also asks for any pertinent contracts, photographs, letters, advertisements or other documents.

(4) All complaints must be in writing, other than complaints alleging conduct which, if true, would constitute an imminent or continuing threat to the public health, safety, or welfare. These latter complaints must be reduced to writing before the conclusion of the investigative process.

(5) Complaints are initially referred to an Investigator who will acknowledge receipt of the complaint in writing to the Complainant. The Investigator next will send a copy of the complaint to the Respondent by certified mail. The letter of transmittal will request a written narrative response and possibly documents from the Respondent within 15 days of receipt of the letter.

(6) The Investigator, at the conclusion of the investigation, will prepare a preliminary summary of the allegations, the Investigator's findings, and a recommendation to send to the Staff Attorney.

(7) The Staff Attorney will determine first if the substance of the complaint falls within the Commission's jurisdiction. If not, The Staff Attorney will dismiss the complaint with the approval of the Executive Director. The Staff Attorney or the Legal Assistant will draft a letter to notify the Complainant of the determination of the Commission, and possibly refer the matter to an entity having authority over the matter, if the facts show a probable violation of law.

(8) If the Staff Attorney determines that the facts indicate a probable violation of law or rule over which the Commission has regulatory authority, the Investigator will prepare a Preliminary Report. This Report will state the facts upon which it is based and that a violation has occurred. The Staff Attorney will assess the penalty amount based on the Disciplinary Guidelines described in §201.11 of this title (relating to Disciplinary Guidelines).

(9) The Legal Assistant will send the person charged with the violation (Respondent) a copy of the Report and a Notification of an Informal Conference.

(10) The Staff Attorney or the Legal Assistant will send the Report by first class mail, certified and regular, to the Respondent's address on file with the Commission.

(11) The Executive Director presides over Informal Conferences. The Conferences are usually attended by a panel including the Staff Attorney, the Legal Assistant, the Administrator of Compliance and Consumer Affairs and the Investigator who investigated the complaint. The commission's legal counsel may attend. The Complainant is entitled to attend the conference as well. If the Complainant attends the Conference, the panel typically hears first from the Complainant followed by the Respondent. The Respondent is entitled to Legal Counsel.

(12) No court reporter will be present, the parties will not be placed under oath, and no audio or video recording of the Conference will be made or allowed for use in any subsequent proceeding. The panel may notate whether or not the Complainant and/or the Respondent attended the Conference as well as any pertinent information provided by either participant relating to the complaint.

(13) The Executive Director or Staff Attorney will first explain the process used at the Conference. The Complainant is allowed to address the panel first. The Respondent is then given the opportunity to show compliance with all applicable laws and rules.

(14) The panel will confer about the complaint following the Respondent's presentation. The Executive Director makes a decision after receiving input from the Staff Attorney, the Legal Assistant, the Administrator of Compliance and Consumer Affairs, and the Investigator. The Executive Director may decide to dismiss the complaint, investigate further, or take disciplinary action. The Executive Director will give Respondent verbal notice of the Director's decision at the conclusion of the Conference. If the complaint is dismissed, the Staff Attorney or the Legal Assistant will notify the Complainant by letter.

(15) If the complaint is not dismissed the Staff Attorney will provide a case summary, Informal Conference notes, Respondent's complaint history and the Executive Director's recommendation to the Commission at the next scheduled Commission Meeting, unless further investigation is needed. The Commission may affirm the Executive Director's decision made at the Informal Conference, increase or decrease a penalty imposed, dismiss the complaint or order further investigation.

(16) The Staff Attorney or the Legal Assistant will mail notice of the Commission's decision to the Respondent by first class mail, certified and regular, within 10 days of the date of the Commission Meeting. The letter to the Respondent shall be sent to the address on file with the Commission. If the decision imposes sanctions, Respondent shall within 30 days accept the decision and pay the penalty amount; request a SOAH formal hearing; or request mediation at SOAH.

(A) Staff will notify the Complainant if Respondent accepts the decision and pays the penalty imposed.

(B) The Administrative Procedure Act, Texas Government Code Chapter 2001, §2001.051 et seq. and SOAH's Rules of

Practice and Procedure, 1 TAC Chapter 155 et seq. govern SOAH formal hearings and subsequent decisions.

(C) The Commission's Alternative Dispute Resolution Policy and Procedure Rule, found in §207.1 of this title (relating to Alternative Dispute Resolution Policy and Procedure), governs SOAH meditations.

(17) The Commission will notify Complainants upon the final disposition of any complaint.

[(1) Any person may file a complaint with the commission concerning alleged violations of any statute over which the commission has regulatory authority as well as commission rules. Complaints should be addressed to the Commission's address that appears on its website at www.tfse.state.tx.us.]

[(2) Staff will provide Complaint forms to a person who wishes to file a complaint. Complaint forms may also be printed from the commission's website in both Word and PDF format. The commission-approved form provides space for the following information:]

[(A) the name and business address of the person or establishment Complainant complained of;]

[(B) the time and place where the acts occurred;]

[(C) the nature of the acts set out in sufficient detail to enable the Commission to investigate the complaint and the person or entity complained of to identify the incident and prepare a defense; and]

[(D) the names, addresses, and telephone numbers of any persons who witnessed the acts.]

[(3) The form also asks for any pertinent contracts, photographs, letters, advertisements or other documents.]

[(4) All complaints must be in writing, other than complaints alleging conduct which, if true, would constitute an imminent or continuing threat to the public health, safety, or welfare. These latter complaints must be reduced to writing before the conclusion of the investigative process.]

[(5) Complaints are initially referred to an investigator who will acknowledge receipt of the complaint in writing to the complainant. The investigator next will send a copy of the complaint to the respondent by certified mail. The letter of transmittal will request a written narrative response and possibly documents from the respondent within 15 days of receipt of the letter.]

[(6) The investigator, at the conclusion of the investigation, will prepare a preliminary summary of the allegations, the investigator's findings, and a recommendation for disposition to the executive director.]

[(7) The director will determine first if the substance of the complaint falls within the commission's jurisdiction. If not, staff will dismiss the complaint, notify the complainant, and possibly refer the matter to an entity having authority over the matter, if the facts show a probable violation of law. If the investigator determines that the facts indicate a probable violation of law or rule over which the commission has regulatory authority, the investigator will prepare a Preliminary Report. This Report will state the facts, upon which it is based and that a violation has occurred. The director will assess the penalty amount based on the disciplinary guidelines described in §201.11 of this title (relating to Disciplinary Guidelines).]

[(8) The investigator will send the person charged with the violation (respondent) a copy of the Preliminary Report and notification of an informal conference.]

[(9) Staff will send the report by first class mail, certified and regular, to the respondent's address on file with the Commission.]

[(10) The executive director presides over informal conferences. The conferences are usually attended by the legal assistant, the administrator of compliance and consumer affairs and the investigator who investigated the complaint. The commission's legal counsel may attend. The complainant is entitled to attend the conference as well. In this event the panel typically hears first from the complainant followed by the person charged with the violation. The respondent is entitled to counsel.]

[(11) No court reporter will be present; the parties will not be placed under oath, and no audio or video recording of the conference will be made or allowed for use in any subsequent proceeding. Staff may notate whether or not the complainant and/or the respondent attended the informal conference as well as any pertinent information provided by either participant relating to the complaint. The executive director or legal counsel will first explain the process used at the informal conference. The respondent is then given the opportunity to show compliance with all applicable laws and rules.]

[(12) The conference panel will confer about the complaint following the respondent's presentation. The executive director makes a decision after receiving input from the legal assistant, the administrator of compliance and consumer affairs, the investigator, and counsel, if in attendance. The executive director may decide to dismiss the complaint, investigate further, or take disciplinary action. The executive director will give respondent verbal notice of the director's decision at the conclusion of the conference. If the complaint is dismissed, staff will notify the complainant.]

[(13) The executive director, administrator of compliance and consumer affairs, or the investigator will provide a case summary, informal conference notes, respondent's complaint history and the executive director's recommendation to the commission at the next scheduled meeting, unless further investigation is needed. The commission may affirm the executive director's decision made at the informal conference, increase or decrease a penalty imposed, dismiss or order further investigation.]

[(14) Staff will mail notice of the commission's decision to the respondent by first class mail, certified and regular, within 10 days of the meeting date to the respondent's address on file with the Commission. If the decision imposes sanctions, respondent shall, within 30 days accept the decision and pay the penalty amount; request a SOAH formal hearing; or request mediation at the SOAH.]

[(A) Staff will notify the complainant if respondent accepts the decision and pays the penalty imposed.]

[(B) The Administrative Procedure Act, Texas Government Code Chapter 2001, §2001.051 et seq. and SOAH's Rules of Practice and Procedure, 1 TAC Chapter 155 et seq. govern SOAH formal hearings and subsequent decisions.]

[(C) The commission's Alternate Dispute Resolution Policy and Procedure Rule, §207.1 of this title govern SOAH meditations.]

[(15) The commission will notify complainants upon the final disposition of any complaint.]

[(16) The Office of the Attorney General represents the commission before SOAH and in court.]

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 18, 2013.

TRD-201304096

Donna Potter

Interim Executive Director

Texas Funeral Service Commission

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 936-2469

◆ ◆ ◆  
CHAPTER 203. LICENSING AND ENFORCEMENT--SPECIFIC SUBSTANTIVE RULES

22 TAC §203.3

The Texas Funeral Service Commission (Commission) proposes an amendment to §203.3, concerning Funeral Director in Charge.

The proposed amendment to §203.3 changes the mileage in subsection (d) from 60 miles to 100 miles.

Donna Potter, Interim Executive Director, has determined that for the first five-year period the amendment is in effect, there will be no fiscal implication for state or local governments as a result of enforcing or administering the proposed amendment.

Ms. Potter further has determined that for each year of the first five-year period the amendment is in effect, the public benefit anticipated as a result of enforcing the amendment will be increased efficiency in the handling of complaints and investigations. Ms. Potter has also determined that there will be no effect on large, small or micro-businesses, that there is no anticipated economic costs to persons who are required to comply with the amendment as proposed and that there will be no impact on local employment or economies.

Comments on the proposal may be submitted to Ms. Potter at P.O. Box 12217, Capitol Station, Austin, Texas 78711-1440, (512) 479-5064 (fax), or electronically to [info@tfsc.state.tx.us](mailto:info@tfsc.state.tx.us).

The amendment proposed under Texas Occupations Code, §651.152. The Commission interprets §651.152 as authorizing it to adopt rules as necessary to administer Chapter 651.

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

§203.3. *Funeral Director in Charge.*

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

(d) An individual may not be designated as the funeral director in charge of more than one establishment unless the additional establishments are operated as branches or satellites of a primary establishment, all of the establishments are under the same ownership, same general management, and no establishment is more than 100 [60] miles from any other establishment held under the same ownership conditions.

(e) - (h) (No change.)

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

Filed with the Office of the Secretary of State on September 18, 2013.

TRD-201304097  
Donna Potter  
Interim Executive Director  
Texas Funeral Service Commission  
Earliest possible date of adoption: November 3, 2013  
For further information, please call: (512) 936-2469



## TITLE 31. NATURAL RESOURCES AND CONSERVATION

### PART 1. GENERAL LAND OFFICE

#### CHAPTER 15. COASTAL AREA PLANNING

##### SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

###### 31 TAC §15.22

The General Land Office (GLO) proposes an amendment to §15.22, relating to Certification Status of Brazoria County Dune Protection and Beach Access Plan (Plan). The amendment to §15.22 adds new subsection (c) to certify as consistent with state law an amendment to Brazoria County's (the County) Plan.

Copies of the County's Plan can be obtained by contacting Richard Hurd, Brazoria County Parks Director, at (979) 864-1541 or rhurd@brazoria-county.com and GLO's Archives Divisions, Texas General Land Office, P.O. Box 12873, Austin, TX 78711-2873, phone number (512) 475-1859.

###### BACKGROUND

Pursuant to the Open Beaches Act (Texas Natural Resource Code, Chapter 61) and the Beach/Dune Rules (31 TAC §§15.1 - 15.12 and §§15.21 - 15.37), a local government with jurisdiction over Gulf Coast Beaches must submit its dune protection and beach access plan and any amendments to the plan to the GLO for certification pursuant to 31 TAC §15.3(o). The GLO reviews a local beach access and dune protection plan and amendments to the plan and, if appropriate, certifies that the plan is consistent with state law by amendment of a rule as authorized in Texas Natural Resource Code §61.011(d)(5) and §61.015(b). The certification by rule reflects the state's certification of the plan, but the text of the plan is not adopted by the GLO as provided in 31 TAC §15.3(o)(4).

The County is a coastal county consisting of areas bordering Harris, Galveston and Matagorda counties. The County is accessible via State Highways 6, 36 and 332 from the northwest, State Highway 5 from the east and west, County Road 257 from Galveston Island, and State Highway 228 from Harris County. The County also borders the Gulf of Mexico to the southeast extending from the northeast at Follet's Island southwest to the San Bernard National Wildlife Refuge bordering Matagorda County. The Gulf Beaches within the unincorporated areas of the county are governed by the County's Plan. The Plan does not apply to the incorporated areas of the Village of Surfside Beach, the Town of Quintana, the City of Freeport, the San Bernard National Wildlife Refuge, and the Justin Hurst Management Area. The plan was previously amended to adopt an Erosion Response Plan and was certified by the GLO as consistent with state law and became effective March 7, 2013.

###### ANALYSIS OF PROPOSED AMENDMENTS

The County adopted the amendment on April 23, 2013 in Order No. VII.B.2.d and submitted the change to the GLO with a request for certification of the amendment as consistent with state law. The amendment proposes changes to the beach access point and parking areas at San Luis Pass County Park to provide for vehicular restrictions for pedestrian-only traffic along sections of the San Luis Pass County Park Beach and on-beach parking. Specifically, the amendment modifies Section 7, Management of the Public Beach, Subsection II, and Exhibit C to change parking on and adjacent to the beach at San Luis Pass County Park to provide for vehicular restrictions for pedestrian-only traffic along sections of the beach and creates an on-beach parking area. The amendment to §15.22 relating to Certification Status of the County Dune Protection and Beach Access Plan proposes to add subsection (c) to certify the County's proposed amendment to the Plan as consistent with state law.

###### FISCAL AND EMPLOYMENT IMPACTS

Ms. Helen Young, Deputy Commissioner for the GLO's Coastal Resources Program Area, has determined that for each year of the first five years the amended section as proposed is in effect, there will be minimal cost to state or local governments for installation of vehicular controls and signage as a result of enforcing or administering the amended sections.

Ms. Young has also determined that there will be no additional costs of compliance for large and small businesses or individuals resulting from implementation of the amendment to the Plan.

###### PUBLIC BENEFIT

Ms. Young has determined that for the first five years the public will benefit from the proposed amendments to the Plan because the updated parking plan preserves the public's unrestricted ingress and egress to the public beach at San Luis Pass County Park. Ms. Young has determined that the amendment safeguards the conservation of the natural resources in the area, is tailored to the unique natural features and use potential of San Luis Pass County Park, provides for multiple and compatible uses of the coastal zone, preserves public access to and enjoyment of the public beach and clearly coordinates and establishes how the public beach at San Luis Pass County Park will be managed by the County. Ms. Young has also determined that the probable economic costs to persons required to comply with the rule will be negligible. The plan was previously amended to adopt a Beach User Fee Plan that was certified by the GLO as consistent with state law and became effective on March 7, 2013 and no change in the user fee has been proposed as part of the amendment.

###### ENVIRONMENTAL REGULATORY ANALYSIS

GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "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 proposed amendments to §15.22 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the

proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§61.011 - 61.015 relating to the protection and preservation of the public's free and unrestricted right of ingress and egress to the public beach.

#### TAKINGS IMPACT ASSESSMENT

GLO has evaluated the proposed rulemaking in accordance with Texas Government Code §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. GLO has determined that the proposed rulemaking to certify the County's Plan, as consistent with state law, does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §17 and §19 of the Texas Constitution. Furthermore, GLO has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits any owner's right to property that would otherwise exist in the absence of the rule amendment.

#### CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The proposed rulemaking is subject to the Coastal Management Program as provided for in the Texas Natural Resource Code §33.2053, and 31 TAC §505.11(a)(1)(J) and §505.11(c), relating to the Actions and Rules Subject to the CMP. GLO has reviewed this proposed action for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations and has determined that the proposed action is consistent with the applicable CMP goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System).

The amended rule provides certification that the County's adoption of the amendment to the plan is consistent with the CMP goals outlined in 31 TAC §501.12(1), (2), (4), (5) and (6). These goals seek to protect and preserve the diversity and functions of Coastal Natural Resource Areas (CNRA), ensure compatible economic development and multiple uses of the coastal zone, ensure and enhance public access to and enjoyment of the coastal zone, balance benefits from human use of the coastal zone and the benefits from protecting and preserving CNRAs, and ensure coordination of GLO and local government decision-making through the establishment of clear, effective policies for the management of CNRAs. The amendment is tailored to the unique natural features of the development and use potential of the County's beach at San Luis Pass County Park, provides for multiple and compatible uses of the coastal zone, ensures continued public access to and enjoyment of the public beach, and clearly establishes how the CNRA will be managed by the County. The amended rule also provides certification that the County's adoption of the amendment to the plan is also consistent with the CMP policies outlined in 31 TAC §501.26(a)(4) which requires the preservation and enhancement of the ability of the public, individually and collectively, to exercise its rights of use of and access to and from public beaches. The amendment preserves the right of the public to access and use the public beach at San Luis Pass County Park.

#### PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile num-

ber (512) 475-1859, or email [walter.talley@glo.texas.gov](mailto:walter.talley@glo.texas.gov). Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Natural Resources Code §61.011, relating to GLO's authority to adopt rules for the contents and certification of beach access and use plans.

Texas Natural Resources Code §§61.011 - 61.026 are affected by the proposed amendments.

§15.22. *Certification Status of Brazoria County Dune Protection and Beach Access Plan.*

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

(c) The General Land Office certifies as consistent with state law Brazoria County's Dune Protection and Beach Access Plan as amended to provide for vehicular restrictions for pedestrian-only traffic along sections of the San Luis Pass County Park Beach and on-beach parking. The amendment was adopted by Brazoria County on April 23, 2013 in Order No. VII.B.2.f.

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 20, 2013.

TRD-201304182

Larry L. Laine

Chief Clerk, Deputy Land Commissioner

General Land Office

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 475-1859



## PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

### CHAPTER 51. EXECUTIVE SUBCHAPTER D. EDUCATION

#### 31 TAC §51.81

The Texas Parks and Wildlife Department proposes an amendment to §51.81, concerning Mandatory Boater Education.

The 83rd Texas Legislature enacted House Bill (H.B.) 597, which amended Parks and Wildlife Code, Chapter 31 (commonly referred to as the Texas Water Safety Act) by adding §31.108(a-1), which requires a boater education course or equivalency examination to include information on how to prevent the spread of exotic harmful or potentially harmful aquatic plants, fish, and shellfish, including department-approved methods for cleaning boats, boat motors; fishing and other equipment, and boat trailers.

Under Parks and Wildlife Code, §31.109, all boat operators born after September 1, 1993 are required to successfully complete an approved boater education course before operating certain vessels (vessels powered by a motor of more than 15 horsepower; windblown vessels of over 14 feet in length, and personal watercraft) on public waters. Under department rules (31 TAC §51.81) a boater education course or equivalency examination shall consist of boats (uses, capacities, trailers, equipment,

numbering, and titling), boating safety (accident causes, prevention, and emergency procedures), boating operation (preparation, float plans, navigation rules, navigation aids, local hazards and weather), and state laws (Texas Water Safety Act, Boating While Intoxicated (BWI) Laws, violation prevention, and basic boating responsibilities). The proposed amendment would add the provisions required by H.B. 597.

Tim Spice, Boater Education Coordinator, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Mr. Spice also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be an increased awareness of the negative impacts of invasive species and steps that the boating public can take to minimize those impacts.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The proposal does not impact individuals who may wish to operate a motor boat or personal water craft or small or micro-businesses. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006. There will be no fiscal implications for persons required to comply with the rule as proposed.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rules may be submitted to [http://www.tpwd.texas.gov/business/feedback/public\\_comment](http://www.tpwd.texas.gov/business/feedback/public_comment) or Tim Spice, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8141 (e-mail: [tim.spice@tpwd.state.tx.us](mailto:tim.spice@tpwd.state.tx.us)).

The amendment is proposed under the authority of Parks and Wildlife Code, §31.108, which requires the commission to adopt rules to administer a boater education program.

The proposed amendment affects Parks and Wildlife Code, Chapter 31.

§51.81. *Mandatory Boater Education.*

(a) (No change.)

(b) Courses and equivalency exams shall consist of the following subjects:

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

(3) Boating operation--preparation, float plans, navigation rules, navigation aids, local hazards and weather; [and]

(4) State laws--Texas Water Safety Act, Boating While Intoxicated (BWI) Laws, violation prevention and basic boating responsibilities; and[-]

(5) Information on how to prevent the spread of exotic harmful or potentially harmful aquatic plants, fish, and shellfish, including department-approved methods for cleaning:

(A) a boat;

(B) a boat's motor;

(C) fishing and other equipment; and

(D) a boat trailer.

(c) - (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.

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



## SUBCHAPTER J. CONTRACT DISPUTE RESOLUTION

### 31 TAC §51.200

The Texas Parks and Wildlife Department proposes an amendment to §51.200, concerning Applicability. The proposed amendment would add contracts described in Civil Practice and Remedies Code, Chapter 114, to the list of the types of contracts to which the provisions of the department's rules in Chapter 51, Subchapter J, do not apply.

Government Code, Chapter 2260, sets out the procedure for handling certain contract claims against the state. The department's rules in Chapter 51, Subchapter J, set out the procedure for handling claims against the department asserted under Government Code, Chapter 2260. The 83rd Texas Legislature (Regular Session) enacted House Bill (H.B.) 586, which amended the Civil Practice and Remedies Code by adding Chapter 114 to address certain design and construction claims arising under written contracts with state agencies. Under the provisions of H.B. 586, "a claim for breach of a written contract for engineering, architectural, or construction services or for materials related to engineering, architectural, or construction services brought by a party to the written contract, in which the amount in controversy is not less than \$250,000, excluding penalties, costs, expenses, prejudgment interest, and attorney's fees" that arises under a contract executed on or after September 1, 2013 is subject to

the provisions of new Civil Practice and Remedies Code, Chapter 114, as added by H.B. 586, rather than Government Code, Chapter 2260. Therefore, it is necessary to amend the department's rules to exclude such contract claims from the department's rule implementing Government Code, Chapter 2260.

Under the department's current rule, eight categories of contract types are exempted from the provisions of Chapter 51, Subchapter J. The proposed amendment adds contracts described in Civil Practice and Remedies Code, Chapter 114, to the list.

Ann Bright, General Counsel, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the proposed amendment.

Ms. Bright also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be accurate regulations.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, micro-businesses, or persons required to comply with the rule as proposed, because the proposed amendment is for the sole purpose of conforming the department's rules to recently enacted legislation.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to [http://www.tpwd.state.tx.us/business/feedback/public\\_comment](http://www.tpwd.state.tx.us/business/feedback/public_comment) or Ann Bright, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8558 (e-mail: [ann.bright@tpwd.texas.gov](mailto:ann.bright@tpwd.texas.gov)).

The amendment is proposed under the authority of Government Code, §2260.052(c), which requires each unit of state government with rulemaking authority to develop rules to govern the negotiation and mediation of contract claims against the state, and Parks and Wildlife Code, §11.0171, which requires the commis-

sion to adopt by rule policies and procedures for soliciting and awarding contracts.

The proposed amendment affects Government Code, Chapter 2260, and Parks and Wildlife Code, Chapter 11.

*§51.200. Applicability.*

(a) This subchapter does not apply to an action of the department for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(b) This subchapter does not apply to contracts:

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

(7) within the exclusive jurisdiction of federal courts or regulatory bodies; [øø]

(8) that are solely and entirely funded by federal grant monies other than for a project defined in 51.201(10) of this title (relating to Definitions); or[-]

(9) subject to Civil Practice and Remedies Code, Chapter 114.

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



## SUBCHAPTER O. ADVISORY COMMITTEES DIVISION 5. STATE PARKS

### 31 TAC §51.642

The Texas Parks and Wildlife Department proposes an amendment to §51.642, concerning San Jacinto Historical Advisory Board (SJHAB). The proposed amendment would implement the provisions of House Bill 3163, enacted by the 83rd Texas Legislature (Regular Session), which amended Parks and Wildlife Code, §22.012, to rename the Battleship Texas Commission the Battleship Texas Foundation. The proposed amendment would also correct a typographical error.

Ann Bright, General Counsel, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the proposed amendment.

Ms. Bright also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be accurate regulations.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the

Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, micro-businesses, or persons required to comply with the rule as proposed, because the proposed amendment is nonsubstantive.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to <http://www.tpwd.state.tx.us/business/feedback/public> comment or Ann Bright, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8558 (e-mail: [ann.bright@tpwd.texas.gov](mailto:ann.bright@tpwd.texas.gov)).

The amendment is proposed under the authority of Government Code, Chapter 2110, which requires that rules be adopted regarding each state agency advisory committee.

The proposed amendment affects Government Code, Chapter 2110.

§51.642. *San Jacinto Historical Advisory Board.*

(a) (No change.)

(b) The SJHAB shall consist of five members, which shall include the chairman of the Battleship Texas Foundation ~~[Commission]~~, the president of the San Jacinto Museum of History Association, and, three members of the public. The public members are appointed by the governor for staggered six-year terms expiring in odd-numbered years. One ~~or [ore]~~ more of the public members may be selected from the San Jacinto Chapter of the Daughters of the Republic of Texas.

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

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775

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CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT  
AND MOTOR FEES

31 TAC §53.3

The Texas Parks and Wildlife Department proposes an amendment to §53.3, concerning Combination Hunting and Fishing License Packages. The proposed amendment would designate nonresident disabled veterans as Texas residents for purposes of allowing them to obtain a super combination hunting and "all water" fishing package (consisting of a resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag) and would allow nonresident disabled veterans to obtain the license at no charge. In addition, for ease of reference a definition of "disabled veteran" is added to incorporate the definition of "qualified disabled veteran" contained in Parks and Wildlife Code, §42.012(c).

Parks and Wildlife Code, §42.012 provides for the commission to waive the resident hunting license fee for a qualified disabled veteran. A "qualified disabled veteran" is defined by Parks and Wildlife Code, §42.012(c) as "a veteran with a service connected disability, as defined by the Veterans' Administration, consisting of the loss of the use of a lower extremity or of a disability rating of 60 percent or more and who is receiving compensation of the United States for the disability." A similar waiver is created for fishing license fees under Parks and Wildlife Code, §46.004.

Current department rules authorize a resident disabled veteran to obtain a super combination hunting and "all water" fishing license package ("super combination" license) at no charge. However, under current rules a nonresident who is a qualified disabled veteran must pay the full fee for a nonresident hunting license (\$315) or a nonresident fishing license (\$53). See, 31 TAC §53.5(a)(4), §53.6(a)(5). Under current rules, there is also no mechanism for nonresident disabled veterans to obtain the super combination license. Parks and Wildlife Code, §50.001(a) authorizes the department to "issue to residents of this state a combination hunting and fishing license." For purposes of combination licenses, Parks and Wildlife Code, §50.001(4) defines a "resident" to include a member of a "category of individual that the commission by regulation designates as residents." Therefore, to facilitate the issuance of a super combination license to qualified disabled veterans, the proposed amendment defines "resident" for purposes of obtaining a super combination hunting and "all water" fishing package super combination licenses to include a qualified disabled veteran.

The department has received requests from organizations that provide therapeutic hunting and angling opportunities for disabled veterans to alter department rules so that disabled veterans from other states are able to participate more easily in events held in Texas. The department believes that veterans who meet the definition of qualified disabled veteran as a result of their service on behalf of all citizens should be able to participate in hunting and angling activities in Texas without the financial stress of having to purchase a nonresident hunting or fishing license, stamps, and tags. Therefore, the proposed amendment

would allow both resident and nonresident qualified disabled veterans to obtain a super combination hunting and "all water" fishing package for at no cost.

Robert Macdonald, Regulations Coordinator, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to state government as a result of enforcing or administering the proposed amendment. The cost to the department is the cost of issuing super combination license package via the department's automated license system, which is \$.76 per license.

As noted elsewhere in this preamble, the department currently issues a resident disabled veteran super combination license package. To determine the likely impact of the proposal, the department considered the rate at which eligible Texas residents obtain the resident disabled veteran super combination license package. In Texas, data from the Office of the Governor indicate that there are 37,460 veterans with a service connected disability of 50% or 60% and 77,733 veterans with a service connected disability of greater than 70%. To ensure that this analysis does not underestimate the fiscal implications of the proposed amendment to the department, the department therefore uses the aggregate of the two numbers (37,460 and 77,733) to obtain an estimate of potentially eligible Texas residents (115,193), recognizing that this number overstates the number of individuals eligible for the disabled veteran license. Of the estimated 115,193 Texas residents who currently qualify for disabled veteran super combination license, the number who have acquired the license in each of the previous three license years (LY) is as follows: LY 2011: 35,581; LY 2012: 38,840; LY 2013: 42,771. Therefore, the percentage of Texas residents who currently obtain resident disabled veteran super combination license is estimated to be between 31% and 37% of Texas residents who are eligible to acquire such a license.

The United States Census Bureau and Veterans Administration national data indicate that as of 2011 there were approximately 810,245 veterans with a service connected disability of 70% or greater and 386,231 veterans with a service connected disability of 50% or 60%. To ensure that this analysis does not underestimate the fiscal implications of the proposed amendment to the department, the department therefore uses the aggregate of the two numbers (810,245 and 386,231) to obtain a national estimate of potentially eligible persons (1,196,476), recognizing that this number overstates the number of individuals who meet the definition of "qualified disabled veteran." Subtracting the number of Texas veterans from the national number yields an approximate value for the number of nonresident disabled veterans that would be eligible to obtain a super combination license package at no cost (1,081,283). Multiplying this number by the transaction cost associated with issuing a license yields the maximum estimated cost to the department of \$821,775 if every nonresident disabled veteran with a service connected disability of 60% or greater sought to obtain a super combination license package. If nonresident qualified disabled veterans sought to obtain the super combination license at the same rate as Texas residents who are qualified disabled veterans, then between 335,198 (31% of 1,081,283) and 400,075 (37% of 1,081,283) would seek such a license resulting to an approximate cost to the department between \$254,750 and \$304,057. It is highly unlikely that every person who is eligible will seek a license or that nonresidents would seek such licenses at the same rate as residents.

Another method of estimating the potential revenue implications is to consider the percentage of the population of nonresident

disabled veterans who engage in hunting and angling. If such a percentage is similar to that of the general population (approximately 15%, based on data obtained from the 2011 national survey conducted by the U.S. Fish and Wildlife Department), the estimated cost to the department would be \$123,266. However, as noted above, the department anticipates that the actual cost will be much lower, because not every qualifying nonresident veteran who participates in hunting or angling will seek to engage in hunting or angling in Texas.

There will be no fiscal implications to other units of state and local government.

Mr. Macdonald also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the ability of qualified disabled veterans to hunt and fish in Texas.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, micro-businesses, or persons required to comply with the rule as proposed. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to [http://www.tpwd.state.tx.us/business/feedback/public\\_comment/](http://www.tpwd.state.tx.us/business/feedback/public_comment/) or Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: [robert.macdonald@tpwd.texas.gov](mailto:robert.macdonald@tpwd.texas.gov)).

The amendment is proposed under the authority of Parks and Wildlife Code, §50.0001, which authorizes the commission to designate by rule a category of person as residents for purposes of the issuance of combination licenses.

The proposed amendment affects Parks and Wildlife Code, Chapter 50.

§53.3. *Combination Hunting and Fishing License Packages.*

(a) Combination hunting and fishing license packages may be priced at an amount less than the sum of the license and stamp prices of the individual licenses and stamps included in the package.

(1) Resident combination hunting and freshwater fishing package--\$50. Package consists of a resident hunting license, a resident fishing license and a freshwater fish stamp;

(2) Resident combination hunting and saltwater fishing package--\$55. Package consists of a resident hunting license, a resident fishing license, a saltwater sportfishing stamp, and a red drum tag;

(3) Resident combination hunting and "all water" fishing package--\$60. Package consists of a resident hunting license, a resident fishing license, a freshwater fish stamp, a saltwater sportfishing stamp, and a red drum tag;

(4) Resident senior combination hunting and freshwater fishing package--\$16. Package consists of a senior resident hunting license, a senior resident fishing license and a freshwater fish stamp;

(5) Resident senior combination hunting and saltwater fishing package--\$21. Package consists of a senior resident hunting license, a senior resident fishing license, a saltwater sportfishing stamp, and a red drum tag;

(6) Resident senior combination hunting and "all water" fishing package--\$26. Package consists of a senior resident hunting license, a senior resident fishing license, a freshwater fish stamp, a saltwater sportfishing stamp, and a red drum tag;

(7) Resident super combination hunting and "all water" fishing package--\$68. Package consists of a resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag;

(8) Resident senior super combination hunting and "all water" fishing package--\$32. Package consists of a senior resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a senior resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag;

(9) Disabled [~~Resident disabled~~] veteran super combination hunting and "all water" fishing package--\$0. Package consists of a resident hunting license, a migratory game bird stamp, an upland game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag;

(10) Texas resident active duty military super combination hunting and "all water" fishing package--\$0. Package consists of a resident hunting license, an upland game bird stamp, a migratory game bird stamp, an archery stamp, a resident fishing license, a freshwater fish stamp, and a saltwater sportfishing stamp with a red drum tag; and

(11) Replacement combination or replacement super combination packages--\$10 except for a replacement disabled veteran super combination hunting and "all water" fishing package or a Texas resident active duty military super combination hunting and "all water" fishing package, which shall be replaced at no charge.

(b) A nonresident disabled veteran is a resident for the purpose of obtaining a super combination hunting and "all water" fishing package.

(c) For purposes of this section, a "disabled veteran" is a veteran with a service connected disability, as defined by the Veterans' Administration, consisting of the loss of the use of a lower extremity or of a disability rating of 60 percent or more and who is receiving compensation of the United States for the disability.

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



### 31 TAC §53.14

The Texas Parks and Wildlife Department proposes an amendment to §53.14, concerning Deer Management and Removal Permits. The proposed amendment would establish the fees for a three-year and a five-year deer breeder's permit renewal. In another proposed rulemaking published elsewhere in this issue of the *Texas Register*, the department proposes to create three-year and five-year renewal options for deer breeder's permits.

Under current rules, the department issues deer breeder's permits and renewal on a one-year basis with an annual fee of \$200. The 83rd Texas Legislature (Regular Session), enacted Senate Bill (S.B.) 820, which amended Parks and Wildlife Code, §43.352 to authorize the department to issue deer breeder's permits with a three-year or five-year period of validity. The department's fee rules therefore need to reflect the longer permit terms (\$600 for a three-year permit renewal and \$1,000 for a five-year permit renewal).

Mitch Lockwood, Big Game Program Director, has determined that for each of the first five years that the rule as proposed is in effect, other than the initial computer programming adjustments necessary for initial implementation of the rule, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule. The department notes that any other impacts to the department will be positive, since the department will not have to bear the administrative expense of processing annual permit renewal fees for persons who hold a three-year or five-year permit.

Mr. Lockwood also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be accurate fee rules.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits;

adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effect on small businesses, micro-businesses, or persons required to comply with the rule as proposed, because the proposed rule does not alter the annual permit fee. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to [http://www.tpwd.state.tx.us/business/feedback/public\\_comment/](http://www.tpwd.state.tx.us/business/feedback/public_comment/) or Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: [robert.macdonald@tpwd.texas.gov](mailto:robert.macdonald@tpwd.texas.gov)).

The amendment is proposed under the authority of Parks and Wildlife Code, §43.352, which authorizes the commission to by rule establish criteria for the issuance of a deer breeder's permit with a period of validity of three years or five years.

The proposed amendment affects Parks and Wildlife Code, Chapter 43.

*§53.14. Deer Management and Removal Permits.*

(a) Deer breeding and related permits.

(1) One-year deer [Deer] breeder's and deer breeder's renewal--\$200;

(2) Three-year breeder's renewal--\$600; and

(3) Five-year breeder's renewal--\$1,000.

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

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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SUBCHAPTER E. DISPLAY OF BOAT  
REGISTRATION

31 TAC §53.90, §53.91

The Texas Parks and Wildlife Department proposes amendments to §53.90, concerning Display of Registration Validation Sticker, and §53.91, concerning Documented Vessels. The proposed amendments would implement statutory changes enacted by the 83rd Texas Legislature (Regular Session) and make additional changes for purposes of grammatical sense.

Under Parks and Wildlife Code, §31.021, each vessel on the water of the state is required to be numbered unless specifically exempted. Under Parks and Wildlife Code, §31.032, the department is authorized to prescribe the manner in which identification numbers and validation decals are placed on a vessel. The provisions of current §53.90 require vessel registration numbers to be displayed on the bow of a vessel.

House Bill 115 (H.B. 115), enacted by the 83rd Texas Legislature (Regular Session), amended Parks and Wildlife Code, §31.021, to require vessel registration numbers to be displayed anywhere on the forward half of the vessel, provided for alternative display of registration numbers for vessels whose hull or superstructure architecture creates visibility issues with respect to registration identification, and replaced the word "validation" with the word "registration."

The proposed amendment to §53.90 would replace references to the bow of a vessel with references to the forward half of a vessel, remove the word "validation" wherever it occurs, and replace the word "sticker" with the word "decal," which is the term used in the statute. The proposed amendment would also restructure the section in the interest of clarity and readability. As currently written, the grammatical sense of the rule places the onus of regulatory compliance on the vessel, which is an inanimate object. The proposed amendment would reword the section so that it is clear that the section applies to persons operating vessels.

The proposed amendment to §53.91 would remove the word "validation" wherever it occurs and re-word the section for grammatical sense for reasons set forth in the discussion of the proposed amendment to §53.90.

Cody Jones, State Boating Law Administrator, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state and local governments as a result of enforcing or administering the rules.

Mr. Jones also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be easier identification of vessels by marine safety enforcement officers.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that the rules as proposed would not affect any small or microbusinesses. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006. There will be no adverse economic effect on persons required to comply with the rules as proposed.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the department has determined that the rules as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rules.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules.

Comments on the proposed rules may be submitted to <http://www.tpwd.state.tx.us/business/feedback/public> comment or Robert Macdonald, Texas Parks and Wildlife, Department 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: [robert.macdonald@tpwd.state.tx.us](mailto:robert.macdonald@tpwd.state.tx.us)).

The amendments are proposed under Parks and Wildlife Code, §31.032, which authorizes the department to prescribe the manner in which identification numbers and validation decals are placed on a vessel.

The proposed amendments affect Parks and Wildlife Code, Chapter 31, Subchapter B.

*§53.90. Display of Registration [Validation] Sticker.*

(a) Except as provided in this section or Parks and Wildlife Code, §31.022, no person may operate or give permission to operate any vessel on the water of this state unless the vessel is documented through the United States Coast Guard or displays the state-assigned TX numbers as prescribed in this section. [Documented vessels are required to display the registration validation sticker on both sides of the bow and maintain current documentation through the United States Coast Guard or display the state-assigned TX numbering series with the decal.]

(b) No person required to register a vessel may dock, moor, or store the vessel on the water of this state unless the vessel is in compliance with the provisions of this section and the provisions of Parks and Wildlife Code, Chapter 31 that apply to required numbering.

(c) The registration decal for a documented vessel shall be placed on the forward half of each side of the vessel. On a vessel configured so that a number on the hull or superstructure is not easily visible, the number must be painted on or attached to a backing plate that is attached to the forward half of the vessel so that the number is visible from each side of the vessel.

(d) The following are exempt from registration requirements:

- (1) commercial tugboats;
- (2) vessels exceeding 115 feet in length; and
- (3) pilot or crew boats transporting freight, supplies, or personnel to or from cargo ships, freighters, or offshore oil infrastructure.

(e) ~~[(b)]~~ For the purposes of this section, vessel length is the length of the vessel listed on the United States Coast Guard national documentation.

(f) ~~[(e)]~~ Vessels registered as antique boats are permitted to display the registration decal [validation sticker] on the left portion of

the windshield. In the absence of a windshield, the registration decal [validation sticker] must be attached to the certificate of number and made available for inspection when the boat is operated on public water.

*§53.91. Documented Vessels.*

(a) A registration [New vessels that have applied for documentation may acquire a certificate of number and validation] decal may be obtained at any TPWD boat registration office. At the time of application, applicants must present:

- (1) a properly completed registration application on a form supplied by the department;
- (2) a copy of:
  - (A) the current documentation from the U. S. Coast Guard National Vessel Documentation Center (USCGNVDC) or their website in the applicant's name; or
  - (B) the application for initial documentation with the USCGNVDC in the applicant's name;
- (3) payment of any tax required under Tax Code, Chapter 160, or verification of payment; and
- (4) payment of the appropriate registration fee as required by Parks and Wildlife Code, §31.026, and §53.16 of this title (relating to Vessel, Motor, and Marine Licensing Fees).

(b) A certificate of number and registration decal for a used [Used] or previously documented vessel may be obtained [vessels may acquire a certificate of number and validation decal] at any TPWD boat registration office. At the time of application, applicants must present:

- (1) a properly completed registration application on a form supplied by the department;
- (2) a copy of:
  - (A) the current documentation from the U. S. Coast Guard National Vessel Documentation Center (USCGNVDC) or their website in the previous owner's name, or the applicant's name; or
  - (B) the lapsed documentation from the USCGNVDC or their website in the previous owner's name and the application for current documentation with the USCGNVDC in the applicant's name;
- (3) payment of any tax required under Tax Code, Chapter 160, or verification of payment; and
- (4) payment of the appropriate registration fee as required by Parks and Wildlife Code, §31.026, and §53.16 of this title [~~(relating to Vessel, Motor, and Marine Licensing Fees)]~~.

(c) Renewal of certificate of number and registration [validation] decal for a documented vessel may be obtained [acquired] at any TPWD boat registration office. At the time of application, applicants must present:

- (1) a properly completed registration application or renewal notice on a form supplied by the department, or a hand written request;
- (2) a copy of the current documentation from the U.S. Coast Guard National Vessel Documentation Center (USCGNVDC) or their website in the current owner's name;
- (3) for vessels greater than 65 feet in length for the first registration renewal, verification of payment under Tax Code, Chapter 151, or verification from the TPWD boat system; and
- (4) payment of the appropriate registration fee as required by §53.16 of this title [~~(relating to Vessel, Motor, and Marine Licensing Fees)]~~.

(d) A registration decal is not required for a [A] vessel used as a tender for direct transportation between a mother ship and the shore [is not required to display a validation decal], provided:

(1) the vessel is equipped with propulsion machinery of less than 10 horsepower;

(2) is owned by the owner of a vessel for which a valid certificate of number has been issued and displays the registration number of that vessel followed by the suffix "1" (i.e. TX-1234-AB-1) in the manner specified by Parks and Wildlife Code, §31.031; and

(3) is used for no purpose other than direct transportation between a mother ship and the shore.

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



## CHAPTER 55. LAW ENFORCEMENT SUBCHAPTER A. PROOF OF RESIDENCY REQUIREMENTS

### 31 TAC §55.1

The Texas Parks and Wildlife Department proposes an amendment to §55.1, concerning Proof of Residency. The proposed amendment would implement the provisions of House Bill 1718, enacted by the 83rd Texas Legislature (Regular Session), which amended Parks and Wildlife Code, §42.001, to allow terminally ill individuals who are participating in an event sponsored by a charitable organization to qualify as residents for purposes of purchasing a hunting license, provided approval of the executive director of the department has been obtained. The proposed amendment adds §55.1(8) to provide for the department's executive director to authorize the issuance of a resident hunting license to a nonresident who is terminally ill and participating in an event sponsored by a charitable organization. The proposed amendment also makes conforming changes to §55.1(5) and (6). It should be noted that the reference to §53.3(b) in the proposed amendments to §55.1(5) and 55.1(6) relates to a proposed amendment to §53.3 published elsewhere in this edition of the *Texas Register*.

Justin Halvorsen, Budget Analyst, has determined that for each of the first five years that the rule as proposed is in effect, there will be minimal fiscal implications to state government as a result of enforcing or administering the proposed amendment. However, the department is unable to accurately estimate of potential license sales volume resulting from the sale of resident hunting licenses to nonresidents who are terminally ill and participating in an event sponsored by a charitable organization is impossible, since the department does not collect data on the health status of persons purchasing nonresident licenses, does not track hunting opportunity provided by charitable organizations; and can-

not precisely characterize revenue implications because there is more than one type of nonresident hunting license and only one resident hunting license. However, based on anecdotal information, the department believes that the number of licenses sold under the rule will be less than 100. To provide an estimate that captures the likely revenue implications, the department assumes that if 100 persons obtained a license pursuant to the proposed amendment, and all such license sales represent the difference between the most expensive nonresident license (the general nonresident hunting license - \$315) and the resident general hunting license (\$25), which yields an estimated revenue loss of \$29,000.

There will be no fiscal implication for other units of state or local government.

Mr. Halvorsen also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be accurate regulations.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, micro-businesses, or persons required to comply with the rule as proposed. There will be a positive economic effect on any nonresident who is authorized to purchase a resident hunting license because nonresident licenses are more expensive than the equivalent license for resident hunters.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to [http://www.tpwd.state.tx.us/business/feedback/public\\_comment/](http://www.tpwd.state.tx.us/business/feedback/public_comment/) or Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: [robert.macdonald@tpwd.texas.gov](mailto:robert.macdonald@tpwd.texas.gov)).

The amendment is proposed under the authority of Parks and Wildlife Code, §42.001(1)(D), which allows terminally ill individuals who are participating in an event sponsored by a charitable organization to qualify as residents for purposes of purchasing

a hunting license, provided approval of the executive director of the department has been obtained, and §42.006, which authorizes the commission to prescribe requirements relating to the possession of a license issued under the provisions of Chapter 42.

The proposed amendment affects Parks and Wildlife Code, Chapter 42.

*§55.1. Proof of Residency.*

The requirements of this section are in addition to any requirements of Parks and Wildlife Code, Chapters 42 and 46.

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

(5) Except for active-duty members of the armed forces of the United States and nonresidents described in paragraph (8) of this section, §53.3(b) of this title (relating to Combination Hunting and Fishing License Packages), and §53.4(b) of this title (relating to Lifetime Licenses), the department will not issue a resident license or permit to any person if any proof of residency presented to the department indicates residency anywhere other than Texas.

(6) Except for active-duty members of the armed forces of the United States and nonresidents described in paragraph (8) of this section, §53.3(b) of this title, and §53.4(b) of this title, a person who claims residency in any other state for any purpose is not a Texas resident for the purposes of obtaining a resident license or permit from the department.

(7) (No change.)

(8) The executive director may authorize the issuance of a resident hunting license to a nonresident who is terminally ill and participating in an event sponsored by a charitable organization.

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



## CHAPTER 59. PARKS SUBCHAPTER J. OFF-HIGHWAY VEHICLE TRAIL AND RECREATIONAL AREA PROGRAM

### 31 TAC §59.231

The Texas Parks and Wildlife Department proposes an amendment to §59.231, concerning the Off-Highway Vehicle Trail and Recreational Area Program.

The proposed amendment would correct an inaccurate reference to the Transportation Code in subsection (a). The proposed amendment is a result of the passage of House Bill 1044 and Senate Bill 487 by the 83rd Texas Legislature (Regular Session), which amended Parks and Wildlife Code, §29.001, relating

to the operation of all-terrain vehicles and recreational off-highway vehicles. The proposed amendment would amend §59.231 to refer to the definition of "motorcycle" in Transportation Code, §502.001.

Steve Thompson, Off-Highway Vehicle Program Manager, has determined that for each of the first five years that the rule as proposed are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the proposed amendment.

Mr. Thompson also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be accurate cross-references in department regulations.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, micro-businesses, or persons required to comply with the rules as proposed, because the proposed amendment is nonsubstantive.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to <http://www.tpwd.state.tx.us/business/feedback/public> comment or Steve Thompson, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8230 (e-mail: [steve.thompson@tpwd.texas.gov](mailto:steve.thompson@tpwd.texas.gov)).

The amendment is proposed under Parks and Wildlife Code, §29.010, which authorizes the commission to adopt rules necessary to implement the provisions of Parks and Wildlife Code, Chapter 29.

The proposed amendment affects Parks and Wildlife Code, Chapter 29.

*§59.231. Off-Highway Vehicle Trail and Recreational Area Program.*

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

clearly indicates otherwise. All other words and terms shall have the meanings assigned by Parks and Wildlife Code.

(1) Off-highway motorcycle--A vehicle meeting the definition of a motorcycle in Transportation Code, §502.001 [§502.001(12)], that is not registered for use on a public roadway.

(2) (No change.)

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

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



## CHAPTER 65. WILDLIFE

### SUBCHAPTER C. PERMITS FOR TRAPPING, TRANSPORTING, AND TRANSPLANTING GAME ANIMALS AND GAME BIRDS

#### 31 TAC §65.119

The Texas Parks and Wildlife Department proposes an amendment to §65.119, concerning Penalties.

Parks and Wildlife Code, Chapter 43, Subchapter E, authorizes the department to issue permits to trap, transport, and transplant game animals and game birds, urban white-tailed deer removal permits, and permits to trap and transport surplus white-tailed deer. Prior to September 1, 2013, Parks and Wildlife Code, §43.062, mandated that any violation of Subchapter E or a permit issued under Subchapter E constituted a Class B Parks and Wildlife Code misdemeanor. The 83rd Texas Legislature (Regular Session) enacted Senate Bill (S.B.) 1342 and House Bill (H.B.) 2649, which amended Parks and Wildlife Code, §43.062, to provide that a violation of a rule relating to a reporting requirement for a permit issued under Subchapter E or a term of a permit issued under Subchapter E is a Class C Parks and Wildlife Code misdemeanor. The proposed amendment would add a reference to the punishments prescribed for a Class C Parks and Wildlife Code misdemeanor.

Robert Macdonald, Regulations Coordinator, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the proposed amendment, which is nonsubstantive.

Mr. Macdonald also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be accurate cross-references in department regulations.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a

regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that there will be no adverse economic effects on small businesses, micro-businesses, or persons required to comply with the rules as proposed, because the proposed amendment is nonsubstantive.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, Government Code, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to <http://www.tpwd.state.tx.us/business/feedback/public> comment or Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-8230 (e-mail: [robert.macdonald@tpwd.texas.gov](mailto:robert.macdonald@tpwd.texas.gov)).

The amendment is proposed under Parks and Wildlife Code, §§43.061(f), 43.0661(c), and 43.062(k), which authorize the commission to promulgate rules necessary to implement the provisions of Chapter 43, Subchapter E.

The proposed amendment affects Parks and Wildlife Code, Chapter 43, Subchapter E.

#### §65.119. Penalties.

A person who violates a provision of this subchapter, a condition of any permit issued pursuant to this subchapter, or any provision of Parks and Wildlife Code, Chapter 43, Subchapter E, commits an offense and is subject to the penalties prescribed by Parks and Wildlife Code, §12.405 or §12.406, as applicable.

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 19, 2013.

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4775



## SUBCHAPTER T. DEER BREEDER PERMITS

### 31 TAC §65.603

The Texas Parks and Wildlife Department proposes an amendment to §65.603, concerning Application and Permit Issuance. The proposed amendment would create a three-year and a five-year deer breeder's permit renewal option, which would be available to persons who have possessed a deer breeder's permit for at least the three years immediately preceding application for renewal and have been in substantial compliance with department rules governing deer breeder's permits and the provisions of Parks and Wildlife Code, Chapter 43, Subchapters L (Deer Breeder's Permit) and X (Deer Disposition Protocol).

Under current rules, the department issues deer breeder's permits and renewals on a one-year basis. The 83rd Texas Legislature (Regular Session), enacted Senate Bill (S.B.) 820, which amended Parks and Wildlife Code, §43.352 to authorize the department to issue deer breeder's permits with a three-year or five-year period of validity. Parks and Wildlife Code, §43.352, as amended by S.B. 820 provides that a three-year or five-year permit "is available only to a person who (1) has held a deer breeder's permit for the three consecutive permit years immediately preceding the date of the application for a three-year or five-year permit; (2) agrees to submit the annual reports required under this subchapter electronically; and (3) meets any other criteria established by rule of the commission." The proposed amendment would authorize the issuance of a deer breeder's permit renewal with a three-year or five-year period of validity, provided the applicant, in addition to meeting the requirements of Parks and Wildlife Code, §43.352, has been in substantial compliance with 31 TAC Chapter 65, Subchapter T (Deer Breeder Permits), and the provisions of Parks and Wildlife Code, Chapter 43, Subchapters L and X and has met the other criteria set out in §65.603(d) for the three-year period preceding the application for a three-year or five-year permit. The proposed amendment would also modify §65.603(d) to clarify that the criteria for renewal of any deer breeder permit includes substantial compliance with the provisions of Chapter 65, Subchapter T, and Parks and Wildlife Code, Chapter 43, Subchapters L and X.

The department does not intend for "substantial compliance" to mean total or perfect compliance and does not intend for minor, non-habitual, or understandable irregularities to be an automatic bar to obtaining a three-year or five-year permit renewal. The department intends to consider a number of factors and make such determinations on a case-by-case basis; however, egregious, problematic, and repeated instances of noncompliance will constitute grounds for refusal to issue a permit renewal. The factors that may be considered by the department in determining whether to issue a permit renewal would include, but not be limited to, the number and nature of instances of noncompliance, the existence or absences of a pattern of noncompliance, and the effectiveness of good-faith efforts made by the permittee to correct or remediate deficiencies.

The proposed amendments are for the purpose of implementing only the three-year and five-year permit options contained in S.B. 820. Any rules necessary to implement other provisions of S.B. 820 will be considered and proposed at a later date.

Mitch Lockwood, Big Game Program Director, has determined that for each of the first five years that the rule as proposed is in effect, other than the initial computer programming adjustments necessary for initial implementation of the rule, there will be no fiscal implications to state or local governments as a result of

enforcing or administering the rule. The department notes that any other impacts to the department will be positive, since the department will not have to bear the administrative expense of annual permit renewal for persons who hold a three-year or five-year permit.

Mr. Lockwood also has determined that for each of the first five years the rule as proposed is in effect the public benefit anticipated as a result of enforcing or administering the rule as proposed will be greater efficiency in program administration.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, commission considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that because the rule does not substantively alter any requirement currently in effect, but only makes permit renewals of longer term available to persons already in compliance with existing standards, there will be no adverse economic effects on small businesses, micro-businesses, or persons required to comply with the rule as proposed. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedure Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

Comments on the proposed rule may be submitted to [http://www.tpwd.state.tx.us/business/feedback/public\\_comment/](http://www.tpwd.state.tx.us/business/feedback/public_comment/) or Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 (e-mail: [robert.macdonald@tpwd.texas.gov](mailto:robert.macdonald@tpwd.texas.gov)).

The amendment is proposed under the authority of Parks and Wildlife Code, §43.352, which authorizes the commission to by rule establish criteria for the issuance of a deer breeder's permit with a period of validity of three years or five years.

The proposed amendment affects Parks and Wildlife Code, Chapter 43.

*§65.603. Application and Permit Issuance.*

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

(c) An initial [A] deer breeder's permit shall be a one-year permit valid from the date of issuance until the immediately following July 1. The department may issue a three or five-year deer breeder's per-

mit if the permit holder has met the requirements of subsection (d) of this section for the three-year period immediately prior to application for a three or five-year permit renewal. A three-year or five-year deer breeder permit renewal is valid for the three-year or five-year period specified on the permit.

(d) Except as provided in subsection (g) of this section, a deer breeder's one, three, or five-year permit may be renewed prior to the date of expiration [annually], provided that the applicant:

(1) is in substantial compliance with the provisions of this subchapter and Parks and Wildlife Code, Chapter 43, Subchapters L and X;

(2) has submitted a timely application for renewal or is, as determined by the department, making satisfactory progress towards resolution of deficiencies that prevent timely renewal;

(3) has filed the annual report in a timely fashion, as required by §65.608 of this title (relating to Annual Reports and Records); [and]

(4) has paid the permit renewal fee as specified in Chapter 53, Subchapter A, of this title (relating to Fees); and[-]

(5) for a permit renewal of three-years or five-years, meets the criteria for a three-year and five-year permit specified in Parks and Wildlife Code, §43.352.

(e) - (j) (No change.)

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

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Ann Bright

General Counsel

Texas Parks and Wildlife Department

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## TITLE 37. PUBLIC SAFETY AND CORRECTIONS

### PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

#### CHAPTER 28. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES

##### SUBCHAPTER I. ACCREDITATION

###### 37 TAC §28.144

The Texas Department of Public Safety (the department) proposes amendments to §28.144, concerning List of Recognized Accrediting Bodies. This amendment adds one new accrediting body to the list of recognized accrediting bodies.

Denise Hudson, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Hudson has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Hudson has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the publication of the additional recognized accrediting body.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to D. Pat Johnson, Crime Laboratory Service, 5800 Guadalupe, Austin, Texas 78752; pat.johnson@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.0205, which authorizes the director to adopt rules considered necessary for establishing an accreditation process for crime laboratories and other entities conducting forensic analyses of physical evidence for use in criminal proceedings.

Texas Government Code, §411.0205, is affected by this proposal.

###### §28.144. List of Recognized Accrediting Bodies.

(a) The director recognizes the [following] accrediting bodies in this subsection, subject to the stated discipline or subdiscipline limitations:

(1) American Board of Forensic Toxicology (ABFT)--recognized for accreditation of toxicology discipline only.

(2) American Society of Crime Laboratory Directors, Laboratory Accreditation Board (ASCLD/LAB)--recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter.

(3) Forensic Quality Services (FQS and FQS-I); formerly known as the National Forensic Science Technology Center (NFSTC)--recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter.

(4) Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services (HHS/SAMHA), formerly known as the National Institute on Drug Abuse of the Department of Health and Human Services (HHS/NIDA)--recognized for accreditation of toxicology discipline in the subdiscipline of Urine Drug Testing for all classes of drugs approved by the accrediting body.

(5) College of American Pathologists (CAP)--recognized for accreditation of toxicology discipline.

(6) American Association for Laboratory Accreditation (A2LA)--recognized for accreditation of all disciplines which are eligible for accreditation under this chapter.

(b) If an accrediting body is recognized under subsection (a) of this section and the recognized body approves a new discipline, subdiscipline, or procedure, the director may temporarily recognize the new discipline, subdiscipline, or procedure. A temporary approval shall be effective for 120 days.

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 18, 2013.

TRD-201304056

D. Phillip Adkins  
General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 424-5848



### 37 TAC §28.152

The Texas Department of Public Safety (the department) proposes new §28.152, concerning Consent to Cooperate with the Texas Forensic Science Commission. This new rule is made necessary by the 83rd Legislative Session, SB 1238 which amended Government Code, §411.0205. Changes to §411.0205 require crime laboratories and other entities seeking accreditation from the department to agree to consent to any request for cooperation by the Texas Forensic Science Commission that is made as part of the exercise of the commission's duties under Code of Criminal Procedure, Article 38.01.

Denise Hudson, Assistant Director, Finance, has determined that for each year of the first five-year period the rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Hudson has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Hudson has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be compliance by crime laboratories and other entities accredited by the department with requests for cooperation by the Texas Forensic Science Commission.

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

state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to D. Pat Johnson, Crime Laboratory Service, 5800 Guadalupe, Austin, Texas 78752; pat.johnson@dps.texas.gov. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.0205, which authorizes the director to adopt rules considered necessary for establishing an accreditation process for crime laboratories and other entities conducting forensic analyses of physical evidence for use in criminal proceedings.

Texas Government Code, §411.0205, is affected by this proposal.

§28.152. Consent to Cooperate with the Texas Forensic Science Commission.

The director requires that a laboratory or other entity that is accredited by the department must agree to consent to any request for cooperation by the Texas Forensic Science Commission that is made as part of the commission's duties under Code of Criminal Procedure, Article 38.01.

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 18, 2013.

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D. Phillip Adkins  
General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 424-5848



## PART 9. TEXAS COMMISSION ON JAIL STANDARDS

### CHAPTER 259. NEW CONSTRUCTION RULES

#### SUBCHAPTER B. NEW MAXIMUM SECURITY DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

##### 37 TAC §259.167

The Texas Commission on Jail Standards proposes an amendment to §259.167, concerning Audible Communication in New Maximum Security Design. The purpose of the proposed amendment is to add licensed peace officers, bailiffs, and staff designated by sheriff to communicate with inmates using two-way systems. In addition, to create uniformity within minimum jail standards, the term jailer will be substituted for corrections officer.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

*§259.167. Audible Communication.*

Two-way voice communication shall be available at all times between inmates and jailers, licensed peace officers, court bailiffs, or staff designated by the sheriff [~~corrections officers~~].

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 18, 2013.

TRD-201304062

Brandon S. Wood  
Executive Director

Texas Commission on Jail Standards

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 463-8236



## SUBCHAPTER C. NEW LOCKUP DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

### 37 TAC §259.263

The Texas Commission on Jail Standards proposes an amendment to §259.263, concerning Audible Communication in New Lockup Security Design. The purpose of the proposed amendment is to add licensed peace officers, bailiffs, and staff designated by sheriff to communicate with inmates using two-way systems. In addition, to create uniformity within minimum jail standards, the term jailer will be substituted for corrections officer.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarifica-

tion of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

*§259.263. Audible Communication.*

Two-way voice communication shall be available at all times between inmates and jailers, licensed peace officers, court bailiffs, or staff designated by the sheriff [~~corrections officers~~].

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 18, 2013.

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Brandon S. Wood  
Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



## SUBCHAPTER D. NEW MEDIUM SECURITY DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

### 37 TAC §259.357

The Texas Commission on Jail Standards proposes an amendment to §259.357, concerning Audible Communication in New Medium Security Design. The purpose of the proposed amendment is to add licensed peace officers, bailiffs, and staff designated by sheriff to communicate with inmates using two-way systems. In addition, to create uniformity within minimum jail standards, the term jailer will be substituted for corrections officer.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards

with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

*§259.357. Audible Communication.*

Two-way voice communication shall be available at all times between inmates and jailers, licensed peace officers, court bailiffs, or staff designated by the sheriff [~~corrections officers~~].

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 18, 2013.

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Brandon S. Wood  
Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



## SUBCHAPTER E. NEW MINIMUM SECURITY DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

### 37 TAC §259.453

The Texas Commission on Jail Standards proposes an amendment to §259.453, concerning Audible Communication in New Minimum Security Design. The purpose of the proposed amendment is to add licensed peace officers, bailiffs, and staff designated by sheriff to communicate with inmates using two-way systems. In addition, to create uniformity within minimum jail standards, the term jailer will be substituted for corrections officer.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

*§259.453. Audible Communication.*

Two-way voice communication shall be available at all times between inmates and jailers, licensed peace officers, court bailiffs, or staff designated by the sheriff [~~corrections officers~~].

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 18, 2013.

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Brandon S. Wood  
Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



## SUBCHAPTER F. TEMPORARY HOUSING--TENTS

### 37 TAC §259.520

The Texas Commission on Jail Standards proposes an amendment to §259.520, concerning Audible Communication in Temporary Housing--Tents. The purpose of the proposed amendment is to add licensed peace officers, bailiffs, and staff designated by sheriff to communicate with inmates using two-way systems. In addition, to create uniformity within minimum jail standards, the term jailer will be substituted for corrections officer.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

*§259.520. Audible Communication.*

Two-way voice communication shall be available at all times between inmates and jailers, licensed peace officers, court bailiffs, or staff designated by the sheriff [~~corrections officers~~].

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 18, 2013.

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Brandon S. Wood

Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236

## SUBCHAPTER G. TEMPORARY HOUSING--BUILDINGS

### 37 TAC §259.620

The Texas Commission on Jail Standards proposes an amendment to §259.620, concerning Audible Communication in Temporary Housing--Buildings. The purpose of the proposed amendment is to add licensed peace officers, bailiffs, and staff designated by sheriff to communicate with inmates using two-way systems. In addition, to create uniformity within minimum jail standards, the term jailer will be substituted for corrections officer.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

#### §259.620. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers, licensed peace officers, court bailiffs, or staff designated by the sheriff [~~corrections officers~~].

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 18, 2013.

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Brandon S. Wood

Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236

## SUBCHAPTER H. NEW LONG-TERM INCARCERATION DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

### 37 TAC §259.769

The Texas Commission on Jail Standards proposes an amendment to §259.769, concerning Audible Communication in Long-term Incarceration. The purpose of the proposed amendment is to add licensed peace officers, bailiffs, and staff designated by sheriff to communicate with inmates using two-way systems. In addition, to create uniformity within minimum jail standards, the term jailer will be substituted for corrections officer.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

#### §259.769. Audible Communication.

Two-way voice communication shall be available at all times between inmates and jailers, licensed peace officers, court bailiffs, or staff designated by the sheriff [~~corrections officers~~].

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 18, 2013.

TRD-201304068

Brandon S. Wood

Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236

## CHAPTER 260. COUNTY CORRECTIONAL CENTERS

### SUBCHAPTER B. CCC DESIGN, CONSTRUCTION AND FURNISHING REQUIREMENTS

### 37 TAC §260.161

The Texas Commission on Jail Standards proposes an amendment to §260.161, concerning Audible Communication in County Correctional Centers. The purpose of the proposed amendment is to add licensed peace officers, bailiffs, and staff designated by sheriff to communicate with inmates using two-way systems. In addition, to create uniformity within minimum jail standards, the term jailer will be substituted for corrections officer.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

#### §260.161. Audible Communication.

Two-way voice communication shall be available at all times between offenders and jailers, licensed peace officers, court bailiffs, or staff designated by the sheriff [corrections officers].

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 18, 2013.

TRD-201304069

Brandon S. Wood  
Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



## CHAPTER 271. CLASSIFICATION AND SEPARATION OF INMATES

### 37 TAC §271.1

The Texas Commission on Jail Standards proposes an amendment to §271.1, concerning Objective Classification Plan. The purpose of the proposed amendment is to replace the CARE system with CCQ because the CARE system no longer exists.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

#### §271.1. Objective Classification Plan.

(a) Each sheriff/operator shall develop and implement an objective classification plan approved by the Commission by January 1, 1997. The plan shall include principles, procedures, instruments and explanations for classification assessments, housing assignments, re-assessments and inmate needs. Plans utilizing an approved objective classification system shall be submitted and approved by the Commission. The following principles and procedures shall be addressed:

(1) - (7) (No change.)

(8) the following shall apply to prisoners in transit:

(A) - (F) (No change.)

(G) the facility providing temporary housing is not required to check prisoners in transit against the Department of State Health Services' CCQ [CARE] system to determine if the prisoner has previously received state mental healthcare; and

(H) (No change.)

(9) - (12) (No change.)

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

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

Filed with the Office of the Secretary of State on September 18, 2013.

TRD-201304070

Brandon S. Wood  
Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



## CHAPTER 273. HEALTH SERVICES

### 37 TAC §273.8

The Texas Commission on Jail Standards proposes an amendment to §273.8, concerning the Memorandum of Understanding between Texas Correctional Office on Offenders with Medical and Mental Impairments, Texas Commission on Law Enforcement, and Texas Commission on Jail Standards. The purpose of the proposed amendment is to update the proper names of

the Texas Commission on Law Enforcement and Texas Correctional Office on Offenders with Medical and Mental Impairments. Also, the term jailers is substituted for corrections officers.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§273.8. *Memorandum of Understanding [Health Services].*

For the purpose of establishing a continuity of care system for offenders with mental impairments, elderly, physically disabled, terminally ill, or significantly ill, the Texas Correctional Office on Offenders with Medical and Mental Impairments (TCOOMMI) [~~Texas Council on Offenders with Mental Impairments (TCOMI)~~] and the Texas Commission on Law Enforcement (TCOLE) [~~Officer Standards and Education (TCLEOSE)~~] and the Texas Commission on Jail Standards (TCJS) agree to the following Memorandum of Understanding.

(1) Authority and Purpose. Senate Bill 252, Acts 1993, 73rd Legislature, Chapter 488, 1, codified as Texas Health and Safety Code, §614.013, authorizes TCOOMMI and TCOLE [~~TCOMI and TCLEOSE~~] and the TCJS to establish a written Memorandum of Understanding that identifies methods for:

(A) identifying offenders in the criminal justice system who are mentally impaired, elderly, physically disabled, terminally ill, or significantly ill;

(B) developing procedures for the exchange of information relating to offenders who are mentally impaired, elderly, physically disabled, terminally ill, or significantly ill by the TCOOMMI, TCOLE [~~Council, TCLEOSE~~], and the TCJS for use in the continuity of care and services program; and

(C) adopting rules and standards that assist in the development of a continuity of care and services program for offenders who are mentally impaired, elderly, physically disabled, terminally ill, or significantly ill.

(2) All entities agree to the extent possible to:

(A) enter into a Memorandum of Understanding fulfilling the statutory requirements and purposes of Texas Health and Safety Code, §614.013, as set forth in this section;

(B) seek a statutory change in current statutes to allow for the exchange of information (including electronic) about offenders with special needs without consent of the individuals involved for the purpose of providing or coordinating services among the entities;

(C) develop a system that provides for timely identification of offenders with special needs who come into contact with law enforcement or jail personnel;

(D) submit a list of contact staff to the TCOOMMI [~~TCOMI~~] who are responsible for responding to referrals and/or issues regarding persons with special needs;

(E) distribute relevant training seminar and/or educational information towards improving each agency's knowledge and understanding of the identification and management of offenders with special needs;

(F) develop and implement a standardized release of information form that can facilitate the exchange of client information;

(G) inform the other of any proposed rule or standards changes which could affect the continuity of care system. Each agency shall be afforded 30 days after receipt of proposed change(s) to respond to the recommendations prior to the adoption;

(H) provide ongoing status reports to TCOOMMI [~~the Council~~] on the implementation of initiatives outlined in this Memorandum of Understanding; and

(I) provide opportunities for cross-training for each other's staff.

(3) TCOOMMI [~~Texas Commission on Mental Impairments~~] shall:

(A) provide technical assistance toward the development of improved medical and psychiatric screening standards;

(B) provide training and technical assistance to state or local law enforcement or jails on enhancing identification and management strategies for offenders with special needs;

(C) develop a statewide directory of contact staff for distribution to state and local law enforcement and jail personnel;

(D) monitor and coordinate the implementation of the activities of this Memorandum of Understanding;

(E) provide reports to the Legislature on the status of implementation of activities; and

(F) participate in any relevant research or studies relevant to offenders with special needs who come into contact with law enforcement or who are incarcerated in county jails.

(4) TCOLE [~~Texas Commission on Law Enforcement Officer Standards and Education~~] shall:

(A) develop and publish a mental health officer training inservice curriculum to train law enforcement officers and county jailers [~~corrections officers~~];

(B) establish a Mental Health Officer Certification Program; and

(C) develop and publish an inservice training course for law enforcement officers and county jailers [~~corrections officers~~] that is concerned with individuals with special needs.

(5) TCJS [~~Texas Commission on Jail Standards~~] shall:

(A) develop mental health standards which address training needs, identification, communication, housing, supervision and referrals; and

(B) provide technical assistance for local jails on management strategies for offenders with special needs.

(6) Review and Monitoring.

(A) TCOOMMI, TCOLE [~~TCOMI, TCLEOSE~~], and TCJS shall jointly monitor implementation of the continuity of care system as outlined in this Memorandum of Understanding. The intent of all agencies is to provide timely communication, discussion and resolution of transitional problems should any occur.

(B) This Memorandum of Understanding shall be adopted by TCOOMMI, TCOLE, and TCJS [~~the Texas Council on Offenders with Mental Impairments, the Texas Commission on Law Enforcement Officer Standards and Education and the Texas Commission on Jail Standards~~]. Subsequent to adoption, all parties to this memorandum shall annually review this memorandum and provide status reports to TCOOMMI [~~the Texas Council on Offenders with Mental Impairments~~]. Amendments to this Memorandum of Understanding may be made at any time by mutual agreement to the parties.

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 18, 2013.

TRD-201304071  
Brandon S. Wood  
Executive Director  
Texas Commission on Jail Standards  
Earliest possible date of adoption: November 3, 2013  
For further information, please call: (512) 463-8236



## CHAPTER 275. SUPERVISION OF INMATES

### 37 TAC §275.1

The Texas Commission on Jail Standards proposes an amendment to §275.1, concerning Regular Observation by Corrections Officers. The purpose of the proposed amendment is to clarify that observations of inmates shall be documented and observations shall be conducted once every 60 minutes. Also, the term jailers is substituted for corrections officers to promote uniformity.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§275.1. *Regular Observation by Jailers* [~~Corrections Officers~~].

Every facility shall have the appropriate number of jailers [~~corrections officers~~] at the facility 24 hours each day. Facilities shall have an established procedure for documented [~~visual~~], face-to-face observation of all inmates by jailers no less than once every 60 minutes. [~~corrections officers at least once every hour~~]. Observation shall be performed at least every 30 minutes in areas where inmates known to be assaultive, potentially suicidal, mentally ill, or who have demonstrated bizarre behavior are confined. There shall be a two-way voice communication capability between inmates and jailers, licensed peace officers, bailiffs, and designated staff at all times. Closed circuit television may be used, but not in lieu of the required personal observation.

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 18, 2013.

TRD-201304072  
Brandon S. Wood  
Executive Director  
Texas Commission on Jail Standards  
Earliest possible date of adoption: November 3, 2013  
For further information, please call: (512) 463-8236



### 37 TAC §275.2

The Texas Commission on Jail Standards proposes an amendment to §275.2, concerning Corrections Officer Training and Licensing. The purpose of the proposed amendment is to clarify that personnel who directly supervise jailers shall be licensed by the Texas Commission on Law Enforcement. Also the term jailer is substituted for corrections officer to promote uniformity.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§275.2. *Jailer* [~~Corrections Officer~~] *Training and Licensing*. Personnel employed or appointed as jailers [~~or guards~~] of county jails or personnel appointed, employed, or assigned to directly supervise jailers shall be licensed as per the requirements of the Texas Commission on Law Enforcement [~~Officer Standards and Education~~] under the provisions of Part 7 of this title [~~the Texas Administrative Code, Title 37~~]. Personnel employed or appointed as jailers or personnel appointed, employed, or assigned to directly supervise jailers [~~guards~~]

at facilities operated under vendor contract with a county or city shall be licensed as per the requirements of the Texas Commission on Law Enforcement under the provisions of Part 7 of this title [subject to the same qualifications, training, and testing procedures as county jailers].

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

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Brandon S. Wood

Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



### 37 TAC §275.4

The Texas Commission on Jail Standards proposes an amendment to §275.4, concerning Staff. The purpose of the proposed amendment is to clarify that jailers shall observe inmates once every 60 minutes and also the term jailer is substituted for corrections officer to promote uniformity.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

#### §275.4. Staff.

Inmates shall be supervised by an adequate number of jailers [corrections officers] to comply with state law and this chapter [these standards]. One jailer [corrections officer] shall be provided on each floor of the facility where 10 or more inmates are housed, with no less than 1 jailer [corrections officer] per 48 inmates or increment thereof on each floor for direct inmate supervision. This jailer [officer] shall provide visual inmate supervision not less than once every 60 minutes [hourly]. Sufficient staff to include supervisors, jailers [correctional officers] and other essential personnel as accepted by the Commission shall be provided to perform required functions. A plan concurred in by both commissioners' court and sheriff's department, which provides for adequate and reasonable staffing of a facility, may be submitted to the Commission for approval. This rule shall not preclude the Texas Commission on Jail Standards from requiring staffing in excess of minimum requirements when deemed necessary to provide a safe,

suitable, and sanitary facility nor preclude submission of variance requests as provided by statute or Chapter 299 of this title [these rules].

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

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Brandon S. Wood

Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



### 37 TAC §275.5

The Texas Commission on Jail Standards proposes an amendment to §275.5, concerning Census. The purpose of the proposed amendment is to substitute jailer with corrections officer to promote uniformity within minimum jail standards.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

#### §275.5. Census.

Inmates shall be physically counted by a jailer [corrections officer] at frequent and regular intervals, no less than once per day.

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

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TRD-201304075

Brandon S. Wood

Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



**37 TAC §275.7**

The Texas Commission on Jail Standards proposes new §275.7, concerning Supervision Outside the Security Perimeter--Court Holding Cells. The purpose of the proposed new section is to provide standards on the proper supervision of inmates when occupying court holding cells outside the secured perimeter of the jail.

Brandon S. Wood, Executive Director, has determined that for the first five year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Mr. Wood has also determined that for each year of the first five years the new section is in effect the public benefits anticipated as a result of enforcing the section as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The new section is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by the new section are Local Government Code, Chapter 351, §351.002 and §351.015.

§275.7. Supervision Outside the Security Perimeter--Court Holding Cells.

Inmates shall be observed by a peace officer or a jailer licensed by the Texas Commission on Law Enforcement or bailiff when outside the security perimeter in court holding cells. The sheriff/operator shall have an established procedure for documented, face-to-face observation of all inmates no less than once every 30 minutes. One jailer, licensed peace officer, or bailiff shall be provided on each floor where 10 or more inmates are detained, with no less than one jailer, licensed peace officer, or bailiff per 48 inmates or increment thereof on each floor for direct inmate supervision. Where required, there shall be a two-way voice communication capability between inmates and jailers, licensed peace officers, or bailiffs at all times. Closed circuit television may be used, but not in lieu of the required personal observation.

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

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Brandon S. Wood  
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Texas Commission on Jail Standards  
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For further information, please call: (512) 463-8236



**CHAPTER 277. CLOTHING, PERSONAL HYGIENE AND BEDDING**

**37 TAC §277.8**

The Texas Commission on Jail Standards proposes an amendment to §277.8, concerning Bedding and Linens. The purpose of the proposed amendment is to give sheriffs discretion in providing bedding and linens to persons in holding/detoxification cells.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has also determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711; (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§277.8. Bedding and Linens.

A standard issue of bedding and linens to each inmate to be placed in housing [detained overnight] shall include, but shall not be limited to, the following clean, safe, and serviceable items:

- (1) one mattress;
- (2) one sheet or mattress cover;
- (3) one towel; and
- (4) one blanket, or more depending upon climatic conditions. The sheriff or their designee shall determine whether such items are provided to inmates detained in holding/detoxification cells.

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

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Brandon S. Wood  
Executive Director  
Texas Commission on Jail Standards  
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For further information, please call: (512) 463-8236



**CHAPTER 289. WORK ASSIGNMENTS**

**37 TAC §289.4**

The Texas Commission on Jail Standards proposes an amendment to §289.4, concerning Outside the Security Perimeter. The purpose of the proposed amendment is to clarify that jailers or persons designated by the sheriff should supervise inmates assigned to work outside the security perimeter.

Brandon S. Wood, Executive Director, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Mr. Wood has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Diana Spiller, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

#### §289.4. *Outside the Security Perimeter.*

Only inmates classified as minimum custody should be assigned to work outside the security perimeter and should be supervised by jailers or persons designated by the sheriff [~~corrections officers~~].

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

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TRD-201304078

Brandon S. Wood  
Executive Director

Texas Commission on Jail Standards

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For further information, please call: (512) 463-8236



## PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

### CHAPTER 341. JUVENILE PROBATION DEPARTMENT GENERAL STANDARDS

The Texas Juvenile Justice Department (TJJD) proposes the repeal of §341.16, concerning Testing; §341.28, concerning Certification of Staff; §§341.52 - 341.56, concerning Non-Caseworker Systems; and §341.60, concerning TJPC Monthly Folder Extract.

TJJD proposes amendments to §§341.1 - 341.4, 341.9, 341.10, 341.29, 341.35 - 341.41, 341.47 - 341.51, 341.65 - 341.71, and 341.80 - 341.90, concerning Texas Juvenile Justice Department Standards.

TJJD also proposes new §341.20, concerning Risk and Needs Assessment.

#### SECTION-BY-SECTION SUMMARY

The repeal of §341.16 will allow for the inclusion of a broader requirement in §341.3 for juvenile boards to adopt zero-tolerance policies regarding sexual abuse.

The repeal of §341.28 will allow for the content of this section to be moved to §344.800, which is a more appropriate location for information regarding positions requiring certification.

The repeal of §§341.52 - 341.56 which comprise Subchapter H, Division 2, will allow for the content of this Division to be consolidated with Division 1.

The repeal of §341.60 will allow for the requirement to submit the monthly data extract to be moved to §341.49. The precise data specifications will no longer be included in the rule.

New §341.20 will add the requirement from Texas Human Resources Code §221.003(b) and (e) for juvenile probation departments to use a validated risk and needs assessment instrument provided or approved by TJJD.

The proposed amendment to §341.3 will remove the requirement for a juvenile board's personnel policies to include a salary scale for juvenile probation officers and a provision for juvenile probation officers to receive all benefits given to county employees. The amended section will also include a new requirement for policies on research studies and zero-tolerance for sexual abuse. Additionally the amended section will require more specific documentation for volunteer and intern sign-in/out logs.

The proposed amendments to §§341.47 - 341.51 will remove references to specific case management systems.

The proposed amendment to §341.67 will add language to clarify the provision that prohibits the obstruction of the airway or impairs the breathing of a juvenile to include that nothing can be placed in, on, or over the juvenile's mouth or nose.

The proposed amendment to §341.81 will add that a juvenile probation officer is not authorized to carry a firearm if he/she has been designated as a perpetrator in a TJJD abuse, neglect, or exploitation investigation. Additionally a reference to §221.35 of this title has been added to reflect that a juvenile probation officer must successfully complete the Texas Commission on Law Enforcement's (TCOLE) current firearms training program for juvenile probation officers to be authorized to carry a firearm in the course of the officer's official duties.

The proposed amendment to §341.82 will clarify that documentation must be provided to TJJD *after* a juvenile probation officer obtains an initial or renewal firearms proficiency certificate from TCOLE. The list of documents no longer includes proof of certain facts that are attested to on TJJD's verification of eligibility form.

Throughout all amended sections in Chapter 341, non-substantive terminology updates and clarifications will also be made.

#### RULE REVIEW

Simultaneously with these proposed rulemaking actions, TJJD also publishes this notice of intent to review all rules in Chapter 341 as required by Texas Government Code §2001.039. Comments on whether the reasons for originally adopting these rules continue to exist may be submitted to TJJD by following the instructions provided later in this notice.

#### FISCAL NOTE

Mike Meyer, Chief Financial Officer, has determined that for each year of the first five years the new, amended, and repealed sections will be in effect, there is no significant fiscal impact to state

or local governments as a result of enforcing or administering the sections.

#### PUBLIC BENEFIT/COSTS

James Williams, Senior Director of Probation and Community Services, has determined that for each year of the first five years the new, amended, and repealed sections are in effect, the public benefits anticipated as a result of administering the sections will be additional safeguards for the safety of youth under juvenile probation jurisdiction, additional flexibility regarding the content of juvenile boards' personnel policies, and the availability of rules that more accurately reflect current statutes and TJJJ's current structure and practices.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the sections as proposed. No private real property rights are affected by adoption of these sections.

#### PUBLIC COMMENTS

Comments on the proposal and/or rule review may be submitted within 30 days after publication of this notice to Steve Roman, Policy Coordinator, Texas Juvenile Justice Department, P.O. Box 12757, Austin, Texas 78711, or email to [policy.proposals@tjjd.texas.gov](mailto:policy.proposals@tjjd.texas.gov).

### SUBCHAPTER A. DEFINITIONS

#### 37 TAC §341.1

##### STATUTORY AUTHORITY

The amendment is proposed under Texas Human Resources Code §221.002(a), which requires TJJJ to adopt reasonable rules that provide minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

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

##### §341.1. Definitions.

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

(1) Alleged Victim--A juvenile alleged as being a victim of abuse, exploitation, or neglect.

(2) Chief Administrative Officer--Regardless of title, the person hired by a juvenile board who is responsible for oversight of the day-to-day operations of a juvenile probation department, including the juvenile probation department of a multi-county judicial district.

~~(3) Commission--The Texas Juvenile Probation Commission.~~

(3) [(4)] Juvenile Justice Program--A program or department operated wholly or partly by the governing board, juvenile board, or by a private vendor under a contract with the governing board or juvenile board that serves juveniles under juvenile court jurisdiction or juvenile board jurisdiction. The term includes:

(A) [a] juvenile justice alternative education programs; [program and]

(B) [a] non-residential programs [program] that serve [serves] juvenile offenders under the jurisdiction of the juvenile court; and [or juvenile board jurisdiction and a]

(C) juvenile probation departments [department].

(4) [(5)] Referral--A referral to the juvenile court for conduct defined in Texas Family Code §51.03 that results in a face-to-face

interview between the juvenile and the authorized staff of the juvenile probation department.

(5) TJJJ--Texas Juvenile Justice Department.

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

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TRD-201304153

Brett Bray

General Counsel

Texas Juvenile Justice Department

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For further information, please call: (512) 490-7014



### SUBCHAPTER B. JUVENILE BOARD RESPONSIBILITIES

#### 37 TAC §§341.2 - 341.4

##### STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code §221.002(a), which requires TJJJ to adopt reasonable rules that provide minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

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

##### §341.2. Administration.

(a) Local Juvenile Probation Services Administration.

(1) The juvenile board must [shall] employ a chief administrative officer for each autonomous juvenile probation department.

(2) The juvenile board must [shall] specify the responsibilities and functions of the juvenile probation department as well as the authority, responsibility, and function of the position of the chief administrative officer.

(3) When probation services for adult and juvenile offenders are provided by a single probation office, the juvenile board must [shall] ensure that the juvenile probation department policies, programs, and procedures are clearly differentiated.

(b) Referral Ratio. The juvenile board shall employ at least one certified juvenile probation officer for each 100 referrals made to the juvenile probation department annually.

(c) Participation in Community Resource Coordination Groups.

(1) Juvenile boards must [shall] participate in the system of community resource coordination groups pursuant to Texas Government Code §531.055 [and the procedures in the memorandum of understanding adopted in §349.69 of this title].

(2) The chair of the juvenile board [;] or his/her [the chair's] designee must [shall] serve as representative to the interagency dispute resolution process required by Texas Government Code §531.055 [described in the memorandum of understanding].

(d) Notice of Complaint Procedures. The juvenile board must ~~[shall]~~ post the sign provided by TJJJ ~~[the Commission]~~ relating to complaint procedures in a public area of:

(1) the juvenile probation department; and

(2) any facility operated by the juvenile board~~[,]~~ or ~~[operated]~~ by a private entity through a contract with the juvenile board.

§341.3. *Policy and Procedures.*

(a) Personnel Policies. The juvenile board must ~~[shall]~~ adopt written personnel policies. ~~[These personnel policies shall include but not be limited to:]~~

~~[(1) a salary scale for all juvenile probation officers; and]~~

~~[(2) the provision for juvenile probation officers to receive all applicable benefits and allowances given to county employees.]~~

(b) Department Policies. The juvenile board must ~~[shall]~~ adopt written department policies and procedures. These policies must include, at a minimum, the following provisions ~~[shall include but not be limited to:]~~:

(1) Deferred Prosecution. The deferred prosecution policy must, ~~[shall]~~ at a minimum, include the following provisions ~~[policies]~~:

(A) The maximum supervision fee for deferred prosecution cases is \$15.00 per month.

(B) The monthly fee must ~~[shall]~~ be determined after obtaining a financial statement from the parent or guardian.

(C) The fee schedule must ~~[shall]~~ be based on total parent/guardian income.

(D) The chief administrative officer~~[,]~~ or his/her ~~[the chief administrative officer's]~~ designee must ~~[shall]~~ approve in writing the fee assessed for each child including any waiver of deferred prosecution fees.

(E) A deferred prosecution fee must ~~[shall]~~ not be imposed if the juvenile board does not adopt a fee schedule and rules for waiver of the deferred prosecution fee.

(2) Volunteers and Interns. If a juvenile probation department has or develops a volunteer or internship program, the juvenile board must, at a minimum, ~~[shall]~~ adopt the following policies for the volunteer and internship program:

(A) a description of the authority, responsibility, and accountability of volunteers and interns who work with the department;

(B) a requirement for criminal history searches in accordance with the requirements set forth in Chapter 344 ~~[§344.300]~~ of this title;

(C) selection and termination criteria, including disqualification based on criminal history;

(D) orientation and training requirements including training on reporting abuse, exploitation, and neglect;

(E) a requirement that volunteers and interns meet minimum professional requirements if serving in a professional capacity; and

(F) a provision requiring all volunteer and intern activity involving contact with juveniles to be documented through the use of a log which identifies: ~~[for a volunteer and intern sign in log.]~~

(i) the name of the volunteer/intern;

(ii) the date and time (beginning and ending) of the activity;

and

(iii) the name of the juvenile(s) contacted/served;

(iv) general description of the activity/service the volunteer/intern provided.

(3) Experimentation. The juvenile board must adopt a policy that, ~~[policy shall]~~ at a minimum, prohibits ~~[prohibit]~~ a department or juvenile justice program from using juveniles for medical, pharmaceutical, or cosmetic experiments.

(4) Research Studies. Participation by juveniles in medical, psychological, pharmaceutical, or cosmetic research is prohibited unless the research study is approved in writing by the juvenile board subject to the following requirements:

(A) The juvenile board must promulgate approved policies that govern all authorized research studies. Studies that include medically invasive procedures must be prohibited.

(B) Approved research studies must adhere to all applicable policies of the authorizing juvenile board.

(C) Research studies approved by the juvenile board must be reported to TJJJ in a format prescribed by TJJJ prior to commencement of the study.

(D) After receiving a request from TJJJ, the juvenile board chair or the chief administrative officer must provide TJJJ with the written results of a completed research study.

(E) Policies governing research studies must adhere to all federal requirements governing human subjects and confidentiality.

(5) Zero-Tolerance for Sexual Abuse. The department must adopt and enforce zero-tolerance policies and procedures regarding sexual abuse. The policies and procedures must:

(A) strictly prohibit all sexual abuse of juveniles under the jurisdiction of the department by department staff;

(B) establish the actions department staff must take in response to allegations of sexual abuse and TJJJ-confirmed incidents of sexual abuse; and

(C) provide for administrative and/or criminal disciplinary sanctions.

§341.4. *Waiver or Variance to Standards.*

Unless expressly prohibited by another standard, an application for waiver or variance of any standard in this chapter may be submitted in accordance with §349.200 of this title ~~[the juvenile board, or chief administrative officer may make an application for waiver and the juvenile board may make an application for variance of any standard or standards adopted by the Commission in accordance with §349.2 of this title].~~

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

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Brett Bray  
General Counsel  
Texas Juvenile Justice Department  
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For further information, please call: (512) 490-7014



## SUBCHAPTER C. CHIEF ADMINISTRATIVE OFFICER RESPONSIBILITIES

### 37 TAC §341.9, §341.10

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code §221.002(a), which requires TJJD to adopt reasonable rules that provide minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

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

#### §341.9. Policy and Procedure Manual.

(a) The chief administrative officer must develop, [shalt] maintain, and enforce a policy and procedure manual for the juvenile probation department, which must [shalt] include the policies and [;] procedures[; and regulations] of the juvenile probation department as adopted by the juvenile board. The chief administrative officer must also ensure the daily juvenile probation department practice conforms to the policies and procedures detailed in the manual.

(b) The chief administrative officer must [shalt] provide all employees with a copy of or access to the policy and procedure manual, review the manual at least once every 365 calendar days, maintain documentation of this review, [on an annual basis] and update the manual [it] as necessary.

#### §341.10. Participation in Community Resource Coordination Groups.

The chief administrative officer or his/her designee must [shalt] serve as the liaison to the local community resource coordination group pursuant to Texas Government Code §531.055. [in accordance with the memorandum of understanding adopted in §349.69 of this title.]

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

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Brett Bray  
General Counsel  
Texas Juvenile Justice Department  
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For further information, please call: (512) 490-7014



## SUBCHAPTER D. TREATMENT AND SAFETY

### 37 TAC §341.16

*(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 Juvenile Justice Department or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

#### STATUTORY AUTHORITY

The repeal is proposed under Texas Human Resources Code §221.002(a), which requires TJJD to adopt reasonable rules that provide minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

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

#### §341.16. Testing.

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

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## SUBCHAPTER D. ASSESSMENT AND SCREENING

### 37 TAC §341.20

#### STATUTORY AUTHORITY

The new section is proposed under Texas Human Resources Code §221.002(a), which requires TJJD to adopt reasonable rules that provide minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services. The new section is also proposed under Texas Human Resources Code §221.003(b) and (e), which requires TJJD to adopt rules requiring juvenile probation departments to use a validated risk and needs assessment instrument that has been provided or approved by TJJD.

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

#### §341.20. Risk and Needs Assessment.

A juvenile probation department must, before the disposition of a child's case and using a validated risk and needs assessment instrument or process provided or approved by TJJD, complete a risk and needs assessment for each child under the jurisdiction of the juvenile probation department.

##### (1) Selection of Risk and Needs Assessment Instrument.

(A) All juvenile probation departments may use the TJJD Risk and Needs Assessment Instrument (RANA).

(B) Departments may request and receive approval from TJJD to use a validated risk and needs assessment instrument other than the RANA.

(2) Administration of Instrument. The risk and needs assessment instrument must be administered by an individual trained to administer the instrument.

##### (3) Reports to TJJD.

(A) The summary risk and needs scores of all juveniles assessed with a risk and needs assessment instrument must be electron-

ically reported to TJJD on a monthly basis in accordance with §341.49 of this chapter.

(B) All risk and needs factor information must be electronically reported to TJJD in the format prescribed by TJJD.

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

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Brett Bray

General Counsel

Texas Juvenile Justice Department

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For further information, please call: (512) 490-7014



## SUBCHAPTER F. REQUIREMENTS FOR JUVENILE PROBATION OFFICERS

### 37 TAC §341.28

*(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 Juvenile Justice Department or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

The repeal is proposed under Texas Human Resources Code §221.002(a), which requires TJJD to adopt reasonable rules that provide certification standards for probation officers and minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

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

§341.28. *Certification of Staff.*

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

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Brett Bray

General Counsel

Texas Juvenile Justice Department

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### 37 TAC §341.29

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Human Resources Code §221.002(a), which requires TJJD to adopt reasonable rules that provide certification standards for probation officers and minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

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

§341.29. *Duties of Certified Juvenile Probation Officers.*

(a) In addition to any duties, responsibilities, or powers granted by Title III of the Texas Family Code, the following duties and responsibilities must [~~shall~~] be performed only by certified juvenile probation officers:

(1) recommending a disposition [~~dispositional recommendations~~] in formal court proceedings;

(2) providing final approval of written social history reports;

(3) acting as the primary supervising officer for all court-ordered [~~court ordered~~] and deferred prosecution cases;

(4) writing and administering case plans in accordance with Subchapter G of this chapter [~~accordance with the Commission's case management standards~~]; and

(5) [~~if authorized by the juvenile board under Texas Family Code §53.01,~~] conducting intake interviews and investigations [~~investigations,~~] and making release decisions if authorized by the juvenile board under Texas Family Code §53.01.

(b) An individual hired as a juvenile probation officer<sup>[,]</sup> who is not yet certified as a juvenile probation officer may perform the duties under subsection(a) of this section so long as the individual:

(1) has [~~not~~] worked for the probation department for no more than six [~~6~~] months from the individual's date of hire;

(2) has received training on each duty listed in subsection [under] (a) of this section; and

(3) has received training in recognizing and reporting abuse, exploitation, and neglect.

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

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## SUBCHAPTER G. CASE MANAGEMENT STANDARDS

### 37 TAC §§341.35 - 341.41

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code §221.004(a), which requires TJJD to adopt rules that provide case management standards for all probation services provided by local probation departments.

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

§341.35. *Definitions.*

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

(1) Case Plan--A written document that sets out actions and goals for a juvenile to follow while under the supervision of the juvenile court in order to make changes necessary to best meet the juvenile's status and circumstances over time. The case plan is developed for each adjudicated juvenile and addresses a juvenile's needs (e.g., educational, family, substance abuse, mental health, etc.), risks of re-offending, level of supervision, strengths and weaknesses, any appropriate intake information, Strategies for Juvenile Supervision [strategies for juvenile supervision] findings if any, preliminary investigation information, and victim impact statements utilizing all appropriate resources.

(2) Case Plan Review--A written document that reviews and measures the initial case plan's goals for progress, including the reassessment and reevaluation of the juvenile's status, circumstances, and resources.

(3) Courtesy Supervision--A request from one Texas county (sending county) to another Texas county [County] (receiving county) requesting supervision for an adjudicated juvenile who is or will be residing in the receiving county.

(4) Exit Plan--A [The exit plan is the] written document developed for each juvenile that identifies the juvenile's needs for post-supervision reintegration and specifies the community resources available to meet those needs. The purpose of the exit plan is to facilitate a continuum of community services to the juvenile and the juvenile's family after probation supervision ends.

(5) Field Supervision--Supervision ordered by a juvenile court in accordance with Texas Family Code §54.04(d)(1)(A) where the child is placed on probation in the child's home or in the custody of a relative or another fit person.

(6) Formal Referral--Occurs and should be counted when all three of the following conditions exist:

(A) delinquent conduct, conduct indicating a need for supervision, or a violation of probation was allegedly committed;

(B) the juvenile probation department has jurisdiction and venue; and

(C) either a face-to-face contact occurs with the office or official designated by the juvenile board or written or verbal authorization to detain is given by the office or official designated by the juvenile board.

(7) Residential Placement--Supervision ordered by a juvenile court in accordance with Texas Family Code §54.04(d)(1)(B) where the juvenile is placed on probation outside the child's home in [either] a foster home[;] or a public or private institution or agency.

(8) Substitute Care Provider--A foster home or a[;] public or private institution or agency that provides residential services to juveniles.

(9) Supervision--Supervision involves the case management of a juvenile by the assigned juvenile probation officer or designee through contacts (face-to-face, telephone, office, home, collateral) with the juvenile, the juvenile's family, and other case planning participants.

(10) TJJD [TJPC] Standard Screening Tool--An instrument provided by TJJD [the Texas Juvenile Probation Commission] to assist in identifying juveniles who may have mental health needs.

#### §341.36. Screening.

(a) TJJD [TJPC] Standard Screening Tool. The TJJD [TJPC] Standard Screening Tool must [shall] be completed for all juveniles who receive a formal referral to the juvenile probation department. If the TJJD [TJPC] Standard Screening Tool has been completed within the previous two weeks and is contained in the juvenile's case record, the department is not required to complete an additional screening.

(b) Time of Screening.

(1) Referrals Without Detention. The TJJD [TJPC] Standard Screening Tool must [shall] be administered no later than 14 calendar days after the date of [from] the first face-to-face contact between the juvenile and a juvenile probation officer.

(2) Referrals With Detention.

(A) The TJJD [TJPC] Standard Screening Tool must [shall] be administered to each juvenile admitted into detention.

(B) The TJJD [TJPC] Standard Screening Tool must [shall] be administered within 48 hours after [from] the time the juvenile is admitted into detention.

(c) Administration of Instrument. The TJJD [TJPC] Standard Screening Tool must [shall] be administered by an individual trained to administer the instrument.

(d) Reports to TJJD [the Commission]. The summary scores of all juveniles screened using the TJJD [TJPC] Standard Screening Tool and any other information required by TJJD must [the Commission shall] be electronically reported to TJJD [the Commission] on a monthly basis under §341.49 of this chapter [(CASEWORKER counties), §341.54 of this chapter (non-CASEWORKER counties); or through a separate database provided by the Commission].

#### §341.37. Case Planning.

In accordance with §341.38 or §341.39 of this chapter, a written case plan must [shall] be developed and implemented for juveniles assigned to progressive sanctions levels three through five and any juvenile given determinate sentence probation under Texas Family Code §54.04(q).

#### §341.38. Field Supervision.

(a) Initial Case Plan. The initial case plans for juveniles placed on field supervision must [shall] be:

(1) developed in consultation with the juvenile's parent, guardian, or custodian; [;] the juvenile; [and] the supervising juvenile probation officer; and any other interested parties;

(2) developed within 60 calendar days after [from] the date of the juvenile's disposition;

(3) signed and dated by the juvenile; [;] the juvenile's parent, guardian, or custodian; [;] supervising juvenile probation officer; and any interested parties; and

(4) maintained in the juvenile's case file with copies provided to the juvenile and the juvenile's parent, guardian, or custodian.

(b) Case Plan Review.

(1) Case plans must [shall] be reviewed and updated:

(A) at least once every six months;

(B) within 15 calendar days after a juvenile's probation is modified by a court order; and

(C) within 15 calendar days after acceptance of a juvenile's case from another county for courtesy supervision.

(2) The juvenile; ~~the supervising juvenile probation officer;~~ and at least one parent, guardian, or custodian ~~must [and the supervising juvenile probation officer shall]~~ participate in the review process.

(3) The case plan review must [shall] document the following:

(A) appropriateness of the juvenile's current level of supervision and services;

(B) extent of the juvenile's compliance with the individualized case plan;

(C) extent of the juvenile's compliance with the conditions of probation;

(D) extent of progress toward the goals outlined in the case plan;

(E) a projection of a likely date the juvenile is expected to complete probation; and

(F) services assessed, offered, or provided to the juvenile and family to address identified risks and needs.

(4) All case plan reviews must [shall] be signed and dated by the juvenile; ~~the juvenile's parent, guardian, or custodian;~~ and the juvenile's supervising juvenile probation officer.

(5) Copies of every case plan review must [shall] be maintained in the juvenile's case file with copies provided to the juvenile and the juvenile's parent, guardian, or custodian.

§341.39. Residential Placement.

(a) Initial Case Plan. The initial case plans for juveniles placed in residential placement must [shall]:

(1) be developed and implemented within 30 calendar days ~~after~~ [on] the juvenile's initial date of placement;

(2) be developed in consultation with the juvenile's parent, guardian, or custodian; ~~the juvenile;~~ ~~the substitute care provider;~~ and the supervising juvenile probation officer;

(3) contain specific behavioral goals using the nine domains outlined in 1 TAC §351.13 [~~Title 4 Part 45 Texas Administrative Code §351.13~~];

(4) be signed by the juvenile; ~~and~~ the juvenile's parent, guardian, or custodian; and the juvenile's supervising probation officer; and

(5) be retained in the juvenile's case file with copies provided to the juvenile; ~~the juvenile's parent, guardian, or custodian;~~ and the substitute care provider.

(b) Case Plan Review.

(1) Case plans must [shall] be reviewed and updated at least once every 90 calendar days.

(2) The juvenile and at least one parent, guardian, or custodian must [shall] participate in the case plan review with the substitute care provider and the juvenile's supervising juvenile probation officer.

(3) The case plan reviews must [shall] measure the juvenile's progress toward meeting his/her goals using the six-point [~~six point~~] scale outlined in 1 TAC §351.13 [~~Title 4 Part 45 Texas Administrative Code §351.13~~].

(4) The outcome of the substitute care provider's service delivery must [shall] be assessed based on whether the child is progressing in 50 [~~fifty~~] percent or more of identified goals.

(5) Case plan reviews must [shall] be signed by the juvenile; ~~the juvenile's parent, guardian, or custodian;~~ and the supervising juvenile probation officer.

(6) Copies of every case plan review must [shall] be retained in the juvenile's case file.

§341.40. Level of Supervision.

(a) The juvenile probation department must [shall] adopt written criteria the department will use to determine a juvenile's level of supervision~~;~~ while under field supervision.

(b) The level of supervision must [shall] be included in the juvenile's written case plan~~;~~ ~~written under §341.35 of this chapter~~.

(c) A minimum of one face-to-face contact per month with the juvenile is mandatory unless otherwise noted in the case plan.

§341.41. Exit Plan.

(a) A written exit plan must [shall] be developed prior to the juvenile's scheduled release from probation.

(b) An exit plan is to be provided at a date no later than the date the juvenile successfully completes probation, unless the juvenile was committed to TJJJ [~~the Texas Youth Commission~~].

(c) The written exit plan must [shall] be developed in consultation with the juvenile;~~the juvenile's parent, guardian, or custodian;~~ and the supervising juvenile probation officer.

(d) The exit plan must [shall] be signed and dated by the juvenile;~~the juvenile's parent, guardian, or custodian;~~ and the supervising juvenile probation officer.

(e) The original exit plan must [shall] be filed [~~placed~~] in the juvenile's case file.

(f) Copies of the exit plan must [shall] be provided to the juvenile and the juvenile's parent, guardian, or custodian.

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SUBCHAPTER H. DATA COLLECTION STANDARDS

37 TAC §§341.47 - 341.51

STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code §221.004(a), which requires TJJJ to adopt rules that provide standards for the collection and reporting of information about juvenile offenders by local probation departments.

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

§341.47. Definitions.

The following words or terms, when used in [during Division 4 of] this subchapter, [shall] have the following meanings unless the context clearly indicates otherwise.

(1) Case Management System [CASEWORKER]--A [personal] computer-based tracking [and case management] system[, developed and supported by the Commission,] that provides juvenile probation officers a systematic method to track and manage juvenile offender caseloads.

(2) Data Coordinator--A person employed by a juvenile probation department who is designated by the juvenile board to serve and function as the primary contact with TJJJ [the Commission] on all matters relating to data collection and reporting.

(3) TJJJ Electronic Data Interchange (EDI) [TJPC Monthly Folder] Extract--An automated process to extract and submit modified case records from the department's case management [CASEWORKER] system to TJJJ [the Commission]. The extract must be completed in accordance with this chapter [created by CASEWORKER follows in accordance with the Electronic Data Interchange Specifications].

(4) Comprehensive Folder Edit--A report generated in the Caseworker or Juvenile Case Management System (JCMS) application [CASEWORKER] that performs an extensive edit of the case file [folder] information. This report identifies incorrectly entered data, unrecoverable files, and questionable data that impact the accuracy of the reports and programs.

(5) SRSXEdit--An audit program developed by TJJJ to assist juvenile probation departments not using the Caseworker or JCMS application with verifying their data prior to submission to TJJJ.

(6) [(5)] EDI [Electronic Data Interchange] Specifications--Document developed by TJJJ [the Commission] outlining the data fields and file structures that each juvenile probation department is required to follow in submitting the TJJJ EDI [TJPC monthly folder] extract. [The Electronic Data Interchange Specifications are published in Subchapter I, §341.60 of this chapter.]

§341.48. *Data Coordinator.*

(a) Training Requirements.

(1) The data coordinator must [shall] have a thorough understanding of TJJJ's [the Commission] reporting requirements [and shall be trained in CASEWORKER by the Commission].

(2) The [Within 90 days from date of a new designation as data coordinator, the new] data coordinator must complete [shall attend CASEWORKER] training related to data reporting provided by the TJJJ as needed [Commission].

(b) Duties.

(1) The data coordinator is responsible for ensuring that all data submitted to TJJJ [the Commission] by the [local] juvenile probation department is accurate, timely, and consistent with TJJJ's [the Commission] reporting requirements.

(2) The data coordinator must [shall] ensure that the TJJJ EDI [TJPC Monthly Folder] Extract is received on or before [by] the applicable due date.

§341.49. *TJJJ EDI [TJPC Monthly Folder] Extract.*

(a) The TJJJ EDI [TJPC Monthly Folder] Extract must [shall] be sent to the TJJJ [Commission] via the Internet.

(b) The extract is due to the TJJJ [Commission] on the tenth calendar day of each month following the reporting period.

(c) The TJJJ EDI Extract data must include all data fields required by the EDI Specifications. TJJJ staff must discuss any proposed changes to the specifications with juvenile probation departments' designated representatives before making substantive changes to the specifications to minimize any disruption and/or resource issues that may be associated with the changes.

§341.50. *Accuracy of Data.*

(a) Required Fields. The juvenile probation department must [shall] fill in all applicable data fields for each referral in the department's case management [their CASEWORKER] system to minimize missing information.

(b) Monthly [Comprehensive Folder] Edit. The juvenile probation department must [Probation departments shall] run the Comprehensive Folder Edit or SRSXEdit on a monthly basis.

(c) Errors. Errors detected by the Comprehensive Folder Edit must be corrected prior to the next submission of the EDI Extract. Errors detected by a TJJJ monitoring visit [, a Commission monitoring visit,] or the TJJJ [Commission] Research and Planning Division upon analysis must [shall] be corrected prior to a date provided by TJJJ [the next submission of the TJPC Monthly Folder Extract].

§341.51. *Security of Data.*

(a) Passwords.

(1) Each user of the juvenile probation department's case management system must obtain a password to the system. Passwords must not be shared with department employees or other persons.

[(1) Passwords shall be assigned by the CASEWORKER administrator or management information systems administrator for each individual user and should not be shared by employees or other persons.]

(2) Each department must limit the [shall have a limited] number of employees who [that] are authorized to delete information in the department's case management system [contained within CASEWORKER].

(3) Access to the department's case management system must [CASEWORKER system shall] be removed concurrent with the termination of a user's [the person's] employment.

(b) Backup and Restoration.

[(1) The [All] juvenile probation department must [departments shall] adopt and follow a written policy for [the] backup and restoration procedures relating to data in their case management system [procedures relating to data, requiring, at a minimum, a system backup once per week].

[(2) Departments must maintain at least five generations (copies) of data backups.]

(c) Off-Site Storage.

[(1) The [All] juvenile probation department must [departments shall] store a system backup off-site to be accessible in case of a disaster at the department (e.g., fire, tornado, etc.).

[(2) An updated backup for off-site storage must be run at a minimum of once a month, in addition to the five generations of backup.]

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

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## DIVISION 2. NON-CASEWORKER SYSTEMS

### 37 TAC §§341.52 - 341.56

*(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 Juvenile Justice Department or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

#### STATUTORY AUTHORITY

The repeals are proposed under Texas Human Resources Code §221.004(a), which requires TJJD to adopt rules that provide standards for the collection and reporting of information about juvenile offenders by local probation departments.

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

§341.52. *Definitions.*

§341.53. *Data Coordinator.*

§341.54. *TJPC Monthly Folder Extract.*

§341.55. *Accuracy of Data.*

§341.56. *Security of Data.*

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## SUBCHAPTER I. ELECTRONIC DATA

### INTERCHANGE SPECIFICATIONS

#### 37 TAC §341.60

*(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 Juvenile Justice Department or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)*

#### STATUTORY AUTHORITY

The repeal is proposed under Texas Human Resources Code §221.004(a), which requires TJJD to adopt rules that provide standards for the collection and reporting of information about juvenile offenders by local probation departments.

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

§341.60. *TJPC Monthly Folder Extract.*

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

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## SUBCHAPTER J. RESTRAINTS

### 37 TAC §§341.65 - 341.71

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Human Resources Code §221.002(a), which requires TJJD to adopt reasonable rules that provide minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

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

§341.65. *Definitions.*

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

(1) Approved Physical Restraint Technique ("physical restraint")--A professionally trained restraint technique that uses a person's physical exertion to completely or partially constrain another person's body movement without the use of mechanical restraints. The approved physical restraint technique must [shalt] be approved for use by TJJD [the Commission] and adopted by the juvenile board.

(2) Approved Mechanical Restraint Devices ("mechanical restraint")--A professionally manufactured mechanical device to aid in the restriction of a person's bodily movement. The approved mechanical restraint must [shalt] be approved by TJJD [the Commission] and adopted by the juvenile board. The following are TJJD-approved [Commission approved] mechanical restraint devices:

(A) Ankle Cuffs--Metal, cloth, or leather band designed to be fastened around the ankle to restrain free movement of the legs;

(B) Anklets--Cloth or leather band designed to be fastened around the ankle or leg;

(C) Handcuffs--Metal devices designed to be fastened around the wrist to restrain free movement of the hands and arms;

(D) Plastic Cuffs--Plastic devices designed to be fastened around the wrist or legs to restrain free movement of hands, arms, or legs;

(E) Waist Band--A cloth, leather, or metal band designed to be fastened around the waist used to secure the arms to the sides or front of the body; and

(F) Wristlets--A cloth or leather band designed to be fastened around the wrist or arm that [which] may be secured to a waist belt.

- (3) Restraints--Physical or mechanical restraint.

*§341.66. Requirements.*

The use of restraints is ~~[shall be]~~ governed by the following criteria:

- (1) restraints may ~~[shall only]~~ be used only by juvenile probation officers;

- (2) prior to participating in any restraint, juvenile probation officers must ~~[shall]~~ be:

- (A) certified in the use of the approved physical restraint technique; and

- (B) trained in the use of all approved mechanical restraint devices;

- (3) restraints may ~~[shall only]~~ be used only in instances of threat of imminent self-injury, injury to others, or serious property damage;

- (4) restraints may ~~[shall only]~~ be used only as a last resort;

- (5) only the amount of force and type of restraint necessary to control the situation may ~~[shall]~~ be used;

- (6) restraints must ~~[shall]~~ be implemented in such a way as to protect the health and safety of the juvenile and others; and

- (7) restraints must ~~[shall]~~ be terminated as soon as the juvenile's behavior indicates that the threat of imminent self-injury, injury to others, or serious property damage has subsided.

*§341.67. Prohibitions.*

Restraints that employ a technique listed in this section ~~[below]~~ are prohibited:

- (1) restraints used for punishment, discipline, retaliation, harassment, compliance, or intimidation;

- (2) restraints that deprive the juvenile of basic human necessities including restroom privileges, water, food, and clothing;

- (3) restraints that are intended to inflict pain;

- (4) restraints that put a juvenile face down with sustained or excessive pressure on the back or chest cavity;

- (5) restraints that put a juvenile face down with pressure on the neck or head;

- (6) restraints that obstruct the airway or impair the breathing of the juvenile, including a procedure that places anything in, on, or over the juvenile's mouth or nose;

- (7) restraints that restrict the juvenile's ability to communicate;

- (8) restraints that obstruct the view of the juvenile's face;

- (9) any technique that does not require the monitoring of the juvenile's respiration and other signs of physical distress during the restraint; and

- (10) percussive or electrical shocking devices.

*§341.68. Documentation.*

Documentation. Except as provided by §341.71(a) of this chapter, all restraints must ~~[shall]~~ be fully documented and the documentation must be maintained. Written documentation regarding the use of restraints must include, ~~[shall require]~~ at a minimum:

- (1) name of the juvenile;

- (2) name(s) ~~[staff member(s) name]~~ and title(s) of staff members who administered the restraint;

- (3) date of the restraint;

- (4) duration of the restraint including notation of the time the restraint began and ended;

- (5) location of the restraint;

- (6) description of preceding activities;

- (7) behavior that ~~[which]~~ prompted the restraint;

- (8) type of restraint applied;

- (9) efforts made to de-escalate the situation and alternatives to restraint that were attempted; and

- (10) any injury that occurred during the restraint.

*§341.69. Physical Restraint.*

In addition to the requirements ~~[found]~~ in §§341.66, [§]341.67, and [§]341.68 of this chapter ~~[subchapter]~~, juvenile probation officers must ~~[shall]~~ be re-certified in the approved physical restraint technique at least once every two years.

*§341.70. Mechanical Restraint.*

In addition to the requirements ~~[found]~~ in §§341.66, [§]341.67, and [§]341.68 of this chapter ~~[subchapter]~~, the use of mechanical restraint ~~is~~ ~~[restraint, shall be]~~ governed by the following criteria:

- (1) Requirements.

- (A) Mechanical restraints ~~[mechanical restraints shall]~~ only be used in a manner consistent with their intended use. ~~[use; and]~~

- (B) There must ~~[there shall]~~ be provisions for the inspection and maintenance of mechanical restraint devices.

- (2) Prohibitions.

- (A) Mechanical ~~[mechanical]~~ restraint devices must ~~[shall]~~ not be altered from the manufacturer's design.~~;~~

- (B) A juvenile ~~[a juvenile shall]~~ not be placed face down while restrained in any mechanical restraint for a period of time longer than necessary to apply the restraint devices.~~;~~

- (C) A ~~[a]~~ mechanical restraint must ~~[shall]~~ not secure a juvenile in a prone position with the juvenile's ~~[his or her]~~ arms and/or hands behind his/her ~~[the juvenile's]~~ back and secured to his/her ~~[the juvenile's]~~ legs.~~;~~

- (D) Mechanical ~~[mechanical]~~ restraint devices must ~~[shall]~~ not be secured so tightly as to interfere with circulation nor so loosely as to cause chafing of the skin.~~;~~

- (E) Mechanical ~~[mechanical]~~ restraint devices must ~~[shall]~~ not be secured to a stationary object.~~;~~

- (F) A ~~[a]~~ juvenile in mechanical restraints must ~~[shall]~~ not participate in any physical activity.~~;~~ ~~and~~

- (G) Plastic cuffs ~~[plastic cuffs shall only]~~ be used only in emergency situations.

*§341.71. Transporting.*

- (a) Using mechanical ~~[Mechanical]~~ restraints ~~[used]~~ during routine transportation in a vehicle and ~~[vehiele, or]~~ the taking of a juvenile into custody are not required to be documented as a restraint.

- (b) During transportation ~~[of a juvenile]~~ in a vehicle, the juvenile may not be affixed to any part of the vehicle.

- (c) During transportation in a vehicle, a juvenile may not be secured to another juvenile.

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## SUBCHAPTER K. CARRYING OF WEAPONS

### 37 TAC §§341.80 - 341.90

The amendments are proposed under Texas Human Resources Code §221.002(a), which requires TJJD to adopt reasonable rules that provide minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

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

#### §341.80. *Definitions.*

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

(1) Draw--To unholster [~~unholster~~] a weapon in preparation for use against a perceived threat.

(2) Empty-Hand Defense--Defensive tactics through the use of pressure points, releases from holds, and blocking and striking techniques using natural body weapons such as an open hand, fist, forearm, knee, or leg.

(3) Intermediate Weapons--Weapons designed to neutralize or temporarily incapacitate an assailant. This level of self-defense employs the use of tools to neutralize aggressive behavior when deadly force is not justified but when empty-hand defense is not sufficient for escaping from a physical confrontation. For the purposes of this subchapter, intermediate weapons include only electronic restraint devices, irritants, <sub>2</sub> and impact weapons.

(4) On-Duty--An officer is engaged in the actual discharge of the officer's duties when the officer is within the course and scope of his/her employment and is actually authorized to engage in the work being performed. Being on-call is not considered as being engaged in the actual discharge of the officer's duties unless or until the officer is actually called into service.

#### §341.81. *Applicability and Authorization.*

(a) Applicability. This subchapter applies only to actively certified juvenile probation officers who are authorized to carry a firearm pursuant to this subchapter.

(b) Authorization to Carry a Firearm.

(1) In accordance with §142.006 of the Texas Human Resources Code, a juvenile probation officer is authorized to carry a firearm during the course of the officer's official duties if:

(A) the juvenile probation officer has been employed for at least one year by the juvenile probation department described in subparagraph (B) of this paragraph;

{(A) The officer possesses a certificate of firearms proficiency issued by the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) under §1701.258 of the Texas Occupations Code verifying successful completion of the TCLEOSE Juvenile Probation Officer Firearms Certification Course;}

(B) the [The] chief juvenile probation officer of the juvenile probation department that employs the juvenile probation officer authorizes the juvenile probation officer to carry a firearm in the course of the officer's official duties; [and]

(C) the juvenile probation officer possesses a certificate of firearms proficiency issued by the Texas Commission on Law Enforcement (TCOLE) under §1701.259 of the Texas Occupations Code; and

(D) the juvenile probation officer has not been designated a perpetrator in a TJJD abuse, neglect, or exploitation investigation.

{(C) The juvenile probation officer has been employed for at least one year by the juvenile probation department described in subparagraph (B) of this paragraph.}

(2) In accordance with §221.35 of this title, a juvenile probation officer must successfully complete TCOLE's current firearms training program for juvenile probation officers to be authorized to carry a firearm in the course of the officer's official duties.

(3) [(2)] This subchapter does not authorize a juvenile probation officer to carry a firearm while not on duty [on-duty].

(4) [(3)] A license obtained under Chapter 411, Subchapter H<sub>2</sub> of the Texas Government Code (i.e., Concealed Handgun License), does not enable a certified juvenile probation officer to carry a firearm in the course of the officer's official duties and does [~~shall~~] not satisfy, and may not [ø] be accepted in lieu of, the requirements contained in this subchapter.

#### §341.82. *Documentation Requirements [to Qualify for a Firearms Proficiency Certificate].*

(a) Documents Required after Obtaining an Initial Firearms Proficiency Certificate. Within five workdays after [Prior to] obtaining the initial [a] firearms proficiency certificate from TCOLE, the chief juvenile probation officer or the supervising officer of the [TCLEOSE, a] juvenile probation officer who received the certificate must [seeking authorization to carry a firearm during the course of his/her official duties shall] provide the following documents to TJJD [proof to the Texas Juvenile Probation Commission of the following required qualifications]:

(1) a copy of the Juvenile Probation Officer Firearms Proficiency Certificate from TCOLE; and

(2) a completed, signed, and notarized copy of TJJD's Verification of Eligibility for Juvenile Probation Officer to Carry Firearm form, including the following required attachments:

(A) appropriate documentation that the applicant has been subjected to a complete search of local, state, and national records to disclose any criminal record or criminal history;

{(1) current employment as a juvenile probation officer for at least one year by the county juvenile probation department;}

{(2) active certification in good standing as a juvenile probation officer by the Texas Juvenile Probation Commission;}

{(3) appropriate documentation from each chief juvenile probation officer who has authorized the applicant's participation in the juvenile probation officer firearms proficiency training program and

that the applicant has been subjected to a complete search of local, state and national records to disclose any criminal record or criminal history;

(B) [(4)] written documentation from each chief juvenile probation officer who has authorized the applicant's participation in the juvenile probation officer firearms proficiency training program that the applicant has been examined by a psychologist who was [;] selected by the current employing department and who is licensed by the Texas State Board of Examiners of Psychologists; [and]

(C) [(5)] a written declaration from the examining psychologist that the officer possesses the requisite psychological and emotional health to carry a firearm in the course of the officer's official duties;[-]

(D) documentation of successful completion of TCOLE's current firearms training program for juvenile probation officers;

(E) documentation of successful completion of at least 20 hours of training in the use of an empty-hand defense tactic, as required by §341.84 of this chapter; and

(F) documentation of successful completion of adequate training in the use of at least one intermediate weapon, as required by §341.84 of this chapter.

(b) Documents Required after Obtaining Renewed Firearms Proficiency Certificate. Within five workdays after receiving a renewal of a firearms proficiency certificate from TCOLE, the chief juvenile probation officer or the supervising officer of the juvenile probation officer who receive the certificate must provide the following documents to TJJD:

(1) a copy of the renewed Juvenile Probation Officer Firearms Proficiency Certificate from TCOLE;

(2) a completed, signed, and notarized copy of TJJD's Renewal of Verification of Eligibility for Juvenile Probation Officer to Carry Firearm form; and

(3) verification of successful completion of 20 hours of continuing education, as required in §341.89 of this chapter.

§341.83. *Responsibilities of a Juvenile Probation Officer Authorized to Carry a Firearm [Weapon].*

A juvenile probation officer who is authorized to carry a firearm in accordance with this subchapter must [shall]:

(1) comply with the requirements of this subchapter, the officer's department policies and procedures, and the laws of this State and of the United States;

(2) be knowledgeable of the places where firearms [a firearm] or other weapons are prohibited;

(3) immediately report to the chief juvenile probation officer and TJJD if the officer is arrested, charged, or convicted of any criminal offense [the Commission any criminal arrests, charges or convictions];

(4) comply with all training, firearms proficiency, and certification requirements of §221.35 of this title;

[(4) satisfy the firearms proficiency requirements in accordance with §221.1(b) of this title at least once every 12 months;]

[(5) successfully complete all sections of the TCLEOSE training course for juvenile probation officers in accordance with §221.35(b) and (e) of this title, including the classroom training and range qualification;]

[(6) utilize TCLEOSE approved forms for the documentation of the requirements of paragraphs (4) and (5) of this section and provide copies to the Commission;]

(5) [(7)] maintain the firearm and all other authorized weapons in proper working order at all times;

(6) [(8)] be responsible for the safe handling of the firearm and all other authorized weapons; and

(7) [(9)] store the firearm and other weapons in a secure, locked location designed for secure storage of a weapon when the firearm or other weapon is not on the officer's person.

§341.84. *Use of Force Continuum.*

(a) A juvenile probation officer who satisfies the requirements of this subchapter is justified in using force for the protection of persons pursuant to Chapter 9 of the Texas Penal Code.

(b) Prior to carrying a firearm in the course of the officer's duties, a juvenile probation officer authorized to carry a firearm in accordance with this subchapter must [shall]:

(1) receive at least 20 hours [a minimum of 20 hours] of training in the use of an empty-hand defense tactic [tactics]; and

(2) receive adequate training in the use of at least one intermediate weapon [prior to carrying a firearm in the course of the officer's duty].

(c) A juvenile probation officer who is authorized to carry a firearm must carry [Carry] at least one intermediate weapon at all times when the officer carries a firearm.

§341.85. *Responsibilities of Chief Juvenile Probation Officers or Other Supervising Officer.*

(a) The chief juvenile probation officer [;] or the supervising officer of a juvenile probation officer who is authorized to carry a firearm is [; shall be] subject to the same requirements as an officer authorized to carry a firearm in accordance with this subchapter. This requirement does not mandate the chief juvenile probation officer or [the] other supervising officer carry a firearm or other weapon in the course of their duties.

(b) The chief juvenile probation officer or his/her [; or] designee must [; shall] notify TCOLE [TCLEOSE] and TJJD [the Commission] within 24 hours if the department rescinds its [department's] authorization for [of] a juvenile probation officer to carry a firearm [is rescinded].

(c) The chief juvenile probation officer or his/her [; or] designee must [; shall] submit the requisite forms to TCOLE [TCLEOSE] and TJJD [the Commission] within 24 hours if an officer who is authorized to carry a firearm separates from the department.

(d) The chief juvenile probation officer or his/her [; or] designee must [; shall] submit to TJJD [the Commission] the department's approved policies and procedures regarding a juvenile probation officer's authorization to carry a firearm in accordance with this subchapter.

[(e) The chief juvenile probation officer, or designee, shall submit to the Commission within five working days copies of all requisite training certificates and forms submitted to the TCLEOSE in accordance with this subchapter.]

(e) [(f)] The chief juvenile probation officer or his/her [; or] designee must [; shall] conduct an internal investigation in all incidents in which a juvenile probation officer uses an empty-hand defense tactic, draws or uses [utilizes] an intermediate weapon, or draws or discharges a firearm.

(f) ~~[(g)]~~ The chief juvenile probation officer~~[,] or his/her~~ designee ~~must [, shall]~~ immediately place a juvenile probation officer on administrative leave or reassign him/her ~~[the person]~~ to a position having no contact with juveniles or relatives of the juveniles ~~if the officer [; a juvenile probation officer, who] uses an empty-hand defense tactic, uses [utilizes] or draws an intermediate weapon, or draws or discharges a firearm. The administrative leave or reassignment must be implemented until the conclusion of the internal investigation.~~

§341.86. *Written Policies and Procedures.*

Each chief juvenile probation officer who authorizes a juvenile probation officer to carry a firearm in accordance with the requirements contained in this subchapter must [shall] have written policies and procedures that:

(1) define which juvenile probation officers within the department are authorized to carry firearms;

(2) state [stipulate] whether the firearm is to be purchased and maintained by the department or the individual officer;

(3) require that the firearm and all other authorized weapons remain under the control of the officer authorized to carry the firearm and weapon(s) [weapon];

(4) require that the firearm be fully loaded when carried or worn on-duty;

(5) require that the officer display credentials identifying the officer as a certified juvenile probation officer while carrying a firearm in accordance with this subchapter;

(6) describe the circumstances and limitations under which the officer is justified to use force (i.e., self-defense and defense of a third party pursuant to Chapter 9 of the Texas Penal Code);

(7) specify the firearms to be carried, including the type of firearm, manufacturer, model, and caliber;

(8) specify the type of ammunition authorized for use in the firearm;

(9) state [prescribe] whether the firearm must [will] be carried in plain view or concealed;

(10) require that the firearm be encased in an appropriate holster and be worn or carried in ~~[such]~~ a manner that is appropriate to the situation;

(11) define the process for reporting and investigating use of force incidents;

(12) define the process for rescinding or suspending the authorization to carry a firearm;

(13) prohibit the consumption of alcohol while carrying a firearm or intermediate weapon;

(14) define the process for conducting an internal investigation of each incident involving a juvenile~~[,] in which a juvenile probation officer uses an empty-hand defense tactic, draws or uses [utilizes] an intermediate weapon, or draws or discharges a firearm; and~~

(15) require that a juvenile probation officer be placed on administrative leave or be reassigned to a position having no contact with juveniles or relatives of the juveniles until the conclusion of an internal investigation as required in paragraph (14) of this section [of a use of force as defined in this subchapter].

§341.87. *Reporting and Investigating Use of Force Incidents.*

(a) The chief juvenile probation officer~~[,] or his/her~~ designee must [, shall] report to TJJD [the Commission], each incident involv-

ing a juvenile~~[,] in which a juvenile probation officer uses an empty-hand defense tactic, draws or uses [utilizes] an intermediate weapon, or draws or discharges a firearm.~~

(1) The initial report must [shall] be made to TJJD [the Commission] immediately, but no later than four ~~[(4)]~~ hours after [from] the time of the use of force incident~~[,]~~

(2) The initial report must [shall] be made using the toll-free number as designated by TJJD. [the Commission; and]

(3) Within 24 hours after [of] the report by phone, the Juvenile Probation Officer [eompleted] Use of Force Incident Report form must [shall] be submitted to TJJD [the Commission] via fax or e-mail.

(b) The chief juvenile probation officer~~[,] or his/her~~ designee must [, shall] report to local law enforcement any discharge of a firearm by a juvenile probation officer immediately, but no later than one ~~[(1)]~~ hour after [from] the time of discharge.

§341.88. *Records.*

(a) The personnel file of each juvenile probation officer authorized to carry a firearm in accordance with this subchapter must [shall] contain a copy of the:

(1) Firearms Proficiency for Juvenile Probation Officers Application;

(2) PID Assignment (TCOLE [TCLEOSE] C-1);

(3) criminal [Criminal] history checks conducted pursuant to the requirements of this subchapter;

(4) License Psychological and Emotional Health Declaration (TCOLE [TCLEOSE] L-3); ~~[and]~~

(5) proof [Proof] of annual firearms proficiency; ~~and[.]~~

(6) verification of successful completion of TCOLE's current firearms training program for juvenile probation officers.

(b) Juvenile probation departments must [shall] allow TCOLE [TCLEOSE], other law enforcement agencies, and TJJD [the Commission] access to records pertaining to firearms and use of force incidents for auditing and investigation purposes.

§341.89. *Training and Qualification Requirements.*

(a) A [No] juvenile probation officer may not [shall] be authorized to carry a firearm in the course of his/her [their] duties unless the officer has:

(1) completed TCOLE's current firearms training program for juvenile probation officers;

~~[(1)]~~ Completed the TCLEOSE approved firearms training program;

(2) received [Received] a certificate of firearms proficiency from TCOLE [TCLEOSE] as provided in §221.1 of this title; and

(3) completed [Completed] the training requirements in accordance with §341.84 of this chapter [subchapter].

(b) All training received pursuant to the requirements of this subchapter must [shall] be received from a TCOLE-approved [TCLEOSE approved] instructor.

(c) All training received pursuant to the requirements of this subchapter must [shall] be designed with the intent to prepare juvenile probation officers to carry and use [utilize] firearms, intermediate weapons, and empty-hand defense tactics in the context of self-defense and in defense of a third party.

(d) In addition to the training requirements contained in Chapter 344 of this title relating to maintaining an active certification as a juvenile probation officer [JPO], a juvenile probation officer authorized to carry a firearm in accordance with this subchapter must [~~shall~~] successfully complete 20 hours of continuing education every two years. The continuing education must [~~shall~~] be specially designed to enhance the officer's skills and knowledge relating to the proficient and legal use of a firearm, empty-hand defense, and an intermediate weapon as authorized by this subchapter. The training must [~~shall~~] include, but not be limited to:

- (1) use of force;
  - (2) weapons retention; and
  - (3) crisis intervention.
- {(1) Use of Force;}
- {(2) Weapons Retention; and}
- {(3) Crisis Intervention.}

(e) Upon completion of each training requirement, the chief juvenile probation officer or his/her designee must [~~shall~~] submit proof of the successful completion of the training to TJJD [~~the Commission~~] within five workdays after [~~working days of~~] completion of the training.

#### §341.90. *Disqualifying Conduct.*

Pursuant to §142.006(b) of the Texas Human Resources Code, a juvenile probation officer is disqualified from seeking authorization to carry a firearm if the officer has been named as a [~~assigned the role of~~] designated or sustained perpetrator in a TJJD [~~TJPC~~] abuse, neglect, or exploitation investigation.

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 20, 2013.

TRD-201304174

Brett Bray

General Counsel

Texas Juvenile Justice Department

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 490-7014



## CHAPTER 344. EMPLOYMENT, CERTIFICATION, AND TRAINING SUBCHAPTER H. CERTIFICATION

### 37 TAC §344.800

The Texas Juvenile Justice Department (TJJD) proposes an amendment to §344.800, concerning Positions Requiring Certification.

The proposed amendment includes language that is proposed for deletion from §341.28. Chapter 344 is a more appropriate location for information regarding positions requiring certification.

#### FISCAL NOTE

Mike Meyer, Chief Financial Officer, has determined that for each year of the first five years the amended section will be in effect,

there is no significant fiscal impact to state or local governments as a result of enforcing or administering the section.

#### PUBLIC BENEFIT/COSTS

James Williams, Senior Director of Probation and Community Services, has determined that for each year of the first five years the amended section is in effect, the anticipated public benefit as a result of administering the section will be the availability of rules that reflect a more logical arrangement of information.

There will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the section as proposed. No private real property rights are affected by adoption of this section.

#### PUBLIC COMMENTS

Comments on the proposal may be submitted within 30 days after publication of this notice to Steve Roman, Policy Coordinator, Texas Juvenile Justice Department, P.O. Box 12757, Austin, Texas 78711, or email to [policy.proposals@tjjd.texas.gov](mailto:policy.proposals@tjjd.texas.gov).

#### STATUTORY AUTHORITY

The amendment is proposed under Texas Human Resources Code §221.002(a), which requires TJJD to adopt reasonable rules that provide certification standards for probation and detention officers and minimum standards for various aspects of the operation of a juvenile board that are necessary to provide adequate and effective probation services.

#### §344.800. *Positions Requiring Certification.*

(a) Individuals required to maintain an active certification are the following: [~~Certain positions require certification by the Commission in order to perform the job functions of the position. Positions requiring certification are specified in applicable chapters under Title 37 of the Texas Administrative Code.~~]

- (1) chief administrative officers;
- (2) facility administrators;
- (3) supervisors in the direct chain of command over juvenile probation officers or juvenile supervision officers;
- (4) juvenile probation officers;
- (5) juvenile supervision officers;
- (6) youth activities supervisors; and
- (7) any staff, excluding certified physical education teachers, who participates in the administration of intensive physical activity in a Juvenile Justice Alternative Educational Program (JJAEP).

(b) In addition to requiring certification of the individuals in subsection (a) of this section, TJJD offers certification for the following:

- (1) quality assurance officer;
- (2) juvenile probation or supervision officer trainer; or
- (3) staff member responsible for supervision of youth in a JJAEP.

(c) Youth activities supervisors, juvenile supervision officers, and juvenile probation officers may hold more than one certification by TJJD if they meet all criteria required for certification and employment for the positions and their job description is consistent with a youth activities supervisor, juvenile supervision officer, or juvenile probation officer as defined in §344.100 of this chapter.

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

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Brett Bray

General Counsel

Texas Juvenile Justice Department

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## TITLE 40. SOCIAL SERVICES AND ASSISTANCE

### PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

#### CHAPTER 364. REQUIREMENTS FOR LICENSURE

##### 40 TAC §364.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §364.1, concerning Requirements for Licensure. The purpose of the amendment is to address issues of licensure with U.S. Military and spouses of active duty military personnel. The amendment also discusses the requirement for an address of record chosen by the licensee.

John Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be the ability of the applicant to practice occupational therapy sooner. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701; or electronically to [augusta@ptot.texas.gov](mailto:augusta@ptot.texas.gov).

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with the Act to carry out its duties in administering the Act.

Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code is affected by this proposal.

§364.1. *Requirements of Licensure.*

- (a) All applicants shall:

(1) submit a complete[; notarized] application form or on-line application with a recent passport-type color photograph of the applicant;

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

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

(d) For applicants who are active U.S. military service members or U.S. veterans: any military service, training or education verified and credited by an accredited OT or OTA program is acceptable to the Board.

(1) Applicants will mail or fax a copy of the Uniformed Services Military ID Card.

(2) Applicants who are U.S. active duty Military and their spouses shall receive expedited services from the Board.

(e) [~~d~~] An application for license is valid for one year after the date it is received by the board.

(f) [~~e~~] An applicant who submits an application containing false information may be denied a license by the board.

(g) [~~f~~] Should the board reject an application for license, the reasons for the rejection will be communicated in writing to the applicant. The applicant may submit additional information and request reconsideration by the Board. If the applicant remains dissatisfied, a hearing may be requested as specified in the Act.

(h) [~~g~~] Applicants and licensees must notify the board in writing of changes in name, residential address, mailing address, email address, and work address within 30 days of the change. Address of record is the information provided to the public. Failure to identify which address is chosen to be the address of record will result in a default to the home or mailing address. The licensee may update this information at any time.

(i) [~~h~~] The Board will issue a replacement copy of a license to replace one lost or destroyed upon receipt of a written request and the appropriate fee from the licensee. For a name change, the appropriate fee and a copy of the legal document (marriage certificate, divorce decree) enacting the name change must accompany the request.

(j) [~~i~~] The first regular license is valid from the date of issuance until the last day of the applicant's birth month, with a duration of at least two years.

(k) [~~j~~] Licensees will follow the rules for continuing education, as described in Chapter 367 of this title (relating to Continuing Education).

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 20, 2013.

TRD-201304147

John Maline

Executive Director

Texas Board of Occupational Therapy Examiners

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For further information, please call: (512) 305-6900



## CHAPTER 367. CONTINUING EDUCATION

## 40 TAC §367.2

The Texas Board of Occupational Therapy Examiners proposes an amendment to §367.2, concerning Categories of Continuing Education. The amendment corrects wording in the rule which needed to emphasize that a post-test is required for online, tele-conference or home study courses.

John Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be the understanding of the post-test in taking home study courses. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701; or electronically to [augusta@ptot.texas.gov](mailto:augusta@ptot.texas.gov).

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with the Act to carry out its duties in administering the Act.

Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code is affected by this proposal.

### §367.2. *Categories of Continuing Education.*

(a) All continuing education must comply with Type 1 or Type 2 as outlined in §367.1 of this title (relating to Continuing Education). Continuing education undertaken by a licensee for renewal shall be acceptable if it falls in one or more of the following categories.

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

(3) Development of publication, media materials or research/grant activities per two year renewal period: Documentation of this type of CE credit shall include a copy of the actual publication or media material(s), or title page and receipt of grant proposal.

(A) (No change.)

(B) Principle investigator or co-principle investigator in grant or research proposals accepted for consideration<sub>2</sub>[:] 10 hours maximum.

(C) - (F) (No change.)

(4) Home study courses, educational teleconferences, Internet-based courses, and videotape instruction, no maximum.

(A) (No change.)

(B) These courses must have:

(i) Specified learning objectives;

(ii) A post-test; and

(iii) A certificate of completion.

~~{(B) These courses must have specified learning objectives or a post-test and give a certificate of completion.}~~

(C) (No change.)

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

(b) Unacceptable Continuing Education Activities include but are not limited to:

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

(6) Program providers are prohibited from self-promotion of programs, products, and/or services during the presentation of the program.[:]

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

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John Maline

Executive Director

Texas Board of Occupational Therapy Examiners

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For further information, please call: (512) 305-6900



## CHAPTER 370. LICENSE RENEWAL

### 40 TAC §370.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §370.1, concerning License Renewal. The purpose of the amendment is to address which addresses the Board maintains for the licensee and which is the address of record.

John Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Maline has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be clarification of what address is the address of record. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701; or electronically to [augusta@ptot.texas.gov](mailto:augusta@ptot.texas.gov).

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with the Act to carry out its duties in administering the Act.

Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code is affected by this proposal.

### §370.1. *License Renewal.*

(a) Licensee Renewal.[:] Licensees are required to renew their licenses every two years by the end of their birth month. A licensee may not provide occupational therapy services without a current license. The licensee's expiration date is displayed on the board's website and should be considered evidence of current licensure. Licensees and employers should verify licenses and registrations on the board's website.

(1) General Requirements. The renewal application is not complete until the board receives all required items. The components required for license renewals are:

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

(E) the licensee's physical address, any work address, other mailing address, email, and an address of record. The address of record is the address that will be shared with the public. Failure to provide information in choosing the address of record will result in a default to the home or mailing address. The licensee may update this information at any time.

(2) - (3) (No change.)

(b) Restrictions to Renewal/Restoration.

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

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

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John Maline

Executive Director

Texas Board of Occupational Therapy Examiners

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For further information, please call: (512) 305-6900



## CHAPTER 374. DISCIPLINARY ACTIONS/DETRIMENTAL PRACTICE/COMPLAINT PROCESS/CODE OF ETHICS

### 40 TAC §374.4

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

The Texas Board of Occupational Therapy Examiners proposes the repeal of §374.4, concerning Code of Ethics. The Texas Board of Occupational Therapy Examiners has used AOTA's 2005 edition of the Code of Ethics and now will update to the 2010 edition.

John Maline, Executive Director has determined that for the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Maline has also determined that the public benefit will be the enforcement of a more comprehensive and complete Code of Ethics in the 2010 edition. The 2010 version of the Code of Ethics is being taught in colleges and universities across the U.S. and in Texas, so it is apt for us to follow this edition as well. There will not be an effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed repeal.

Comments on the proposal may be submitted in writing to Augusta Gelfand, 333 Guadalupe Street, Suite 2-510, Austin,

Texas 78701. Comments may be submitted electronically to [augusta@ptot.texas.gov](mailto:augusta@ptot.texas.gov) or faxed to (512) 305-6970.

The repeal is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454 of the Texas 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.

Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code is affected by this proposal.

§374.4. Code of Ethics.

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 20, 2013.

TRD-201304150

John Maline

Executive Director

Texas Board of Occupational Therapy Examiners

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 305-6900



### 40 TAC §374.4

The Texas Board of Occupational Therapy Examiners (TBOTE) proposes new §374.4, concerning Code of Ethics. TBOTE proposes to accept the 2010 edition of the American Occupational Therapy Association's (AOTA's) Code of Ethics in its TBOTE Rules and publish AOTA's Code of Ethics in its entirety for Texas licensees to follow.

John Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be the emphasis of ethics in all dealings. There will be no effect on small or micro businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701; or electronically through email to [augusta@ptot.texas.gov](mailto:augusta@ptot.texas.gov).

The new section is proposed under the Occupational Therapy Practice Act, Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code, which provides the Texas Board of Occupational Therapy Examiners with the authority to adopt rules consistent with the Act to carry out its duties in administering the Act.

Title 3, Subtitle H, Chapter 454 of the Texas Occupations Code is affected by this proposal.

§374.4. Code of Ethics.

The Texas Board of Occupational Therapy Examiners' Code of Ethics is a public statement of the values and principles used in promoting and

maintaining high standards of behavior in occupational therapy within the state of Texas. The Code of Ethics is a set of principles that applies to occupational therapy practitioners. ("Practitioners" in this section are defined as those individuals licensed by this board or applicants for licensure with this board.) The Texas Board of Occupational Therapy Examiners follows the 2010 AOTA's Code of Ethics.  
Figure: 40 TAC §374.4

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 20, 2013.

TRD-201304151  
John Maline  
Executive Director  
Texas Board of Occupational Therapy Examiners  
Earliest possible date of adoption: November 3, 2013  
For further information, please call: (512) 305-6900



## TITLE 43. TRANSPORTATION

### PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

#### CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

##### SUBCHAPTER E. GENERAL DISTINGUISHING NUMBERS

###### 43 TAC §215.138

The Texas Department of Motor Vehicles (department) proposes amendments to §215.138, concerning Use of Metal Dealer License Plates.

###### EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments implement the changes mandated by House Bill 894, 83rd Legislature, Regular Session, 2013, which amended Transportation Code, 503.068(b) and added subsection (b-1) to expand the use of metal dealer plates on service or work vehicles employed by an independent motor vehicle dealer to transport inventory to and from points of sale and add a non-substantive amendment.

The proposed amendment to subsection (b) identifies and clarifies the statutory exception under which an independent motor vehicle dealer may use a metal dealer license plate on a service or work vehicle to transport a motor vehicle from the dealer's inventory to and from a point of sale.

The proposed amendment to subsection (e) corrects a punctuation error by adding a comma.

###### FISCAL NOTE

Linda Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. William P. Harbeson, Director of the Enforcement 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 AND COST

Mr. Harbeson has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be increased ease in commerce for independent motor vehicle dealers in transporting inventory to and from points of sale. There will be no adverse economic effect on small businesses or individuals.

###### SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §215.138 may be submitted to Aline Aucoin, Interim General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on November 4, 2013.

###### STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §503.002 and §1002.001, and Occupations Code, §2301.155, which provide the board of the Texas Department of Motor Vehicles (board) with the authority to establish rules necessary to administer the laws relating to the sale and distribution of motor vehicles in this state; and more specifically, Transportation Code, §503.061(b), which provides the board the authority to adopt rules to regulate the issuance and use of metal dealers' license plates.

###### CROSS REFERENCE TO STATUTE

Transportation Code, §503.038 and §503.068.

*§215.138. Use of Metal Dealer License Plates.*

(a) Metal dealer license plates shall be attached to the rear license plate holder of vehicles on which such plates may be displayed pursuant to Transportation Code, §503.061. Although not a requirement, a copy of the receipt for the metal dealer's plate issued by the division should be carried in the vehicle so that it can be presented to law enforcement personnel upon request.

(b) Metal dealer license plates may not be displayed on laden commercial vehicles being operated or moved upon the public streets or highways or on the dealer's service or work vehicles, except as provided by Transportation Code, §503.068(b-1).

(1) Examples of vehicles considered as service or work vehicles for purposes of this subsection are:

(A) a vehicle used for towing or transporting other vehicles;

(B) a vehicle, including a light truck, used in connection with the operation of the dealer's shops or parts department;

(C) a courtesy car on which a courtesy car sign is displayed;

(D) a rental or lease vehicle; and

(E) a boat trailer owned by a dealer or manufacturer that is used to transport more than one boat.

(2) A light truck is not considered to be a laden commercial vehicle when it is:

(A) mounted with a camper unit; or

(B) towing a trailer for recreational purposes.

(3) As used in this subsection, "light truck" has the meaning assigned by Transportation Code, §541.201.

(c) Metal dealer license plates may be displayed only on the type of vehicle for which the general distinguishing number is issued and which a dealer is licensed to sell. Non-franchised dealers may not display metal dealer plates on new motor vehicles.

(d) A dealer shall maintain a record of each dealer metal plate issued to that dealer that contains:

- (1) the assigned metal plate number;
- (2) the year and make of the vehicle to which the plate is affixed;
- (3) the vehicle identification number (VIN) of the vehicle; and
- (4) the name of the person in control of the vehicle.

(e) Dealer metal plates that cannot be accounted for shall be voided in the dealer's record and reported as missing to the department

within three days of the date that the discovery is made. After a plate is reported as missing, it is no longer valid for use.

(f) The dealer's record required under subsections (d) and (e) of this section shall be available at the dealer's location during normal working hours for review by a representative of the department.

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 23, 2013.

TRD-201304191

Aline Aucoin

Interim General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: November 3, 2013

For further information, please call: (512) 467-3853

