PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 12. SWORN COMPLAINTS

SUBCHAPTER C. INVESTIGATION AND PRELIMINARY REVIEW

1 TAC §12.81

The Texas Ethics Commission (the Commission) proposes new §12.81, relating to the procedures for investigating and resolving technical and clerical violations of laws within the Commission's jurisdiction as provided by §571.0631 of the Government Code.

Section 12.81 describes procedures used for investigating and resolving technical and clerical violations of laws within the Commission's jurisdiction.

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

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

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

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

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

The new §12.81 is proposed under Government Code, Chapter 571, §571.062, which authorizes the Commission to adopt rules concerning the laws administered and enforced by the Commission.

The new §12.81 affects §571.0631 of the Government Code.

§12.81. Technical, Clerical, or De Minimis Violations.

(a) A technical, clerical, or de minimis violation for purposes of §571.0631 of the Government Code, may include a first-time allegation against a respondent for:

(1) Typographical or incomplete information on a campaign finance report that is not misleading or does not substantially affect disclosure;

(2) Failure to include a disclosure statement on political advertising;

(3) Failure of a non-incumbent to use the word "for" in a campaign communication, where the communication is not otherwise misleading;

(4) Failure to include the highway right-of-way notice on political advertising;

(5) Filing a late campaign finance report if the total amount of political contributions does not exceed $2,500, the total amount of political expenditures does not exceed $2,500, and the report is not a report due 30 or 8 days before an election, or a special pre-election report;

(6) Filing an incomplete or corrected campaign finance report that is not a report due 30 or 8 days before an election or a special pre-election report if:

(A) the total amount of incomplete or incorrectly reported political contributions does not exceed the lesser of 10% of the total amount of political contributions on the corrected report, or $5,000;

(B) the total amount of incomplete or incorrectly reported political expenditures does not exceed the lesser of 10% of the total amount political expenditures on the corrected report, or $5,000; or

(C) the total amount of incomplete or incorrectly reported political contributions or political expenditures does not exceed the amount of the filing fee for place on the ballot for the office sought or held by the respondent during the period covered by the report at issue, or, if there is not a set filing fee, $500; or

(7) Failure to timely file a campaign treasurer appointment if, before filing the campaign treasurer appointment, the total amount of political contributions accepted does not exceed $2,500 and the total amount of political expenditures made or authorized does not exceed $2,500.

(b) During the review of a sworn complaint under Chapter 571, Subchapter E of the Government Code, if the commission determines that the only alleged violations are technical, clerical, or de minimis, the commission may enter into an assurance of voluntary compliance with the respondent. Before entering into an assurance of voluntary

compliance, the commission may require a respondent to correct the violations.

(c) An assurance of voluntary compliance is confidential under §571.140 of the Government Code.

(d) An assurance of voluntary compliance may include a penalty not to exceed $500.

(e) The executive director may resolve a sworn complaint as provided under 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 June 16, 2010.

TRD-201003404
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-5800

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CHAPTER 22. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES

1 TAC §22.5

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

The Texas Ethics Commission (the Commission) proposes the repeal of §22.5, relating to direct campaign expenditures.

The repeal of §22.5 would repeal the rule relating to restrictions on direct campaign expenditures. The rule is no longer applicable.

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

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

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

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

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

The repeal of §22.5 is proposed under Government Code, Chapter 571, §571.062, which authorizes the Commission to adopt rules concerning the laws administered and enforced by the Commission.

The repeal of §22.5 affects Title 15 of the Election Code.

§22.5. Direct Campaign 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 June 16, 2010.

TRD-201003406
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-5800

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1 TAC §22.6

The Texas Ethics Commission (the Commission) proposes new §22.6, relating to the reporting of direct campaign expenditures.

Section 22.6 would clarify the requirement to disclose direct campaign expenditures as articulated in Ethics Advisory Opinion No. 489 (2010).

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

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

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

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

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

The new §22.6 is proposed under Government Code, Chapter 571, §571.062, which authorizes the Commission to adopt rules

concerning the laws administered and enforced by the Commission.

The new §22.6 affects Title 15 of the Election Code.

§22.6. Reporting Direct Campaign Expenditures.

(a) A person making a direct campaign expenditure that exceeds $100:

(1) Shall comply with Chapter 253, Subchapter C of Title 15 of the Election Code as if the person were an individual; and

(2) Is not required to file a campaign treasurer appointment as a political committee, but is required to use the reporting forms and schedule prescribed by Chapter 254 of Title 15 of the Election Code as if the person were a campaign treasurer of a general-purpose committee that does not file under the monthly reporting schedule option in §254.155 of the Election Code.

(b) A person is not required to file a report as required by this section if:

(1) The person is required to disclose the expenditure in another report required by Title 15 of the Election Code; and

(2) The report is required to be filed within the time prescribed for a direct campaign expenditure required to be filed under this section.

(c) A person making a direct campaign expenditure consisting of the person's personal travel expenses is not required to disclose the expenditures under this section, provided that the person receives no reimbursement for the expenditures.

(d) A political committee is subject to the restrictions in Title 15 of the Election Code.

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

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003405
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-5800

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 12. LOANS AND INVESTMENTS

SUBCHAPTER B. LOANS

7 TAC §12.33

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes to amend §12.33, concerning debt cancellation contracts and debt suspension agreements. The amended rule is proposed to correct references to statutes that have been renumbered since the rule was adopted.

The amendment to §12.33 arises from the renumbering of sections of the Business and Commerce Code. Effective April 1, 2009, the Legislature repealed the Uniform Electronic Transactions Act (UETA), Business and Commerce Code Chapter 43, and recodified it as Business and Commerce Code Chapter 322. Section 12.33 refers to the UETA with its old statutory citation. The proposed amendment would update the reference to the new chapter of the Business and Commerce Code.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rule is in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rule.

Mr. Bacon also has determined that, for each year of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing the rule is an updated and accurate rule.

For each year of the first five years that the rule will be in effect, there will be no economic costs to persons required to comply with the rule as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed amended section must be submitted no later than 5:00 p.m. on August 2, 2010. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

The amendment is proposed under Finance Code, §31.003, which authorizes the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code Chapters 11, 12, and 13.

Finance Code, Chapter 31, and Business and Commerce Code, Chapter 322, are affected by the proposed amended section.

§12.33. Debt Cancellation Contracts and Debt Suspension Agreements.

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

(g) Affirmative election to purchase and acknowledgment of receipt of disclosures required.

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

(4) Special rule for electronic election. The affirmative election and acknowledgment may be made electronically in a manner consistent with the requirements of the Uniform Electronic Transactions Act, Texas Business & Commerce Code Chapter 322 [~~43~~], and the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7001 et seq.

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

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003445

A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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CHAPTER 15. CORPORATE ACTIVITIES
SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes the repeal of §15.8, concerning corporate filings before January 1, 2010, and proposes to amend §15.9, concerning corporate filings after January 1, 2010. The repealed and amended rules are proposed to eliminate transitional language no longer needed.

The proposed repeal of §15.8 arises from the Legislature's 2003 enactment of the Texas Business Organizations Code (TBOC). Finance Code §32.008(a) makes the TBOC generally applicable to banking associations. The commission adopted §15.8 pursuant to Finance Code §32.008(d), which authorized the commission to establish rules permitting banking associations formed before the effective date of the TBOC, January 1, 2006, to choose to be governed by the former law until January 1, 2010. Finance Code §32.008(d) expired on January 1, 2010. The purpose of §15.8 was to clarify that until January 1, 2010, banking associations formed before January 1, 2006 were permitted to file corporate documents pursuant to the former law. Because January 1, 2010 has passed and the TBOC is therefore applicable to all banking associations, regardless of when formed, the transitional instructions in this section are no longer needed.

In proposed §15.9 transition language related to that in §15.8 is deleted because, as described previously, the transition period has passed, and therefore the language is no longer needed.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rules.

Mr. Bacon also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules are updated and clarified provisions.

For each year of the first five years that the rules will be in effect, there will be no economic costs to persons required to comply with the rules as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed repealed and amended sections must be submitted no later than 5:00 p.m. on August 2, 2010. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

7 TAC §15.8

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

The repeal is proposed under Finance Code, §31.003, which authorizes the Commission to adopt rules to accomplish the purposes of the banking statutes, and under Finance Code, §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under Chapter 32.

Finance Code, Chapters 31 and 32 are affected by the proposed repealed section.

§15.8. Corporate Filings before January 1, 2010.

This 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 June 18, 2010.

TRD-201003446
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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7 TAC §15.9

The amendments are proposed under Finance Code, §31.003, which authorizes the Commission to adopt rules to accomplish the purposes of the banking statutes, and under Finance Code, §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under Chapter 32.

Finance Code, Chapters 31 and 32 are affected by the proposed amended section.

§15.9. Corporate Filings [~~after January 1, 2010~~].

[~~(a) This section is applicable to:~~]

[~~(1) all state banks organized after January 1, 2006;~~]

[~~(2) all state banks organized before January 1, 2006 that have elected to be governed by the provisions of the Texas Business Organizations Code to the extent not inconsistent with Title 3, Subtitle A of the Texas Finance Code; and~~]

[~~(3) effective, January 1, 2010, all state banks no matter what their date of organization.~~]

(a) [~~(b)~~] In accordance with the applicable provisions of the Finance Code, Title 3, Subtitle A or G, the following corporate forms regarding a state bank, along with the applicable filing fees, must be filed with the banking commissioner:

(1) a certificate of correction as authorized by Texas Business Organizations Code (TBOC), §4.101;

(2) articles of amendment under the Finance Code, §32.101;

(3) restated, or, amended and restated, articles of association under the Finance Code, §32.101, and TBOC §3.059 and §21.052;

(4) articles of merger under the Finance Code, §32.301 et seq, as supplemented by the TBOC §10.151;

(5) certificate of exchange under TBOC, §10.151;

(6) statement of event or fact pursuant to TBOC §4.055;

(7) establishment of a series of shares by the board of directors under the Finance Code, §32.102, as supplemented by TBOC §21.155 and §21.156;

(8) statement regarding a restriction on the transfer of shares under TBOC, §21.212; and

(9) abandonment of a merger or interest exchange prior to its effective date under TBOC §4.057.

(b) [~~(c)~~] For purposes of corporate filings with the banking commissioner under subsection(a) [~~(b)~~] of this section, state banks may utilize a modified version of forms promulgated by the secretary of state if the banking commissioner or the finance commission has not promulgated an appropriate corporate form; however, the banking commissioner may require the submission of additional information. The modified corporate forms must:

(1) specifically reference the applicable provisions of the Finance Code;

(2) change references from "corporation" to "association"; and

(3) change the references to "stated capital" and similar terms defined in the TBOC to an appropriate reference to terms defined in the Finance Code.

(c) [~~(d)~~] In accordance with the applicable provisions of the Finance Code and the TBOC, a state bank may file the following corporate forms with the secretary of state as instructed in the Finance Code or the TBOC:

(1) name registrations under TBOC §§5.151 - 5.155;

(2) assumed name certificates under TBOC §5.051;

(3) a statement appointing an agent authorized to receive service of process under Finance Code §201.103;

(4) an amendment to a statement appointing an agent to receive service of process under Finance Code §201.103; and

(5) a cancellation of the appointment of an agent to receive service of process under Finance Code §201.103.

(d) [~~(e)~~] The following corporate forms are inapplicable to state banks and are not required to be filed by a state bank with either the secretary of state or the banking commissioner:

(1) changes of registered office or agent under TBOC §5.202 or §5.203;

(2) name reservations under TBOC §5.101;

(3) certificate of termination under TBOC §11.101; and

(4) certificate of reinstatement under TBOC §11.202.

This 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 June 18, 2010.

TRD-201003447

A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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CHAPTER 21. TRUST COMPANY CORPORATE ACTIVITIES
SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes the repeal of §21.8, concerning corporate filings before January 1, 2010, and proposes to amend §21.9, concerning corporate filings after January 1, 2010. The repealed and amended rules are proposed to eliminate transitional language no longer needed.

The proposed repeal of §21.8 arises from the Legislature's 2003 enactment of the Texas Business Organizations Code (TBOC). Finance Code §182.009(a) makes the TBOC generally applicable to trust associations. The commission adopted §21.8 pursuant to Finance Code §182.009(d), which authorized the commission to establish rules permitting trust associations formed before the effective date of the TBOC, January 1, 2006, to choose to be governed by the former law until January 1, 2010. Finance Code §182.009(d) expired on January 1, 2010. The purpose of §21.8 was to clarify that until January 1, 2010, trust associations formed before January 1, 2006 were permitted to file corporate documents pursuant to the former law. Because January 1, 2010 has passed and the TBOC is therefore applicable to all trust associations, regardless of when formed, the transitional instructions in this section are no longer needed.

In proposed §21.9 transition language related to that in §21.8 is deleted because, as described previously, the transition period has passed, and therefore the language is no longer needed.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rules.

Mr. Bacon also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules are updated and clarified provisions.

For each year of the first five years that the rules will be in effect, there will be no economic costs to persons required to comply with the rules as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed repealed and amended sections must be submitted no later than 5:00 p.m. on August 2, 2010. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

7 TAC §21.8

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

The repeal is proposed under Finance Code, §181.003, which authorizes the Commission to adopt rules to accomplish the purposes of Subtitle F.

Finance Code, Chapters 181 and 182, are affected by the proposed repealed section.

§21.8. Corporate Filings before January 1, 2010.

This 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 June 18, 2010.

TRD-201003448
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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7 TAC §21.9

The amendments are proposed under Finance Code, §181.003, which authorizes the Commission to adopt rules to accomplish the purposes of Subtitle F.

Finance Code, Chapters 181 and 182, are affected by the proposed amended section.

§21.9. Corporate Filings [~~after January 1, 2010~~].

[~~(a) This section is applicable to:~~]

[~~(1) all state trust companies organized after January 1, 2006;~~]

[~~(2) all state trust companies organized before January 1, 2006 that have elected to be governed by the provisions of the Texas Business Organizations Code to the extent not inconsistent with the Trust Company Act; and~~]

[~~(3) effective, January 1, 2010, all state trust companies no matter what their date of organization.~~]

(a) [~~(b)~~] In accordance with the applicable provisions of the Trust Company Act, the following corporate forms regarding a state trust company, along with the applicable filing fees, must be filed with the banking commissioner:

(1) a certificate of correction as authorized by Texas Business Organizations Code (TBOC), §4.101;

(2) articles of amendment under the Finance Code, §32.101;

(3) restated, or, amended and restated, articles of association under the Finance Code, §32.101, and TBOC §3.059 and §21.052;

(4) articles of merger under the Finance Code, §32.301 et seq, as supplemented by the TBOC §10.151;

(5) certificate of exchange under TBOC, §10.151;

(6) statement of event or fact pursuant to TBOC §4.055;

(7) establishment of a series of shares by the board of directors under the Finance Code, §32.102, as supplemented by TBOC §21.155 and §21.156;

(8) statement regarding a restriction on the transfer of shares under TBOC, §21.212; and

(9) abandonment of a merger or interest exchange prior to its effective date under TBOC §4.057.

(b) [~~(c)~~] For purposes of corporate filings with the banking commissioner under subsection (a) [~~(b)~~] of this section, state trust companies may utilize a modified version of forms promulgated by the secretary of state if the banking commissioner or the finance commission has not promulgated an appropriate corporate form; however, the banking commissioner may require the submission of additional information. The modified corporate forms must:

(1) specifically reference the applicable provisions of the Finance Code;

(2) change references from "corporation" to "association"; and

(3) change the references to "stated capital" and similar terms defined in the TBOC to an appropriate reference to terms defined in the Finance Code.

(c) [~~(d)~~] In accordance with the applicable provisions of the Finance Code and the TBOC, a state trust company may file the following corporate forms with the secretary of state as instructed in the Finance Code or the TBOC:

(1) name registrations under TBOC §§5.151 - 5.155;

(2) assumed name certificates under TBOC §5.051;

(3) a statement appointing an agent authorized to receive service of process under Finance Code §201.103;

(4) an amendment to a statement appointing an agent to receive service of process under Finance Code §201.103; and

(5) a cancellation of the appointment of an agent to receive service of process under Finance Code §201.103.

(d) [~~(e)~~] The following corporate forms are inapplicable to state trust companies and are not required to be filed by a state trust company with either the secretary of state or the banking commissioner:

(1) changes of registered office or agent under TBOC §5.202 or §5.203;

(2) name reservations under TBOC §5.101;

(3) certificate of termination under TBOC §11.101; and

(4) certificate of reinstatement under TBOC §11.202.

This 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 June 18, 2010.

TRD-201003449
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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CHAPTER 35. CHECK VERIFICATION ENTITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes to amend §§35.1, 35.13, 35.31, 35.52 - 35.57, 35.59, and 35.72, concerning check verification entities. The amended rules are proposed to correct references to statutes that have been renumbered since the rules were adopted.

All the proposed amendments to Chapter 35 arise from the renumbering of sections of the Business and Commerce Code. Effective April 1, 2009, the Legislature repealed Business and Commerce Code §35.595, and recodified it as Business and Commerce Code §523.052. Chapter 35 contains 25 references to the old statutory sections. The proposed amendments would update citations to refer to the new sections of the Business and Commerce Code.

Robert Bacon, Deputy Commissioner, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rules.

Mr. Bacon also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules are updated and accurate statutory citations in Department rules.

For each year of the first five years that the rules will be in effect, there will be no economic costs to persons required to comply with the rules as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed amended sections must be submitted no later than 5:00 p.m. on August 2, 2010. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §35.1

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended section.

§35.1. Definitions.

In this subchapter:

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

(3) Electronic notification system--The secure e-mail or other secure system established under § [~~Section~~] 11.309, Finance Code, and used by financial institutions to notify check verification entities as required by §523.052 [~~Section 35.595~~], Business & Commerce Code.

(4) Financial institution--A financial institution as defined by §523.052(a)(2) [~~Section 35.595(a)(2)~~], [~~Texas~~] Business & Commerce Code.

(5) (No change.)

(6) Sworn statement--The sworn statements referred to in §523.052(b)(2) [~~Section 35.595(b)(2)~~] and §523.052(e)(2)(B) [~~Section 35.595(e)(2)(B)~~], Business & Commerce Code, except when the term is specifically limited to one of the sworn statements.

(7) Written authorization--The written authorization referred to in §523.052(b)(3) [~~Section 35.595(b)(3)~~], Business & Commerce Code.

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

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TRD-201003454
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: August 20, 2010
For further information, please call: (512) 475-1300

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SUBCHAPTER B. REGISTRATION OF CHECK VERIFICATION ENTITIES

7 TAC §35.13

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended section.

§35.13. What must a check verification entity do to register in Texas?

(a) A check verification entity must complete and submit the registration form prescribed by the banking commissioner, which at a minimum, must include:

(1) (No change.)

(2) the full legal name, title, business telephone number, facsimile number, and e-mail address of the following persons associated with the check verification entity:

(A) (No change.)

(B) the person responsible for compliance with the requirements of §523.052 [~~§35.595~~], Business & Commerce Code.

(3) - (5) (No change.)

(b) (No change.)

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

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SUBCHAPTER C. RESPONSIBILITIES OF THE BANKING COMMISSIONER

7 TAC §35.31

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended section.

§35.31. What is the banking commissioner required to do with respect to the electronic notification system?

(a) The banking commissioner is required to establish an electronic notification system, through secure email or another secure system, to be used by a financial institution to notify check verification entities as required by §523.052 [~~Section 35.595~~], Business & Commerce Code.

(b) (No change.)

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

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SUBCHAPTER D. PROCEDURE FOLLOWING A CUSTOMER REPORT OF AN OFFENSE UNDER SECTION 32.51, PENAL CODE

7 TAC §§35.52 - 35.57, 35.59

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended sections.

§35.52. What must a financial institution or check verification entity do when a person reports to it that the person was the victim of an offense under Section 32.51, Penal Code?

(a) When a customer reports to a financial institution that they have been the victim of an offense under §32.51, Penal Code, the financial institution is encouraged to provide the customer with a sworn statement form under §523.052(b)(2) [~~§35.595(b)(2)~~], Business & Commerce Code, and a written authorization form under §523.052(b)(3) [~~§35.595(b)(3)~~].

(b) When a person reports to a check verification entity that they have been the victim of an offense under §32.51, Penal Code, the check verification entity is encouraged to provide the person with a sworn statement form under §523.052(e)(2)(B) [~~§35.595(e)(2)(B)~~], Business & Commerce Code.

(c) (No change.)

§35.53. Will the department provide model forms for the sworn statement and written authorization required by Section 523.052(b)(2) [~~35.595(b)(2)~~] and (3), Business & Commerce Code?

(a) The department has provided a model form combining the sworn statement under §523.052(b)(2) [~~§35.595(b)(2)~~], Business & Commerce Code, and the written authorization under §523.052(b)(3) [~~§35.595(b)(3)~~] for use by financial institutions.

(b) The department has provided a model form sworn statement under §523.052(e)(2)(B) [~~§35.595(e)(2)(B)~~], Business & Commerce Code, for use by check verification entities.

(c) A financial institution or check verification entity may use and accept:

(1) (No change.)

(2) other forms that contain spaces for persons to provide the information required by §523.052 [~~§35.595~~], Business & Commerce Code, and this Chapter.

(d) - (e) (No change.)

§35.54. What information must appear on the sworn statement required by Section 523.052(b)(2) [~~35.595(b)(2)~~], Business & Commerce Code, for use when a person contacts a financial institution with the intent to send information through the electronic notification system?

The sworn statement form required by §523.052(b)(2) [~~§35.595(b)(2)~~], Business & Commerce Code, must include:

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

§35.55. What information must appear on the written authorization required by Section 523.052(b)(3) [~~35.595(b)(3)~~], Business & Commerce Code?

The written authorization form provided to a customer by a financial institution must contain:

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

§35.56. What information must appear on the sworn statement required by Section 523.052(e)(2)(B) [~~35.595(e)(2)(B)~~], Business & Commerce Code, for use with a person who contacts a check verification entity directly?

The sworn statement required by §523.052(e)(2)(B) [~~§35.595(e)(2)(B)~~], Business & Commerce Code, must include:

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

§35.57. When must a financial institution submit customer information through the electronic notification system?

A financial institution must submit the information required by §523.052(d) [~~§35.595(d)~~], Business & Commerce Code, to the electronic notification system not later than the second business day after the date the customer:

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

(3) presents to the home office, if in Texas, or to any branch of the financial institution in Texas:

(A) (No change.)

(B) the sworn statement required by §523.052(b)(2) [~~§35.595(b)(2)~~], Business & Commerce Code; and

(C) the written authorization required by §523.052(b)(3) [~~§35.595(b)(3)~~], Business & Commerce Code.

§35.59. What procedures must a check verification entity maintain to prevent recommending approval of a check or similar sight order after receipt of a notification of an offense under Section 32.51, Penal Code?
A check verification entity must process a notification received through the electronic notification system or pursuant to §523.052(e)(2) [~~§35.595(e)(2)~~], Business & Commerce Code, in the same manner as it processes information received from its usual sources, including information received from its business customers.

This 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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A. Kaylene Ray
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1300

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SUBCHAPTER E. PROCEDURES WHEN INCORRECT INFORMATION IS REPORTED TO THE CHECK VERIFICATION ENTITY

7 TAC §35.72

The amendments are proposed under Business and Commerce Code, §523.052(g), which provides that the Finance Commission may adopt rules to implement §523.052; Finance Code, §11.309, which requires the Commission to adopt rules relating to check verification; and Finance Code, §31.003, which allows the Commission to adopt rules to accomplish the purposes of the Texas Banking Act and Finance Code, Chapters 11, 12, and 13.

Finance Code, §11.309 and Business and Commerce Code, §523.052 are affected by the proposed amended section.

§35.72. What must a check verification entity do when it receives notice directly from a person pursuant to Section 523.052(e)(2) [~~35.595(e)(2)~~], Business & Commerce Code, or from a financial institution through the electronic notification system that information the check verification entity received was erroneous?
Subject to other applicable state or federal law, a check verification entity that is notified that information it received through the electronic notification system is not complete or accurate must process the notice in the same manner as it processes such notices received from its usual sources, including information received from its business customers.

This 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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A. Kaylene Ray
General Counsel
Texas Department of Banking
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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER G. EXAMINATIONS

7 TAC §84.708

The Finance Commission of Texas (commission) proposes amendments to 7 TAC §84.708, concerning Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts).

The purpose of the amendments to 7 TAC §84.708 is to return inadvertently omitted language to the required account record information outlined in §84.708(e)(3)(A). When this rule was last amended by the commission in December 2009 (effective January 7, 2010), the commission intended on readopting the provisions in question without change, as included in the proposal published in September 2009. It was recently discovered that two lists concerning payment history information (subclauses (I) and (II) under §84.708(e)(3)(A)(iv)) and collection contact history (subclauses (I) - (IV) under §84.708(e)(3)(A)(vi)) were mistakenly omitted when submitting the full text of the rule as amended to the *Texas Register.* Thus, these proposed amendments merely return this language, as had been previously published and adopted by the commission when the rule was first enacted in November 2008.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

For each year of the first five years the amendments are in effect, Commissioner Pettijohn has also determined that the public benefit anticipated as a result of the proposed amendments will be that the commission's rules will be more accurate and will be more easily understood. There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the

date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The amendments are proposed under Texas Finance Code §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the proposed amendments are contained in Texas Finance Code, Chapter 348.

§84.708. Files and Records Required (Retail Sellers Collecting Installments on Retail Installment Sales Contracts).

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

(e) Records required.

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

(3) Account record for each retail installment sales contract (including payment and collection contact history). A separate paper, or an electronic record, must be maintained covering each retail installment sales contract. The paper or electronic account record must be readily available by reference to either a retail buyer's name or account number.

(A) Required information. The account record for each retail installment sales contract must contain at least the following information, unless stated otherwise:

(i) - (iii) (No change.)

(iv) payment history information:

(I) itemized payment entries showing date payment received; dual postings are acceptable if date of posting is other than date of receipt;

(II) if requested during an examination or investigation, a payoff amount that denotes amounts applied to principal, time price differential, default, deferment, or other authorized charges;

(v) (No change.)

(vi) collection contact history, including a written record of:

(I) all collection contacts made by a licensee with the retail buyer or any other person in connection with the collection of amounts due under a motor vehicle retail installment sales contract;

(II) all collection contacts made by the retail buyer with the licensee in connection with the collection of amounts due under a motor vehicle retail installment sales contract;

(III) for the collection contacts in subclauses (I) and (II) of this clause, the written record must include the date, method of contact, contacted party, person initiating the contact, and a summary of the contact;

(IV) copies of individual collection notices or letters or references to standard collection letters sent to the retail buyer.

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

(4) - (9) (No change.)

(f) (No change.)

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

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7621

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CHAPTER 90. CHAPTER 342, PLAIN LANGUAGE CONTRACT PROVISIONS

The Finance Commission of Texas (commission) proposes amendments, to 7 TAC Chapter 90, §§90.104, 90.201 - 90.204, 90.301 - 90.304, 90.401 - 90.404, 90.501 - 90.503, 90.601 - 90.604, 90.701 - 90.703, and 90.706 concerning Chapter 342, Plain Language Contract Provisions. The proposed changes affect rules contained in Subchapter A, concerning General Provisions; Subchapter B, concerning Secured Consumer Installment Loans (Chapter 342, Subchapter E); Subchapter C, concerning Signature Loans (Chapter 342, Subchapter F); Subchapter D, concerning Second Lien Home Equity Loans (Chapter 342, Subchapter G); Subchapter E, concerning Second Lien Purchase Money Loans (Chapter 342, Subchapter G); Subchapter F, concerning Second Lien Home Improvement Contracts (Chapter 342, Subchapter G); and Subchapter G, concerning Spanish Disclosures.

The purpose of the amendments to these rules governing plain language contract provisions for Chapter 342 transactions is to implement technical corrections resulting from the commission's review of Chapter 90 under Texas Government Code, §2001.039. The agency circulated these proposed changes to interested stakeholders and did not receive any informal precomments. The notice of intention to review 7 TAC Chapter 90 was published in the May 28, 2010, issue of the *Texas Register* (35 TexReg 4477). The comment period on the notice of intention will be pending at the time this proposal is presented to the commission at its June meeting. The agency received very little feedback, either positive or negative, during the precomment process. Due to the technical nature of these nonsubstantive changes and the lack of written precomments received, the agency anticipates few, if any, comments on the notice of intention to review. Should any comments be received on the notice, the commission will incorporate into the adoption any changes with which it agrees, respond to suggestions with which it does not agree, or propose separate amendments if required by law. Please note that the comment period on the notice of intention is separate and distinct from the 31-day comment period on the amendments contained in this proposal. Any comments received on these proposed amendments as published will also be handled appropriately under the Administrative Procedure Act.

Some of the corrections, including changes to three figures, relate to the removal of references to the Texas Residential Construction Commission (TRCC). The TRCC was abolished by the Sunset Commission and continued in existence until September 1, 2010, to conclude its business. Revisions related to the deletion of the TRCC disclosures are contained in §90.602(1)(N),

(3)(V), and (5)(HH); §90.603(b)(14), (d)(22), and (f)(34); and the figures contained in 7 TAC §90.604(a)(12), (14), and (16). Additionally, appropriate renumbering or relettering of the surrounding provisions is also proposed.

The remaining corrections relate to improvements in consistency, grammar, punctuation, and formatting. Additional changes provide clarification and updated legal citations. With regard to consistency, the term "licensee" will be used throughout the rules in connection with compliance issues. The term "lender" will be used when necessary to maintain parallel language with the title of a model clause or frequent use within a model clause. Any Chapter 90 rule not included in this proposal will be maintained in its current form.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the amendments to these rules are in effect, there will be no fiscal implications for state or local government as a result of administering the amendments.

For each year of the first five years the amendments to these rules are in effect, Commissioner Pettijohn has also determined that the public benefits anticipated as a result of the proposed amendments will be that the commission's rules will be more easily understood. Another public benefit of these rule amendments will be increased uniformity and consistency in credit contracts.

Additional economic costs may be incurred by a person required to comply with this proposal. These costs, however, are required by the Sunset Commission's discontinuation of the TRCC; the proposed amendments merely serve to implement the Sunset Commission's decision. As the TRCC disclosures being removed were only required when the particular registrations were required, not all home improvement contracts even contained these disclosures. For those who will be required to comply by deleting the TRCC disclosures, the anticipated costs would include the costs associated with copying a contract or new forms, and costs attributable to the loss of obsolete forms inventory. Additional copy costs are estimated to be approximately $0.30-$0.40 per contract or new form.

Some licensees who use or lease specialized computer software programs for their loan business may experience some additional costs. These costs are impossible to predict. The agency has attempted to lessen these costs by providing the software programmers with the text of the forms. Whether programmers will use the proposed forms or create their own non-standard contract submission is not predictable. Whether the programmers will charge an additional fee for a document they do not have to draft is also not predictable.

The agency is not aware of any adverse economic effect on small businesses as compared to the effect on large businesses resulting from this proposal. But in order to obtain more complete information concerning the economic effect of these rule amendments, the agency invites comments from interested stakeholders and the public on any economic impact on small businesses, as well as any alternative methods of achieving the purpose of these proposed amendments should that effect be adverse to small businesses.

The rules contained in Chapter 90 provide model clauses and model contracts. Licensees are not required to adopt the model language contained in the rules. For those licensees utilizing the model contracts, the prior model language is acceptable and the agency will permit licensees to use the prior model language (without a non-standard contract submission) until February 1, 2012, to deplete supplies of existing forms during a transition period after the effective date of the rules.

Comments on the proposed amendments may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §90.104

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.104. Non-Standard Contract Filing Procedures.

(a) Non-standard contracts. A non-standard contract is a contract that does not use the model contract provisions. Non-standard contracts submitted in compliance with the provisions of Texas Finance Code, §341.502(c) will be reviewed to determine that the contract is written in plain language. Non-standard contracts submitted for review may gain certain protections under the provisions of Texas Finance Code, §341.502.

(b) Certification of readability. Contract filings subject to this chapter must be accompanied by a certification signed by an officer of the licensee [~~creditor~~] or the entity submitting the form on behalf of the licensee [~~creditor~~]. The certification must state that the contract is written in plain language (i.e., that the contract can be easily understood by the average consumer). The certification must also state that the contract is printed in an easily readable font and type size.

(c) Filing requirements. Contract filings must be identified as to the transaction type. Contract filings must be submitted on paper that is suitable for permanent record storage and imaging. Handwritten forms or handwritten corrections will not be accepted. In addition to the paper submission, the licensee must also submit the contract filings in an electronic version. The electronic version must be submitted in a Corel WordPerfect (.wpd), MS Word (.doc), or a text (.txt) format.

(d) Contact person. One person shall be designated as the contact person for each filing submitted. Each submission should provide the name, address, phone number, and fax number, if available, of the contact person for that filing. If the contracts are submitted by anyone other than the licensee [~~company~~] itself, the contracts must be accompanied by a dated letter which contains a description of the anticipated users of the contracts and designates the legal counsel or other designated contact person for that filing.

This 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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Commissioner
Office of Consumer Credit Commissioner
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SUBCHAPTER B. SECURED CONSUMER INSTALLMENT LOANS (SUBCHAPTER E)

7 TAC §§90.201 - 90.204

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.201. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter E transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. The use of the "plain language" model contract by a licensee is not mandatory. The licensee, however, may not use a contract other than a model contract unless the licensee has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter E contract; however, a licensee is not limited to the contract provisions addressed by these rules.

§90.202. Contract Provisions.

A Chapter 342, Subchapter E contract may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include the provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, if a licensee does not take a security interest in the borrower's personal property, the provisions addressing security interests are not required. A licensee may also exclude non-relevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those non-applicable portions of the model clause. A Chapter 342, Subchapter E contract may contain the following provisions:

(1) Identification of the parties, including the name and address of each party;

(2) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(3) An itemization of amount financed box;

(4) A definitions section specifying the pronouns that designate the borrower and the lender;

(5) A promise to pay;

(6) A late charge provision;

(7) A provision for after maturity interest;

(8) A provision specifying that prepayment is permitted;

(9) A provision specifying the finance charge earnings and refund method;

(10) A provision authorizing deferments;

(11) A provision contracting for a fee for a dishonored check;

(12) A provision specifying the conditions causing default;

(13) A provision regarding [~~relating to~~] property insurance;

(14) A provision regarding [~~relating to~~] credit insurance;

(15) A provision regarding the mailing of notices to the borrower;

(16) Statement of truthful information;

(17) A waiver of notice of intent to accelerate and waiver of notice of acceleration;

(18) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(19) A collection expenses clause;

(20) A clause providing for joint liability;

(21) A usury savings clause;

(22) A savings clause stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid; and

(23) Complaints and inquiries notice.

§90.203. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter E secured consumer installment loan contract.[~~:~~]

(1) Pronoun designation of parties. The model clauses refer to the Borrower as "I" or "me." The Lender is referred to as "you" or "your."

(2) Itemization of amount financed box. Two model clauses for the itemization of amount financed are presented in this paragraph. One is for use when the licensee finances an administrative fee. The other is for use when the administrative fee is paid in cash by the borrower. A licensee may delete portions applicable to any insurance premiums that are not financed and may also delete other inapplicable portions. The model clause options regarding the itemization of the amount financed read:

(A) For use when the administrative fee is financed: Figure: 7 TAC §90.203(b)(2)(A) (No change.)

(B) For use when the administrative fee is paid in cash: Figure: 7 TAC §90.203(b)(2)(B) (No change.)

(3) Promise to pay. The model clause for the borrower's promise to pay reads:

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you, the Lender. I will make the payments at your address above. I

will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you, the Lender. I will make the payments at your address above. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(4) Late charge. At the licensee's [~~lender's~~] option, the late charge provision may be made applicable to loans with more than one installment. Alternatively, a licensee [~~lender~~] may omit the late charge provision for loans with a single repayment. The late charge model clause reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(5) After maturity interest. The after maturity interest model clause reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(6) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(7) Finance charge earnings and refund method. The model finance charge earnings and refund method clause options read:

(A) For contracts using the scheduled installment earnings method, Texas Finance Code, §342.201(a):
Figure: 7 TAC §90.203(b)(7)(A) (No change.)

(B) For contracts using the scheduled installment earnings method, Texas Finance Code, §342.201(d): "The annual rate of interest is ___%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid cash advance. The unpaid cash advance does not include the administrative fee, late charges, and returned check charges. If I prepay my loan in full before the final payment is due, I may save a portion of the Finance Charge. I will not get a refund if the refund would be less than $1.00. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. My final payment may be larger or smaller than my regular payment."

(C) For contracts using the scheduled installment earnings method, Texas Finance Code, §342.201(e):
Figure: 7 TAC §90.203(b)(7)(C) (No change.)

(D) For contracts using the true daily earnings method, Texas Finance Code, §342.201(d): "The annual rate of interest is _____%. This interest rate may not be the same as the Annual Percentage Rate. You figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the cash advance. You base the Finance Charge and Total of Payments as if I will make each payment on the day it is due. You will apply payments on the date they are received. This may result in a different Finance Charge or Total of Payments. My final payment may be larger or smaller than my regular payment."

(E) For contracts using the true daily earnings method, Texas Finance Code, §342.201(e):
Figure: 7 TAC §90.203(b)(7)(E) (No change.)

(8) Deferment clause. The deferment model clause reads:

(A) "If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules."

(B) Optional language for unilateral deferment(s): "You may extend one or more of my payments without my permission. You have to wait six months to do it again."

(9) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~An authorized lender~~] may always choose a lesser amount. The fee for dishonored check model clause reads: "I agree to pay you a fee of up to $30 for a returned check. You can add the fee to the amount I owe or collect it separately."

(10) Default clause. The model default clause reads: "I will be in default if: I do not timely make a payment; I break any promise I made in this agreement; I allow a judgment to be entered against me or the collateral; I sell, lease, or dispose of the collateral; I use the collateral for an illegal purpose; or you believe in good faith that I am not going to keep any of my promises. If there is more than one Borrower, each Borrower agrees to keep all of the promises in the loan documents."

(11) Property insurance disclosure box. The model provision for the disclosure of property insurance reads:
Figure: 7 TAC §90.203(b)(11) (No change.)

(12) Credit insurance disclosure box. The model provision for the disclosure of credit insurance reads:
Figure: 7 TAC §90.203(b)(12) (No change.)

(13) Mailing of notices to borrower. The model agreement regarding the mailing of notices to the borrower reads: "You can mail any notice to me at my last address in your records. Your duty to give me notice will be satisfied when you mail it."

(14) Statement of truthful information. The following clause is sufficient as the borrower's agreement that the information provided to the licensee is true: "I promise that all information I gave you is true."

(15) Waiver of notice of intent to accelerate and waiver of notice of acceleration clause. The waiver of notice of intent to accelerate and waiver of notice of acceleration clause reads: "If I am in default, you may require me to repay the entire unpaid principal balance, and any accrued interest at once. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe."

(16) No waiver of lender's rights. The model agreement regarding the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(17) Collection expenses clause. The model provision relating to the collection of expenses if default occurs reads: "If this debt is referred to an attorney for collection, I will pay any attorney fees set by the court plus court costs."

(18) Joint liability clause. The model joint liability clause reads: "I understand that you may seek payment from only me without first looking to any other Borrower."

(19) Usury savings clause. The model usury savings clause reads: "I don't have to pay interest or other amounts that are more than the law allows."

(20) Savings clause. The model savings clause reads: "If any part of this contract is declared invalid, the rest of the contract remains valid."

(21) Final agreement and modifications in writing. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model agreement requiring any change to be in writing reads: "This written loan agreement is the final agreement between you and me and may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this loan agreement. Any change to this agreement must be in writing. Both you and I have to sign written agreements."

(22) Security agreement clause. The model clause for the security agreement reads: "If I am giving collateral for this loan, I will see the separate security agreement for more information and agreements."

(23) Application of law. The model agreement regarding the law to be applied to the contract reads: "Federal law and Texas law apply to this contract."

(24) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints: "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, www.occc.state.tx.us, (800) 538-1579."

(25) Clause describing collateral. In the Truth in Lending Act [~~TILA~~] disclosure box, the model clause describing the collateral reads: "You will have a security interest in the following described collateral _____."

(26) Clause relating to prepayment. In the Truth in Lending Act [~~TILA~~] disclosure box, the model clause options for prepayment read:

(A) For contracts using the scheduled installment earnings method: "Prepayment: If I pay off early, I may be entitled to a refund of part of the Finance Charge and I will not have to pay a penalty."

(B) For contracts using the true daily earnings method: "Prepayment: If I pay off early, I will not have to pay a penalty."

(27) Security agreement. If the loan is secured, a separate security agreement should be used.

(A) The model clause stating the secured nature of the agreement reads: "To secure this loan, I give you a security interest in the collateral. The collateral includes the property listed below, improvements and attachments to the property, insurance refunds, and proceeds."

(B) Prohibition on transfer and collateral free of encumbrance. The model agreement keeping the collateral free from encumbrance and against transferring it reads: "I own the collateral. I won't sell or transfer it without your written permission. I won't allow anyone else to have an interest in the collateral except you."

(C) Location and restrictions on movement or relocation [~~transfer~~] of collateral. The model agreement regarding the location of the collateral reads: "I will keep the collateral at my address shown above. I will promptly tell you in writing if I change my address. I won't permanently remove the collateral from Texas unless you give me written permission."

(D) Upkeep and use of collateral. The model agreement regarding the upkeep and use of the collateral reads: "I will timely pay all taxes and license fees on the collateral. I will keep it in good repair. I won't use the collateral illegally."

(E) Modifications in writing. The model agreement regarding changes made to the security agreement reads: "Any change to this security agreement has to be in writing. Both you and I have to sign it."

(F) Any default is a default of the security agreement. The model agreement in the security agreement regarding defaults reads: "Any default under my agreements with you will be a default of this security agreement."

(G) Default clause. The model clause setting out the security agreement in case of default reads: "If there is a default, you can take the collateral. You will only do this lawfully and without a breach of the peace. If you take my collateral, you will tell me how much I have to pay to get it back. If I don't pay you to get the collateral back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. My right to get the collateral back ends when you sell it. You can use the money you get from selling it to pay amounts the law allows and to reduce the amount I owe. If any money is left, you will pay it to me. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest."

§90.204. Permissible Changes.

(a) A licensee [~~licensed lender~~] may consider making the following types of changes to the secured consumer installment loans plain language model clauses:

(1) Adding information related to information set forth in the model clauses that is not otherwise prohibited by law;

(2) Substituting another term for "Lender" or "Borrower" that has the same meaning, or using pronouns such as "you," "we," and "us";

(3) Presenting the model clauses in any order, and combining or further segregating the model clauses;

(4) Inserting descriptive headings or number provisions;

(5) Changing the case of a word if otherwise permitted by the Texas Finance Code; or

(6) Making other changes that [~~which~~] do not affect the substance of the disclosures.

(7) A sample model contract using the scheduled installment earnings method is presented in the following example.
Figure: 7 TAC §90.204(a)(7) (No change.)

(8) A sample model contract using the true daily earnings method is presented in the following example.
Figure: 7 TAC §90.204(a)(8) (No change.)

(9) A sample model security agreement is presented in the following example.
Figure: 7 TAC §90.204(a)(9) (No change.)

(b) A [~~An authorized~~] licensee has considerable flexibility to arrange the format of the model form if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures.

This 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 June 18, 2010.

TRD-201003462
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

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SUBCHAPTER C. SIGNATURE LOANS (SUBCHAPTER F)

7 TAC §§90.301 - 90.304

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.301. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter F transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. The use of the "plain language" model contract by a licensee [~~creditor~~] is not mandatory. The licensee [~~creditor~~], however, may not use a contract other than a model contract unless the licensee [~~creditor~~] has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee [~~creditor~~] may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter F contract; however, a licensee [~~creditor~~] is not limited to the contract provisions addressed by these rules.

§90.302. Contract Provisions.

A Chapter 342, Subchapter F contract may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee [~~lender~~] desires to exercise its rights under one of the following provisions, it must include the provision in the contract. A licensee [~~lender~~] who does not desire to apply a provision is not required to include it in the contract. For example, if a licensee [~~lender~~] does not take a security interest in the borrower's personal property, the provisions addressing security interests are not required. A Chapter 342, Subchapter F contract may contain the following provisions:

(1) Identification of the parties, including the name and address of each party;

(2) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(3) A definitions section specifying the pronouns that designate the borrower and the lender;

(4) A promise to pay;

(5) A late charge provision;

(6) A provision for after maturity interest;

(7) A provision specifying that prepayment is permitted;

(8) A provision specifying the finance charge earnings and refund method;

(9) A provision authorizing deferments;

(10) A provision specifying the conditions causing default;

(11) A waiver of notice of intent to accelerate and waiver of notice of acceleration;

(12) A provision contracting for a fee for a dishonored check;

(13) A signature block;

(14) A security agreement including provisions addressing:

(A) a statement that the collateral is free from encumbrances;

(B) the location and restrictions on movement or transfer of the collateral; and

(C) a statement that the borrower will appropriately maintain and use the collateral;

(15) A provision regarding the mailing of notices to the borrower;

(16) Statement of truthful information;

(17) A provision expressing no waiver of the lender's rights;

(18) A clause stating that all modifications to the contract must be in writing;

(19) A provision stating Texas law and federal law will apply to the contract;

(20) A clause providing for joint liability;

(21) A usury savings clause;

(22) Complaints and inquiries notice;

(23) An arbitration agreement; and

(24) A savings clause stating that if any part of the contract is invalid, all other parts remain valid.

§90.303. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter F signature loan contract.[~~:~~]

(1) Pronoun designation of parties. The model clauses refer to the Borrower as "I" or "me." The Lender is referred to as "you" or "your."

(2) Promise to pay. The model clause for the borrower's promise to pay reads: "I promise to pay the Total of Payments to the order of you, the Lender. I will make the payments at your address above. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(3) Late charge. At the licensee's [~~lender's~~] option, the late charge clause may be made applicable only to loans with more than one installment. As other options, a licensee [~~lender~~] may include one of the model late charge clause options, as set out in [~~the~~] subparagraphs (A) and (B) of this paragraph [~~below~~], in both single and multiple installment loans, so long as the licensee [~~lender~~] does not collect a default charge on a single payment loan or omit [~~the lender omits~~] the late charge clause for loans with a single repayment. The licensee [~~lender~~] may use one of the following late charge model provisions:

(A) Option 1: "If I don't pay all of the payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."; or [~~Or~~]

(B) Option 2: "If I don't pay all of the payment within 10 days after it is due, you can charge me a late charge. If the amount financed is less than $100, the late charge will be 5% of the amount of the installment. If the amount financed is $100 or more, the late charge will be the greater of $10 or 5% of the amount of the installment."

(4) After maturity interest. The after maturity interest model clause reads: "If I don't pay all I owe by the date the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be at a rate of 18% per year and will begin the day after the final payment becomes due."

(5) Prepayment clause. The model prepayment clause reads: "I can make a whole payment early."

(6) Finance charge earnings and refund method.

(A) The model finance charge earnings and refund method clause reads: "The acquisition charge on this loan will not be refunded if I pay off early. If I pay all I owe before the beginning of the last monthly period, I will save part of the installment account handling charge. You will figure the amount I save by the sum of the periodic balances method. This method is explained in the Finance Commission rules. You don't have to refund or credit any amount less than $1.00."

(B) At the licensee's [~~lender's~~] option, the licensee [~~lender~~] may include the following model finance charge and refund method language if the licensee [~~lender~~] makes loans of $30 or less: "The acquisition charge on this loan will not be refunded if I pay off early. If this loan is for more than $30 and I pay all I owe before the beginning of the last monthly period, I will save part of the installment account handling charge. You will figure the amount I save by the sum of the periodic balances method. This method is explained in the Finance Commission rules. You don't have to refund or credit any amount less than $1.00."

(7) Deferment clause. The deferment model clause reads: "If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules."

(8) Default clause. The model default clause reads: "If I break any of my promises in this document, you can demand that I immediately pay all that I owe. You can also do this if you in good faith believe that I am not going to be willing or able to keep all of my promises."

(9) Waiver of notice of intent to accelerate and waiver of notice of acceleration clause. The model waiver of notice of intent to accelerate and waiver of notice of acceleration clause reads: "I agree that you don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe."

(10) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. The licensee [~~lender~~] may always choose a lesser amount. The fee for dishonored check model clause reads: "I agree to pay you a fee of up to $30 for a returned check. You can add the fee to the amount I owe or collect it separately."

(11) Signature block. At the licensee's [~~lender's~~] option, a witness signature block may be added.

(12) Clause describing collateral.

(A) In the Truth in Lending Act [~~TILA~~] disclosure box, the model clause describing the collateral reads: "You will have a security interest in the following described collateral _____."

(B) At the licensee's [~~creditor's~~] option, if the promissory note is unsecured, the licensee [~~lender~~] may use the following clause: "This note is unsecured."

(13) Security agreement clause. The model clause setting out the security agreement in case of default reads: "If I am giving collateral for this loan, I will see the separate security agreement for more information and agreements."

(14) Mailing of notice to borrower. The model agreement regarding the mailing of notices to the borrower reads: "You can mail any notice to me at my last address in your records. Your duty to give me notice will be satisfied when you mail it."

(15) Statement of truthful information. The following clause is sufficient as the borrower's agreement that the information provided to the licensee [~~lender~~] is true: "I promise that all information I gave you is true."

(16) No waiver of lender's rights. The model agreement regarding the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(17) Modifications in writing. The model agreement requiring any change to be in writing reads: "Any change to this agreement has to be in writing. Both you and I have to sign it."

(18) Application of law. The model clause regarding the law to be applied to the contract reads: "Federal law and Texas law apply to this contract."

(19) Joint liability. The model joint liability agreement reads: "I will keep all of my promises in this document. If there is more than one Borrower, each Borrower agrees to keep all of the promises in the loan document."

(20) Usury savings clause. The model usury savings clause reads: "I don't have to pay interest or other amounts that are more than the law allows."

(21) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints: "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207; www.occc.state.tx.us; (800) 538-1579."

(22) Security agreement. The model clause setting out the security agreement reads: "We are entering into this security agreement

at the same time that we are entering into a loan. In exchange for the loan referenced above, I agree to the follow terms and conditions: To secure this loan, I give you a security interest in the collateral. The collateral includes the property listed below, anything that becomes attached to it, and all proceeds of the collateral. This security interest also secures all other debt I owe you now. I understand that all collateral that I have given to secure loans may also be used to secure this and any other loans you may make to me. I own the collateral. I won't sell or transfer it without your written permission. I won't allow anyone else to have an interest in the collateral except you. I will keep the collateral at my address shown above. I will promptly tell you in writing if I change my address. I won't permanently remove the collateral from Texas unless you give me written permission. I will timely pay all taxes and license fees on the collateral. I will keep it in good repair. I won't use the collateral illegally. Any change to this security agreement has to be in writing. Both you and I have to sign it. Any default under my agreements with you will be a default of this security agreement. Federal law and Texas law apply to this security agreement. If I don't keep any of my promises, you can take the collateral. You will only take the collateral lawfully and without a breach of the peace. If you take my collateral, you will tell me how much I have to pay to get it back. If I don't pay you to get the collateral back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. My right to get the collateral back ends when you sell it. You can use the money you get from selling it to pay amounts the law allows, and to reduce the amount I owe. If any money is left, you will pay it to me. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest."

§90.304. Permissible Changes.

(a) A licensee [~~An authorized lender~~] may consider making the following types of changes to the signature loans plain language model clauses:

(1) Adding information related to information set forth in the model clauses that is not otherwise prohibited by law;

(2) Substituting another term for "Lender" or "Borrower" that has the same meaning, or using pronouns such as "you," "we," and "us";

(3) Presenting model clauses in any order, and combining or further segregating the model clauses;

(4) Inserting descriptive headings or number provisions;

(5) Changing the case of a word if otherwise permitted by the Texas Finance Code; or

(6) Making other changes that [~~which~~] do not affect the substance of the disclosures.

(7) A sample model contract is presented in the following example.
Figure: 7 TAC §90.304(a)(7) (No change.)

(8) A sample model security agreement is presented in the following example.
Figure: 7 TAC §90.304(a)(8) (No change.)

(b) A licensee [~~An authorized lender~~] has considerable flexibility to arrange the format of the model form if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures.

This 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-201003463
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

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SUBCHAPTER D. SECOND LIEN HOME EQUITY LOANS (SUBCHAPTER G)

7 TAC §§90.401 - 90.404

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.401. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter G (secondary mortgage loans with an effective rate of greater than 10%) home equity loan transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a licensee is not mandatory. The licensee, however, may not use a contract other than a model contract unless the licensee has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter G home equity loan contract; however, a licensee is not limited to the contract provisions addressed by these rules.

§90.402. Contract Provisions.

(a) A Chapter 342, Subchapter G home equity loan contract may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include that provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, a licensee who does not assess a fee for dishonored checks may omit the fee for dishonored check clause. A licensee may also exclude nonrelevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those nonapplicable portions of the model clause. A Chapter 342, Subchapter G second lien home equity loan contract may contain the following provisions:

(1) Identification of the parties, including the name and address of each party and specifying the pronouns that designate the borrower and the lender;

(2) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(3) An itemization of amount financed box;

(4) A promise to pay;

(5) A late charge provision;

(6) A provision for after maturity interest;

(7) A prepayment clause;

(8) A provision specifying the finance charge earnings and refund method;

(9) A provision contracting for a fee for a dishonored check;

(10) A provision specifying the conditions causing default;

(11) A provision regarding property insurance;

(12) A credit insurance disclosure box;

(13) A provision regarding the mailing of notices to the borrower;

(14) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(15) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(16) A collection expenses clause;

(17) A provision providing for joint liability;

(18) A usury savings clause;

(19) A savings clause stating that if any part of the loan agreement is [~~declared~~] invalid, the rest remains valid;

(20) An integration clause stating that the contract supersedes all prior agreements and that the contract may not be changed by oral agreement;

(21) A provision stating that the homestead described in the loan agreement is subject to the lien of the security document;

(22) A provision specifying that federal law and Texas law apply to the contract;

(23) Complaints and inquiries notice;

(24) A provision describing the collateral; and

(25) Signature blocks.

(b) The security document for a Chapter 342, Subchapter G second lien home equity loan contract may contain the following provisions:

(1) A definitions section;

(2) A provision regarding the secured nature of the agreement;

(3) A provision regarding the transfer of rights in the property;

(4) Borrower and Lender's promise;

(5) A provision regarding late charges and prepayment of principal and interest;

(6) A provision regarding the funds for escrow items;

(7) A provision regarding charges and liens;

(8) A provision regarding property insurance;

(9) A provision stating that the borrower occupies the property as the borrower's [~~his~~] homestead;

(10) A provision regarding preservation, maintenance, protection, and inspection of the property;

(11) A provision specifying the conditions causing actual fraud;

(12) A provision regarding protection of the lender's interest in the property and rights under the security document;

(13) A provision regarding the assignment of miscellaneous proceeds and forfeiture;

(14) A provision specifying that the borrower is not released from liability if the licensee [~~lender~~] modifies the payment schedule;

(15) A provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns;

(16) A provision regarding the extension of credit charges;

(17) A provision regarding the delivery of notices;

(18) A provision regarding the law governing the contract, stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid;

(19) A provision regarding rules of clause construction;

(20) A provision specifying that the licensee [~~lender~~] will give the borrower a copy of all signed documents at the time the loan agreement is made;

(21) A provision regarding a transfer of interest in the property;

(22) A provision regarding the borrower's right to reinstate after acceleration;

(23) A provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply;

(24) A provision regarding hazardous substances;

(25) A provision regarding acceleration and remedies;

(26) A provision regarding the power of sale;

(27) A provision regarding the release of the lien securing the loan agreement;

(28) A provision specifying that the loan agreement is given without personal liability against each owner of the homestead and the spouse of each owner;

(29) A provision specifying that the borrower has not been required to repay another debt with the proceeds of the loan;

(30) A provision specifying that the borrower has not assigned wages as security for the loan agreement;

(31) A provision specifying that the licensee [~~lender~~] and the borrower have agreed in writing to the fair market value of the homestead;

(32) A provision regarding trustees and trustee liability;

(33) A provision regarding the licensee's [~~lender's~~] waiving additional collateral;

(34) A default provision;

(35) Signature blocks;

(36) A non-purchase disclosure; and

(37) A provision regarding notice of confidentiality rights.

§90.403. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home equity loan contract.[~~:~~]

(1) Identification. The model identification clause lists the account or contract number, the name and address of the [~~creditor or~~] lender, the date of the note, and the name and address of the borrower. The model clause identifying the pronouns used for the borrower and the lender reads: "A word like "I" or "me" means each person who signs as a Borrower. A word like "you" or "your" means the Lender or "Note Holder." The Lender is _____. The Lender may sell or transfer this Note. The Lender or anyone who is entitled to receive payments under this Note is called the "Note Holder." You will tell me in writing who is to receive my payments."

(2) Truth in Lending Act [~~(TILA)~~] disclosure box. The model Truth in Lending Act [~~(TILA)~~] disclosure box reads:
Figure: 7 TAC §90.403(b)(2) (No change.)

(3) Itemization of amount financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth in Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

(4) Promise to pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the Texas scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The model clause for the borrower's promise to pay reads: "This loan is an Extension of Credit defined by Section 50(a)(6), Article XVI of the Texas Constitution."

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(5) Late charge. The model late charge provision for contracts using the scheduled installments earnings method or the true daily earnings method reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(6) After maturity interest. The model provision for after maturity interest reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(7) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(8) Finance charge earnings and refund method. The model provision options specifying the finance charge earnings and refund method read:

(A) For contracts using the scheduled installment earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.403(b)(8)(A) (No change.)

(B) For contracts using the scheduled installment earnings method with prepayments option - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.403(b)(8)(B) (No change.)

(C) For contracts using the true daily earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.403(b)(8)(C) (No change.)

(9) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~licensed lender~~] may always choose a lesser amount. The fee for dishonored check model clause reads: "I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately."

(10) Default clause. The model provision specifying the conditions causing default reads:
Figure: 7 TAC §90.403(b)(10) (No change.)

(11) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.403(b)(11) (No change.)

(12) Credit insurance. If single premium credit insurance is allowable, a permissible change to the disclosure can be to offer a single charge for the entire term of the loan. The term for the single premium charge should be shown for the original term of the loan, unless otherwise specified. The licensee has the option of including language that reads: "The insurance will cancel on the date when the total past due premiums equal or exceed (insert number) times the first month's premium." The industry standard regarding the relationship between total past due premiums and the first month's premium in this equation appears to be four [~~(4)~~] times. However, if a different time frame is more appropriate, that time frame may be used. The model credit insurance disclosure box reads:
Figure: 7 TAC §90.403(b)(12) (No change.)

(13) Mailing of notices to borrower. The model provision regarding the mailing of notices to the borrower reads: "You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it by first class mail."

(14) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration reads:

"If all or any interest in the homestead is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law. If you exercise this option, you will give me notice of acceleration (i.e., payment of all I owe at once). This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement."

(15) No waiver of lender's rights. The model provision expressing no waiver of the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(16) Collection expenses clause. The model collection expenses clause reads: "If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by law, including Section 50(a)(6), Article XVI of the Texas Constitution. These expenses include, for example, reasonable attorneys' fees. I understand that these fees are not for maintaining or servicing this Loan Agreement."

(17) Joint liability. The model provision providing for joint liability reads: "I understand that you may seek payment from only me without first looking to any other Borrower. You can enforce your rights under this Loan Agreement solely against the homestead. This Loan Agreement is made without personal liability against each owner of the homestead and the spouse of each owner unless the owner or spouse obtained this loan by actual fraud. If this loan is obtained by actual fraud, I will be personally liable for the debt, including a judgment for any deficiency that results from your sale of the homestead for an amount less than is owed under this Loan Agreement."

(18) Usury savings clause. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than the law allows."

(19) Savings clause. The model savings clause stating that if any part of the contract is invalid, the rest remains valid reads: "If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with any law, that law will control. The part of the Loan Agreement that conflicts with any law will be modified to comply with the law. The rest of the Loan Agreement remains valid."

(20) Contract supersedes prior agreements. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model integration clause providing that the contract supersedes prior agreements reads: "This written Loan Agreement is the final agreement between you and me and may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this Loan Agreement. Any change to this Loan Agreement must be in writing. Both you and I have to sign written agreements."

(21) Security document. The model provision stating that the homestead described in the loan agreement is subject to the lien of the security document reads: "The homestead described above by the property address is subject to the lien of the Security Document. I will see the separate Security Document for more information about my rights and responsibilities."

(22) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this Loan Agreement. The Texas Constitution will be applied to resolve any conflict between the Texas Constitution and any other law."

(23) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints [~~The model complaints and inquiries notice reads~~]: "This lender is licensed and examined by the State of Texas - Office of Consumer Credit Commissioner. Call the Consumer Credit Hotline or write for credit information or assistance with credit problems. Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, www.occc.state.tx.us, (800) 538-1579."

(24) Clause describing collateral. The model provision describing the collateral reads: "The homestead described above by the property address is subject to the lien of the Security Document."

(25) Signature blocks. The licensee may also provide additional signature lines for witness signatures. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.403(b)(25) (No change.)

(c) Model clauses for [~~For~~] the security document for a Chapter 342, Subchapter G second lien home equity loan contract.[~~:~~]

(1) The model definitions section reads:

(A) [~~"~~]"Loan Agreement" means the Note, Security Document, deed of trust, any other related document, or any combination of those documents, under which you have extended credit to me.

(B) "Security Document" means this document, which is dated _____, together with all Riders to this document.

(C) "I" or "me" means _____, the grantor under this Security Document and the person who signed the Note ("Borrower").

(D) "You" means _____, the Lender and any holder entitled to receive payments under the Note. Your address is _____. You are the beneficiary under this Security Document.

(E) "Trustee" is _____. Trustee's address is _____.

(F) "Note" means the promissory Note signed by me and dated _____. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____ (maturity date).

(G) "My Homestead" means the property that is described below under the heading "Transfer of Rights in the Property."

(H) "Extension of Credit" means the debt evidenced by the Note, as defined by Section 50(a)(6), Article XVI of the Texas Constitution and all the documents executed in connection with the debt.

(I) "Riders" means all Riders to this Security Document that I execute.
Figure: 7 TAC §90.403(c)(1)(I) (No change.)

(J) "Applicable Law" means all controlling applicable federal, Texas and local constitutions, statutes, regulations, administrative rules, local ordinances, judicial and administrative orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or My Homestead by a condominium association, homeowners association, or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section ___ of this Security Document.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: damage or destruction of My Homestead; condemnation or other taking of all or any part of My Homestead; conveyance instead of condemnation; or misrepresentations or omissions related to the value or condition of My Homestead.

(O) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amounts under this Security Document.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Document, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of me" means any party that has taken title to My Homestead, whether or not that party has assumed my obligations under the Loan Agreement.

(R) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Security Document. Such an arrangement usually takes the form of a long-term "ground lease."

(2) Secured agreement. The model provision regarding the secured nature of the agreement reads: "To secure this loan, I give you a security interest in My Homestead including existing and future improvements, easements, fixtures, attachments, replacements and additions to the property, insurance refunds, and proceeds. This security interest is intended to be limited to the homestead property and not other collateral, as required under the Texas Constitution."

(3) Transfer of rights in [~~the~~] property. The model provision regarding a transfer of rights in the property reads:
Figure: 7 TAC §90.403(c)(3) (No change.)

(4) Borrower and Lender's promise. The model provision regarding the borrower and lender's promise to comply with the terms of the security document reads: "YOU AND I PROMISE:".

(5) Late charges and prepayment. The model provision regarding late charges and prepayment of principal and interest reads:
Figure: 7 TAC §90.403(c)(5) (No change.)

(6) Funds for escrow items. The model provision regarding the funds for escrow items reads:
Figure: 7 TAC §90.403(c)(6) (No change.)

(7) Charges and liens. The model provision regarding charges and liens reads:
Figure: 7 TAC §90.403(c)(7) (No change.)

(8) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.403(c)(8) (No change.)

(9) Homestead. The model provision stating that the borrower occupies the property as the borrower's [~~his~~] homestead reads: "I now occupy and use the property secured by this Security Document as my Texas homestead."

(10) Preservation, maintenance, protection, and inspection of [~~the~~] property. The model provision regarding preservation, maintenance, protection, and inspection of the property reads: "I will not destroy, damage or impair My Homestead, allow it to deteriorate, or commit waste. Whether or not I live in My Homestead, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to My Homestead to avoid further deterioration or damage unless you and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring My Homestead only if you release the insurance or condemnation proceeds for the damage to or the taking of My Homestead. You may release proceeds for the repairs and restoration in a single payment or in a series of payments as the work is completed. I still am obligated to complete repairs or restoration of My Homestead even if there are not enough proceeds to complete the work. You or your agent may inspect My Homestead. You may inspect the interior of My Homestead with reasonable cause. You will give me notice stating reasonable cause when or before the interior inspection occurs."

(11) Conditions causing actual fraud. The model provision specifying the conditions causing actual fraud reads:
Figure: 7 TAC §90.403(c)(11) (No change.)

(12) Protection of lender's interest in [~~the~~] property and rights under [~~the~~] security document. The model provision regarding the protection of the lender's interest in the property and rights under the security document reads:
Figure: 7 TAC §90.403(c)(12) (No change.)

(13) Assignment of miscellaneous proceeds and forfeiture. The model provision regarding the assignment of miscellaneous proceeds and forfeiture reads:
Figure: 7 TAC §90.403(c)(13) (No change.)

(14) Forbearance not a waiver. The model provision specifying that the borrower is not released from liability if the licensee [~~lender~~] modifies the payment schedule reads: "My successors and I will not be released from liability if you extend the time for payment or modify the payment schedule. If I pay late, you will not have to sue me or my successor to require timely future payments. You may refuse to extend time for payment or modify this Loan Agreement even if I request it. If you do not enforce your rights every time, you may enforce them later."

(15) Joint and several liability, security document execution, successors obligated. The model provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns reads:
Figure: 7 TAC §90.403(c)(15) (No change.)

(16) Extension of credit charges. The model provision regarding the extension of credit charges reads:
Figure: 7 TAC §90.403(c)(16) (No change.)

(17) Delivery of notices. The model provision regarding the delivery of notices reads: "Under the Loan Agreement, you and I will give notices to each other in writing. Any notice under the Loan Agreement will be considered given to me when it is mailed by first class mail or when actually delivered to me at my address if given by another means. You will give notice to My Homestead address unless I provide you a different address. I will notify you promptly of any change of address. I will comply with any reasonable procedure for giving a change of address that you provide. There will only be one address for notice under the Loan Agreement. Notice to me will be considered notice to all persons who are obligated under the Loan Agreement unless Applicable Law requires a separate notice. I may give you notice by delivering or mailing it by first class mail to the address provided by you, unless you require a different procedure. You, however, will not receive notice under the Loan Agreement until you actually receive it. Legal requirements governing notices subject to the Loan Agreement will prevail over conditions in the Loan Agreement."

(18) Governing law and severability. The model provision regarding the law governing the contract, stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid reads: "The Loan Agreement will be governed by Texas law and federal law. If any provision in the Loan Agreement conflicts with any legal requirement, all non-conflicting provisions will remain effective."

(19) Rules of construction. The model provision regarding rules of clause construction reads:
Figure: 7 TAC §90.403(c)(19) (No change.)

(20) Loan agreement copies. The model provision specifying that the lender will give the borrower a copy of all signed documents at the time the loan agreement is made reads: "At the time the Loan Agreement is made, you will give me copies of all documents I sign."

(21) Transfer of interest in property. The model provision regarding a transfer of interest in the property reads: ""Interest in My Homestead" means any legal or beneficial interest. This term includes those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement (the intent of which is the transfer of title by me at a future date to a purchaser). If any part of My Homestead is sold or transferred without your prior written permission, you may require immediate payment of all I owe. You will not exercise this option if disallowed by Applicable Law. If you accelerate, you will give me notice. The notice of acceleration will allow me at least 21 days from the date the notice is given to pay all I owe. If I fail to timely pay all I owe, you may pursue any remedy allowed by the Loan Agreement without further notice or demand."

(22) Borrower's right to reinstate after acceleration. The model provision regarding the borrower's right to reinstate after acceleration reads:
Figure: 7 TAC §90.403(c)(22) (No change.)

(23) Sale of note, change of loan servicer, notice of grievance, and lender's right to comply. The model provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply reads:
Figure: 7 TAC §90.403(c)(23) (No change.)

(24) Hazardous substances. The model provision regarding hazardous substances reads:
Figure: 7 TAC §90.403(c)(24) (No change.)

(25) Acceleration and remedies. The model provision regarding acceleration and remedies reads:
Figure: 7 TAC §90.403(c)(25) (No change.)

(26) Power of sale. The model provision regarding the power of sale reads:
Figure: 7 TAC §90.403(c)(26) (No change.)

(27) Release. The model provision regarding the release of the lien securing the loan agreement reads: "You will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the lien to a lender that is refinancing the Loan Agreement. I will pay only the cost of recording the release of lien. My acceptance of the release or endorsement and assignment will end all of your duties under Section 50(a)(6), Article XVI of the Texas Constitution."

(28) Non-recourse liability. The model provision specifying that the loan agreement is given without personal liability against each owner of the homestead and the spouse of each owner reads:
Figure: 7 TAC §90.403(c)(28) (No change.)

(29) Proceeds. The model provision specifying that the borrower has not been required to repay another debt with the proceeds of the loan reads: "I am not required to apply the proceeds of the Loan Agreement to repay another debt except a debt secured by My Homestead or a debt to another lender."

(30) No assignment of wages. The model provision specifying that the borrower has not assigned wages as security for the loan agreement reads: "I have not assigned wages as security for the Loan Agreement."

(31) Acknowledgment of fair market value. The model provision specifying that the licensee [~~lender~~] and the borrower have agreed in writing to the fair market value of the homestead reads: "You and I agreed in writing to the fair market value of My Homestead on the date of the Loan Agreement."

(32) Trustees and trustee liability. The model provision regarding trustees and trustee liability reads:
Figure: 7 TAC §90.403(c)(32) (No change.)

(33) Waiver of additional collateral. The model provision regarding the licensee's [~~lender's~~] waiving additional collateral reads:
Figure: 7 TAC §90.403(c)(33) (No change.)

(34) Default. The model default provision reads: "Any default of my agreements with you will be a default of this Security Document."

(35) Signature blocks. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.403(c)(35) (No change.)

(36) Non-purchase disclosure. The model provision indicating that the security document does not finance a purchase transaction should appear at the beginning of the document, below the heading and prior to the definitions section. The model non-purchase disclosure provision reads: "This Security Document is not intended to finance Borrower's acquisition of the Property."

(37) Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice

of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

§90.404. Permissible Changes.

(a) A licensee [~~licensed lender~~] may consider making the following types of changes to the second lien home equity loans plain language model clauses:

(1) Adding information related to information set forth in the model clauses that is not otherwise prohibited by law;

(2) Substituting another term for "Lender" or "Borrower" that has the same meaning, or using pronouns such as "you," "we," and "us";

(3) Presenting the model clauses in any order, and combining or further segregating the model clauses;

(4) Inserting descriptive headings or number provisions;

(5) Changing the case of a word if otherwise permitted by the Texas Finance Code; or

(6) Making other changes that [~~which~~] do not affect the substance of the disclosures.

(7) A sample model note is presented in the following example.
Figure: 7 TAC §90.404(a)(7) (No change.)

(8) A sample model security document is presented in the following example.
Figure: 7 TAC §90.404(a)(8) (No change.)

(b) A [~~An authorized~~] licensee has considerable flexibility to arrange the format of the model form if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures.

This 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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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER E. SECOND LIEN PURCHASE MONEY LOANS (SUBCHAPTER G)

7 TAC §§90.501 - 90.503

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.501. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter G purchase money loan transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a licensee is not mandatory. The licensee, however, may not use a contract other than a model contract unless the licensee has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee may not claim the commissioner's failure to disapprove a contract constitutes an approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter G purchase money loan contract; however, a licensee is not limited to the contract provisions addressed by these rules.

§90.502. Contract Provisions.

(a) A Chapter 342, Subchapter G purchase money loan transaction may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include that provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, a licensee who does not assess a fee for dishonored checks may omit the fee for dishonored check clause. A licensee may also exclude non-relevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those non-applicable portions of the model clause. A Chapter 342, Subchapter G second lien purchase money loan transaction may contain the following provisions:

(1) Identification of the parties, including the name and address of each party and specifying the pronouns that designate the borrower and the lender, and the property address;

(2) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(3) An itemization of amount financed box;

(4) A promise to pay;

(5) A late charge provision;

(6) A provision for after maturity interest;

(7) A prepayment clause;

(8) A provision specifying the finance charge earnings and refund method;

(9) A provision contracting for a fee for a dishonored check;

(10) A provision specifying the conditions causing default;

(11) A provision regarding property insurance;

(12) A credit insurance disclosure box;

(13) A provision regarding the mailing of notices to the borrower;

(14) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(15) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(16) A collection expenses clause;

(17) A provision providing for joint liability;

(18) A usury savings clause;

(19) A savings clause stating that if any part of the loan agreement is [~~declared~~] invalid, the rest remains valid;

(20) An integration clause stating that the contract supersedes all prior agreements and that the contract may not be changed by oral agreement;

(21) A provision stating that the property described in the loan agreement is subject to the lien of the security document;

(22) A provision specifying that federal law and Texas law apply to the contract;

(23) Complaints and inquiries notice;

(24) A provision describing the collateral; and

(25) Signature blocks.

(b) The security document for a Chapter 342, Subchapter G second lien purchase money loan contract may contain the following provisions:

(1) A definitions section;

(2) A provision regarding the secured nature of the agreement;

(3) A provision regarding the transfer of rights in the property;

(4) Borrower and Lender's promise;

(5) A provision regarding late charges and prepayment of principal and interest;

(6) A provision regarding the funds for escrow items;

(7) A provision regarding charges and liens;

(8) A provision regarding property insurance;

(9) A provision regarding preservation, maintenance, protection, and inspection of the property;

(10) A provision regarding protection of the lender's interest in the property and rights under the security document;

(11) A provision regarding the assignment of miscellaneous proceeds and forfeiture;

(12) A provision specifying that the borrower is not released from liability if the licensee [~~lender~~] modifies the payment schedule;

(13) A provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns;

(14) A provision regarding the extension of credit charges;

(15) A provision regarding the delivery of notices;

(16) A provision regarding the law governing the contract, stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid;

(17) A provision regarding rules of clause construction;

(18) A provision specifying that the licensee [~~lender~~] will give the borrower a copy of all signed documents at the time the loan agreement is made;

(19) A provision regarding a transfer of interest in the property;

(20) A provision regarding the borrower's right to reinstate after acceleration;

(21) A provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply;

(22) A provision regarding hazardous substances;

(23) A provision regarding acceleration and remedies;

(24) A provision regarding the assignment of rents, appointment of receiver, and the lender in possession;

(25) A provision regarding the power of sale;

(26) A provision regarding the release of the lien securing the loan agreement;

(27) A provision regarding the lender's rights and the borrower's responsibilities;

(28) A provision regarding trustees and trustee liability;

(29) A default provision;

(30) A provision regarding subrogation;

(31) A provision regarding what happens if the sum secured and other charges violate applicable law;

(32) A request for notice of default and foreclosure under superior mortgages or security documents provision;

(33) Signature blocks;

(34) An acknowledgment; and

(35) A provision regarding notice of confidentiality rights.

§90.503. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien purchase money loan contract.[~~:~~]

(1) Identification. The model identification clause lists the account or contract number, the name and address of the [~~creditor or~~] lender, the date of the note, the name and address of the borrower, and the property address. The model clause identifying the pronouns used for the borrower and the lender reads: A word like "I" or "me" means each person who signs as a Borrower. A word like "you" or "your" means the Lender or "Note Holder". The Lender is _____. The Lender may sell or transfer this Note. The Lender or anyone who is entitled to receive payments under this Note is called the "Note Holder." You will tell me in writing who is to receive my payments."

(2) Truth in Lending Act [~~(TILA)~~] disclosure box. The model Truth in Lending Act [~~(TILA)~~] disclosure box reads:
Figure: 7 TAC §90.503(b)(2) (No change.)

(3) Itemization of amount financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth in Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

(4) Promise to pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The model clause options for the borrower's promise to pay read:

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(5) Late charge. The model late charge provision for contracts using the scheduled installment earnings method or the true daily earnings method reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(6) After maturity interest. The model clause specifies the maximum interest rate allowed by law for after maturity interest. A licensee [~~creditor~~] may always choose a lower rate. The model provision for after maturity interest reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(7) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(8) Finance charge earnings and refund method. The model provision options specifying the finance charge earnings and refund method read:

(A) For contracts using the scheduled installment earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.503(b)(8)(A) (No change.)

(B) For contracts using the scheduled installment earnings method with prepayments option - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.503(b)(8)(B) (No change.)

(C) For contracts using the true daily earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.503(b)(8)(C) (No change.)

(9) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~creditor~~] may always choose a lesser amount. The model fee for dishonored check provision reads: "I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately."

(10) Default clause. The model provision specifying the conditions causing default reads:
Figure: 7 TAC §90.503(b)(10) (No change.)

(11) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.503(b)(11) (No change.)

(12) Credit insurance. If single premium credit insurance is offered, a permissible change to the disclosure can be to offer a single charge for the entire term of the loan. The term for the single premium charge should be shown for the original term of the loan, unless otherwise specified. The licensee has the option of including language that reads: "The insurance will cancel on the date when the total past due premiums equal or exceed (insert number) times the first month's premium." The industry standard regarding the relationship between total past due premiums and the first month's premium in this equation appears to be four [~~(4)~~] times. However, if a different time frame is more appropriate, that time frame may be used. The model credit insurance disclosure box reads:
Figure: 7 TAC §90.503(b)(12) (No change.)

(13) Mailing of notices to borrower. The duty to give notice is satisfied when it is mailed by first class mail. The model provision regarding the mailing of notices to the borrower reads: "You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it."

(14) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration reads: "If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law. If you exercise this option, you will give me notice that you are demanding immediate payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement."

(15) No waiver of lender's rights. The model provision expressing no waiver of the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(16) Collection expenses clause. The model collection expenses clause reads: "If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by Applicable Law. These expenses include, for example, reasonable attorneys' fees."

(17) Joint liability. The model provision providing for joint liability reads: "I understand that you may seek payment from only me without first looking to any other Borrower."

(18) Usury savings clause. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than Applicable Law allows."

(19) Savings clause. The model savings clause stating that if any part of the contract is invalid, the rest remains valid reads: "If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with any law, that law will control. The part of the Loan Agreement that conflicts with any law will be modified to comply with the law. The rest of the Loan Agreement remains valid."

(20) Contract supersedes prior agreements. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model integration clause providing that the contract supersedes prior agreements reads: "This written Loan Agreement is the final agreement between you and me and may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this Loan Agreement. Any change to this Loan Agreement must be in writing. Both you and I have to sign written agreements."

(21) Security document. The model provision stating that the property described in the loan agreement is subject to the lien of the security document reads: "In addition to the protections given to the Note Holder under this Note, a Security Document, dated _____, protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note. The Security Document describes how and under what conditions I may be required to make immediate payment in full of any amounts that I owe under this Note."

(22) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this Loan Agreement."

(23) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints [~~The model complaints and inquiries notice reads~~]: "The (name of Lender or Note Holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of Lender or Note Holder) should contact the Office of Consumer Credit Commissioner through one of the means indicated below: In Person or U.S. Mail: 2601 North Lamar Boulevard, Austin, Texas 78705-4207; Telephone No.: (800) 538-1579; Fax No.: (512) 936-7610; E-mail: consumer.complaints@occc.state.tx.us; Website: www.occc.state.tx.us."

(24) Clause describing collateral. The model provision describing the collateral reads: "The collateral described above by the property address is subject to the lien of the Security Document."

(25) Signature blocks. The licensee may also provide additional signature lines for witness signatures. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.503(b)(25) (No change.)

(c) Model clauses for a [~~For the~~] security document for a Chapter 342, Subchapter G second lien purchase money loan contract.[~~:~~]

(1) The model definitions section reads:

(A) "Loan Agreement" means the Note, Security Document, deed of trust, any other related document, or any combination of those documents, under which you have made a loan to me.

(B) "Security Document" means this document, which is dated _____, together with all Riders to this document.

(C) "I" or "me" means _____, the grantor under this Security Document and the person who signed the Note ("Borrower").

(D) "You" means _____, the Lender and any holder entitled to receive payments under the Note. Your address is _____. You are the beneficiary under this Security Document.

(E) "Trustee" is _____. Trustee's address is _____.

(F) "Note" means the Purchase Money Note signed by me and dated _____. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than _____ (maturity date).

(G) "Property" means the real estate that is described below under the heading "Transfer of Rights in the Property."

(H) "Riders" means all Riders to this Security Document that I execute.
Figure: 7 TAC §90.503(c)(1)(H) (No change.)

(I) "Applicable Law" means all controlling applicable federal, Texas and state constitutions, statutes, regulations, administrative rules, local ordinances, judicial and administrative orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or the Property by a condominium association, homeowners association, or similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section ___ of this Security Document.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: damage or destruction of the Property; condemnation or other taking of all or any part of the Property; conveyance instead of condemnation; or misrepresentations or omissions related to the value or condition of the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amounts under this Security Document.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Document, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(P) "Successor in Interest of me" means any party that has taken title to the Property, whether or not that party has assumed my obligations under the Loan Agreement.

(Q) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Security Document. Such an arrangement usually takes the form of a long-term "ground lease."[~~".~~]

(2) Secured agreement. The model provision regarding the secured nature of the agreement reads: "To secure this Loan Agreement, I give you a security interest in the Property including existing and future improvements, easements, fixtures, attachments, replacements and additions to the Property, insurance refunds, and proceeds."

(3) Transfer of rights in [~~the~~] property. The model provision regarding a transfer of rights in the property reads:
Figure: 7 TAC §90.503(c)(3) (No change.)

(4) Borrower and Lender's promise. The model provision regarding the borrower and lender's promise to comply with the terms of the security document reads: "YOU AND I PROMISE:"

(5) Late charges and prepayment. The model provision regarding late charges and prepayment of principal and interest reads:
Figure: 7 TAC §90.503(c)(5) (No change.)

(6) Funds for escrow items. The model provision regarding the funds for escrow items reads:
Figure: 7 TAC §90.503(c)(6) (No change.)

(7) Charges and liens. The model provision regarding charges and liens reads:
Figure: 7 TAC §90.503(c)(7) (No change.)

(8) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.503(c)(8) (No change.)

(9) Preservation, maintenance, protection, and inspection of [~~the~~] property. The model provision regarding preservation, maintenance, protection, and inspection of the property reads: "I will not destroy, damage or impair the Property, allow it to deteriorate, or commit waste. Whether or not I live in the Property, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to the Property to avoid further deterioration or damage unless you and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring the Property only if you release the insurance or condemnation proceeds for the damage to or the taking of the Property. You may release proceeds for the repairs and restoration in a single payment or in a series of payments as the work is completed. I still am obligated to complete repairs or restoration of the Property even if there are not enough proceeds to complete the work. If this Security Document secures a unit in a condominium or planned unit development, I will perform all of my obligations under the declaration or covenants creating or governing the condominium or planned unit development, and any other relevant document. You or your agent may inspect the Property. You may inspect the interior of the Property with reasonable cause. You will give me notice stating reasonable cause when or before the interior inspection occurs."

(10) Protection of lender's interest in [~~the~~] property and rights under [~~the~~] security document. The model provision regarding the protection of the lender's interest in the property and rights under the security document reads:
Figure: 7 TAC §90.503(c)(10) (No change.)

(11) Assignment of miscellaneous proceeds and forfeiture. The model provision regarding the assignment of miscellaneous proceeds and forfeiture reads:
Figure: 7 TAC §90.503(c)(11) (No change.)

(12) Forbearance not a waiver. The model provision specifying that the borrower is not released from liability if the licensee [~~lender~~] modifies the payment schedule reads: "My successors and I will not be released from liability if you extend the time for payment or modify the payment schedule. If I pay late, you will not have to sue me or my successor to require timely future payments. You may refuse to extend time for payment or modify this Loan Agreement even if I request it. If you do not enforce your rights every time, you may enforce them later."

(13) Joint and several liability, security document execution, successors obligated. The model provision regarding joint and several liability and specifying that the person who signs the contract grants his ownership in the property and binds his successors and assigns reads:
Figure: 7 TAC §90.503(c)(13) (No change.)

(14) Extension of credit charges. The model provision for the extension of credit charges reads:
Figure: 7 TAC §90.503(c)(14) (No change.)

(15) Delivery of notices. The model provision regarding the delivery of notices reads: "Under the Loan Agreement, you and I will give notices to each other in writing. Any notice under the Loan Agreement will be considered given to me when it is mailed by first class mail or when actually delivered to me at my address if given by another means. You will give notice to the Property address unless I provide you a different address. I will notify you promptly of any change of address. I will comply with any reasonable procedure for giving a change of address that you provide. There will only be one address for notice under the Loan Agreement. Notice to me will be considered notice to all persons who are obligated under the Loan Agreement unless Applicable Law requires a separate notice. I may give you notice by delivering or mailing it by first class mail to the address provided by you, unless you require a different procedure. You, however, will not receive notice under the Loan Agreement until you actually receive it. Legal requirements governing notices subject to the Loan Agreement will prevail over conditions in the Loan Agreement."

(16) Governing law and severability. The model provision regarding the law governing the contract, stating that if any part of the contract is [~~declared~~] invalid, the rest of the contract remains valid reads: "The Loan Agreement will be governed by Texas law and federal law. If any provision in the Loan Agreement conflicts with any legal requirement, all non-conflicting provisions will remain effective."

(17) Rules of construction. The model provision regarding rules of clause construction reads:
Figure: 7 TAC §90.503(c)(17) (No change.)

(18) Loan agreement copies. The model provision specifying that the lender will give the borrower a copy of all signed documents at the time the loan agreement is made reads: "At the time the Loan Agreement is made, you will give me copies of all documents I sign."

(19) Transfer of interest in property. The model provision regarding a transfer of interest in the property reads: "Interest in the Property" means any legal or beneficial interest. This term includes those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement (the intent of which is the transfer of title by me at a future date to a purchaser). If any part of the Property is sold or transferred without your prior written

permission, you may require immediate payment of all I owe. You will not exercise this option if disallowed by Applicable Law. If you accelerate, you will give me notice. The notice of acceleration will allow me at least 21 days from the date the notice is given to pay all I owe. If I fail to timely pay all I owe, you may pursue any remedy allowed by the Loan Agreement without further notice or demand.["]

(20) Borrower's right to reinstate after acceleration. The model provision regarding the borrower's right to reinstate after acceleration reads:
Figure: 7 TAC §90.503(c)(20) (No change.)

(21) Sale of note, change of loan servicer, notice of grievance, and lender's right to comply. The model provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply reads: "A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect my monthly payment and will comply with other servicing conditions required by the Loan Agreement or Applicable Law. In some cases, the company servicing or handling the Loan Agreement may change even if the Loan Agreement is not sold. If the company servicing or handling the Loan Agreement is changed, I will be given written notice of the change. The notice will state the name and address of the new company, the address to which my payments should be made, and any other information required by RESPA. Any notice of acceleration and opportunity to cure under the Loan Agreement will satisfy the notice and opportunity to address the alleged violation provisions of this Section. No agreement between you and me or any third party will limit your ability to comply with your duties under the Loan Agreement and the Applicable Law. You and I are limiting all agreements so that all current or future interest or fees in connection with this Loan Agreement will not be greater than the highest amount allowed by Applicable Law. You and I intend to conform the Loan Agreement to the provisions of Applicable Law. If any part of the Loan Agreement is in conflict with the Applicable Law, then that part will be corrected or removed. This correction will be automatic and will not require any amendment or new document. Your right to correct any violation will survive my paying off the Loan Agreement. My right to correct will override any conflicting provision of the Loan Agreement. Your right to comply as provided in this Section will survive the payoff of the Loan Agreement. The provisions of this Section will supersede any inconsistent provision of the Loan Agreement."

(22) Hazardous substances. The model provision regarding hazardous substances reads:
Figure: 7 TAC §90.503(c)(22) (No change.)

(23) Acceleration and remedies. The model provision regarding acceleration and remedies reads:
Figure: 7 TAC §90.503(c)(23) (No change.)

(24) Assignment of rents, appointment of receiver, and lender in possession. The model provision regarding assignment of rents, appointment of receiver, and the lender in possession reads: "As additional security, I assign to you the rents of the Property, provided that I have the right, prior to acceleration or abandonment of the Property, to collect and retain the rents as they become due. Upon acceleration or abandonment, you, by agent or by court-appointed receiver, will be entitled to enter, take possession, manage the Property, and collect due and past due rents. All rents you or the court-appointed receiver collect will be applied first to payment of the costs of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorneys' fees, and then to the sums secured by this Security Document. You and the receiver will be liable to account only for rents received."

(25) Power of sale. The licensee [~~lender~~] has the option to choose wording to indicate that a Trustee's deed will convey good title to the Property that cannot be defeated. The model provision regarding the power of sale reads:
Figure: 7 TAC §90.503(c)(25) (No change.)

(26) Release. If the licensee [~~lender~~] cannot return the note to the borrower, the licensee [~~lender~~] may provide the borrower with a discharge and release of all obligations under the loan. The discharge must meet the requirements of Texas Finance Code, §342.454. The model provision regarding the release of the lien securing the loan agreement reads: "Upon payment of all that I owe under this Loan Agreement, you will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the lien to a lender that is refinancing the Loan Agreement. If you cannot, you will provide me with a discharge and release of all obligations under the loan. I will pay only the cost of recording the release of lien."

(27) Lender's rights and borrower's responsibilities. The model provision specifying that each person who signs the document is responsible for each promise and duty in the security document reads:
Figure: 7 TAC §90.503(c)(27) (No change.)

(28) Trustees and trustee liability. The model provision regarding trustees and trustee liability reads:
Figure: 7 TAC §90.503(c)(28) (No change.)

(29) Default. The model default provision reads: "Any default of my agreements with you will be a default of this Security Document."

(30) Subrogation. The model provision regarding subrogation reads: "If I ask, you will use proceeds from the Loan Agreement to pay off all valid outstanding liens against the Property. You will then own all rights, superior titles, liens, and interests owned or claimed by any owner or holder of an outstanding lien or debt. You own these things whether the lien or debt is transferred to you or whether it is released by the holder upon payment."

(31) Partial invalidity. The model provision regarding what happens if the sums secured and other charges violate applicable law reads: "If any portion of the sums secured by this Security Document cannot be lawfully secured, payments minus those sums will be applied first to the portions not secured. If any charge provided for in this Loan Agreement, separately or together with other charges that are considered part of this Loan Agreement, violates Applicable Law, the charge is reduced to the extent necessary to eliminate the violation. Lender will refund the amount of interest or other charges paid to Lender in excess of the amount permitted by Applicable Law. At Lender's option, the amount in excess will either be refunded directly to me or will be applied to reduce the principal of the debt."

(32) Request for notice of default and foreclosure under superior mortgages or security documents. The model provision regarding the lender and borrower's request for notice of default and foreclosure under superior mortgages or security documents reads:
Figure: 7 TAC §90.503(c)(32) (No change.)

(33) Signature blocks. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.503(c)(33) (No change.)

(34) Acknowledgment. The model provision regarding the acknowledgment reads:
Figure: 7 TAC §90.503(c)(34) (No change.)

(35) Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

This 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 June 18, 2010.

TRD-201003465
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 936-7621

♦ ♦ ♦

SUBCHAPTER F. SECOND LIEN HOME IMPROVEMENT CONTRACTS (SUBCHAPTER G)

7 TAC §§90.601 - 90.604

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.601. Purpose.

(a) The purpose of the rules contained in this subchapter is to provide a model plain language contract in English for Texas Finance Code, Chapter 342, Subchapter G home improvement transactions. The establishment of model provisions for these transactions will encourage use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a licensee is not mandatory. The licensee, however, may not use a contract other than a model contract unless the licensee has submitted the contract to the commissioner in compliance with §90.104 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner will [~~shall~~] issue an order disapproving the contract if the commissioner determines the contract does not comply with Texas Finance Code, §341.502 [~~this section~~] or rules adopted under this chapter [~~section~~]. A licensee may not claim the commissioner's failure to disapprove a contract constitutes approval.

(b) The provisions in this subchapter are intended to constitute a complete plain language Chapter 342, Subchapter G home improvement transaction; however, a licensee is not limited to the contract provisions addressed by these rules.

§90.602. Contract Provisions.

A Chapter 342, Subchapter G second lien home improvement loan transaction may include, but is not limited to, the following contract provisions to the extent not prohibited by law or regulation. If the licensee desires to exercise its rights under one of the following provisions, it must include that provision in the contract. A licensee who does not desire to apply a provision is not required to include it in the contract. For example, a licensee who does not assess a fee for dishonored checks may omit the fee for dishonored check clause. A licensee may also exclude non-relevant portions of a model clause. For example, a licensee who does not routinely finance certain insurance coverages may omit those non-applicable portions of the model clause. A Chapter 342, Subchapter G home improvement loan transaction may contain the following provisions:

(1) For a contract for use in a transaction that does not allow withdrawals or multiple advances:

(A) An identification clause;

(B) A definitions section;

(C) A provision regarding construction of improvements;

(D) A clause regarding the contract price;

(E) A transfer of lien clause;

(F) A provision specifying that completion is made by the contractor, not the lender;

(G) A partial lien clause;

(H) A provision regarding changes and extras;

(I) A provision regarding receipts and releases;

(J) A provision specifying that no work has been done prior to execution of the contract;

(K) A provision regarding the trustee's duties;

(L) A notice specifying the preservation of claims and defenses;

(M) A notice specifying that the owner and the contractor are responsible for meeting the terms of the contract;

[~~(N) Texas Residential Construction Commission disclosures;~~]

(N) [~~(O)~~] An assignment; and

(O) [~~(P)~~] A provision regarding notice of confidentiality rights.

(2) For a promissory note for use in a transaction that does not allow withdrawals or multiple advances:

(A) An identification clause;

(B) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(C) An itemization of amount financed box;

(D) A security for payment provision;

(E) A definitions section;

(F) A promise to pay;

(G) A late charge provision;

(H) A provision for after maturity interest;

(I) A prepayment clause;

(J) A provision specifying the finance charge earnings and refund method;

(K) A deferment clause;

(L) A provision contracting for a fee for a dishonored check;

(M) A provision specifying the conditions causing default;

(N) A provision regarding property insurance;

(O) A credit insurance disclosure box;

(P) A provision regarding the mailing of notices to the borrower;

(Q) A provision specifying that the borrower's statements are truthful;

(R) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(S) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(T) A collection expenses clause;

(U) A provision providing for joint liability;

(V) A usury savings clause;

(W) A savings clause stating that if any part of the loan agreement is [~~declared~~] invalid, the rest remains valid;

(X) An integration clause stating that the contract supersedes all prior agreements and that the contract may not be changed by oral agreement;

(Y) A provision specifying that federal law and Texas law apply to the contract;

(Z) Complaints and inquiries notice;

(AA) A provision describing the collateral;

(BB) A notice regarding the preservation of claims and defenses; and

(CC) Signature blocks.

(3) For a contract for use in a transaction that allows for withdrawals or multiple advances:

(A) An identification clause;

(B) A definitions section;

(C) A provision regarding construction of improvements;

(D) A clause regarding the contract price;

(E) A clause regarding the note payable to the lender;

(F) A clause regarding the note being secured by the lien;

(G) A transfer of lien clause;

(H) A clause regarding exceptions to conveyance and warranty;

(I) A provision specifying that completion is made by the contractor, not the lender;

(J) A partial lien clause;

(K) A provision regarding changes and extras;

(L) A provision regarding receipts and releases;

(M) A provision specifying that no work has been done prior to execution of the contract;

(N) A provision regarding the owner's promises and rights;

(O) A provision regarding the owner's duties;

(P) A provision regarding the contractor's duties;

(Q) A provision regarding the contractor's rights;

(R) A provision regarding the trustee's duties;

(S) General provisions;

(T) A notice specifying the preservation of claims and defenses;

(U) A notice specifying that the owner and the contractor are responsible for meeting the terms of the contract;

[~~(V) Texas Residential Construction Commission disclosures;~~]

(V) [~~(W)~~] An assignment; and

(W) [~~(X)~~] A provision regarding notice of confidentiality rights.

(4) For a promissory note for use in a transaction that allows for withdrawals or multiple advances:

(A) An identification clause;

(B) A Truth in Lending Act [~~(TILA)~~] disclosure box;

(C) An itemization of amount financed box;

(D) A security for payment provision;

(E) A definitions section;

(F) A promise to pay;

(G) A late charge provision;

(H) A provision for after maturity interest;

(I) A prepayment clause;

(J) A provision specifying the finance charge earnings and refund method;

(K) A deferment clause;

(L) A provision contracting for a fee for a dishonored check;

(M) A provision specifying the conditions causing default;

(N) A provision regarding property insurance;

(O) A credit insurance disclosure box;

(P) A provision regarding the mailing of notices to the borrower;

(Q) A provision specifying that the borrower's statements are truthful;

(R) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(S) A provision expressing no waiver of the lender's [~~licensee's~~] rights;

(T) A collection expenses clause;

(U) A provision providing for joint liability;

(V) A usury savings clause;

(W) A savings clause stating that if any part of the loan agreement is [~~declared~~] invalid, the rest remains valid;

(X) An integration clause stating that the contract supersedes all prior agreements and that the contract may not be changed by oral agreement;

(Y) A provision specifying that the note is secured by a deed of trust;

(Z) A provision specifying that federal law and Texas law apply to the contract;

(AA) Complaints and inquiries notice;

(BB) A provision describing the collateral;

(CC) A notice regarding the preservation of claims and defenses; and

(DD) Signature blocks.

(5) For a deed of trust for use in a transaction that allows for withdrawals or multiple advances:

(A) A definitions section;

(B) A provision regarding the transfer of rights in the property;

(C) A provision regarding late charges and prepayment of principal and interest;

(D) A provision regarding the funds for escrow items;

(E) A provision regarding charges and liens;

(F) A provision regarding property insurance;

(G) A provision regarding preservation, maintenance, protection, and inspection of the property;

(H) A provision regarding protection of the lender's interest in the property and rights under the deed of trust;

(I) A provision regarding the assignment of miscellaneous proceeds and forfeiture;

(J) A provision expressing no waiver of the lender's rights;

(K) A provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns;

(L) A usury savings clause;

(M) A provision regarding the mailing of notices to the borrower;

(N) A provision specifying that federal law and Texas law apply to the contract;

(O) A provision regarding rules of clause construction;

(P) A provision specifying that the licensee [~~lender~~] will give the borrower a copy of all signed documents at the time the loan agreement is made;

(Q) A provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration;

(R) Lender, contractor, and borrower's promise and agreement;

(S) A provision regarding acceleration and remedies;

(T) A provision regarding the power of sale;

(U) A provision regarding the borrower's right to reinstate after acceleration;

(V) A provision regarding the assignment of rents, appointment of receiver, and the lender in possession;

(W) A provision regarding release of the lien;

(X) A provision regarding trustees and trustee liability;

(Y) A provision regarding the assignment of the contractor's lien and commencement of the work;

(Z) A provision regarding subrogation;

(AA) A provision regarding what happens if the sum secured and other charges violate applicable law;

(BB) A provision regarding the renewal and extension of the note secured by the deed of trust;

(CC) A provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply;

(DD) A provision regarding hazardous substances;

(EE) A provision regarding the lender's rights and the borrower's responsibilities;

(FF) A provision regarding default;

(GG) A provision regarding the lender and the borrower's request for notice of default and foreclosure under superior mortgages or deeds of trust;

[~~(HH) Texas Residential Construction Commission disclosures;~~]

(HH) [~~(II)~~] Signature blocks; and

(II) [~~(JJ)~~] A provision regarding notice of confidentiality rights.

§90.603. Model Clauses.

(a) Generally. These model clauses are the plain language rendition of contract clauses that have typically been stated in technical legal terms. Nothing in this regulation prohibits a contract from including provisions that provide more favorable results for the borrower than those that would result from the use of a model clause.

(b) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan contract for use in a transaction that does not allow for withdrawals or multiple advances.[~~:~~]

(1) Identification. The model identification clause reads: Figure: 7 TAC §90.603(b)(1) (No change.)

(2) Definitions. The model definitions section reads:

(A) [~~"~~]"Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker. "I" or "me" means the Owner.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies. "You" or "your" means the Contractor.

(C) "Lender" means (name of Lender), whose address is (address of Lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement and Power of Sale.[~~"~~]

(3) Construction of improvements. The model clause regarding construction of improvements reads: "You agree to furnish and pay for all labor and material needed to complete the Work within _____ days from the date of this Contract. The Work will be performed on the Property in a good and workmanlike manner."

(4) Contract price. The model clause establishing the contract price reads: "I agree to pay, or cause to be paid, to you, or to your order, the sum of _____ dollars (U.S. $_____) when the Work is completed."

(5) Transfer of lien. The model clause regarding the transfer of the lien reads: "You transfer to Lender all of your rights and interests in this Contract."

(6) Completion by contractor, but not lender. The model clause specifying that the lender is not responsible for completing the construction reads: "You will complete the Work by the Completion Date. Lender is not responsible for completing the Work. Lender is not a guarantor of your performance. You will indemnify and hold Lender harmless against all claims related to the Work."

(7) Partial lien. The model clause regarding a partial lien reads: "If you do not complete the Work by the Completion Date in a good and workmanlike manner, then Lender will have a valid lien for the contract price, less the amount reasonably necessary to complete the Work. As an alternative, Lender may choose to complete the Work and the lien will be valid for the contract price."

(8) Changes and extras. The model clause regarding changes and extras reads: "All labor or material furnished outside of this Contract must be agreed upon in writing or it will be considered as performed under the original Contract and you will receive no extra money."

(9) Receipts and releases. The model clause regarding receipts and releases reads: "If I ask, you will give me valid receipts and releases for the Work from any subcontractor, worker, and supplier."

(10) No work commenced. The model clause specifying that no work has commenced prior to execution of the contract reads: "This Contract is executed, acknowledged, and delivered before any labor has been performed and any material has been furnished for the Work."

(11) Trustee's duties. The model clause regarding the trustee's duties reads:
Figure: 7 TAC §90.603(b)(11) (No change.)

(12) Preservation of claims and defenses. In accordance with the Federal Trade Commission's Holder in Due Course Rule (16 C.F.R. §433), it is an unfair or deceptive act or practice to take or receive a consumer credit contract in connection with the sale or lease of goods or services to consumers that does not include the following notice. The notice regarding the preservation of claims and defenses reads: "NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(13) Owner and contractor responsible. Texas Property Code, §41.007 specifies that a home improvement contract must contain a notice specifying that the owner and the contractor are responsible for meeting the terms of the contract. This notice must appear either in this contract or in the residential construction contract. The Property Code requires that the notice must be conspicuously printed, stamped, or typed in a font size equal to at least 10-point boldfaced type or computer equivalent and appear next to the owner's signature line on the contract. The wording of the notice is specified by the Property Code, which uses the pronouns "you" and "your" to refer to the owner. Licensees are encouraged to explain in the contract, prior to the notice, that "you" and "your" refer to the owner in this notice. The parties' signatures must be notarized. The licensee may use a different notary acknowledgment without having to submit the contract to the agency as a non-standard contract. The notice specifying that the owner and the contractor are responsible for meeting the terms of the contract, the model explanatory clause regarding the use of "you" and "your" in the notice, and the signature blanks read:
Figure: 7 TAC §90.603(b)(13) (No change.)

[~~(14) Texas Residential Construction Commission (TRCC) disclosures.~~]

[~~(A) TRCC home improvement contract notice. If a contract for the construction of a new home or an improvement to an existing home is required to be registered under the Texas Residential Construction Commission Act, Texas Property Code, §426.003, the contract must contain a TRCC home improvement contract notice. The disclosure or notice must contain:~~]

[~~*(i)* the builder's name and certificate of registration number; and~~]

[~~*(ii)* the notice required by the Texas Residential Construction Commission Act, Texas Property Code, §420.001, including the telephone number of the TRCC, in at least 10-point bold type or the computer equivalent.~~]

[~~(B) TRCC builder notice. If the contractor is required to register as a builder with the TRCC, the contract for improvements to an existing residence must incorporate a TRCC builder notice. The disclosure or notice must contain:~~]

[~~*(i)* the contractor's certificate of registration number; and~~]

[~~*(ii)* the address and telephone number at which the owner may file a complaint with the TRCC about the conduct of the contractor.~~]

[~~(C) Omission permitted if not applicable. The TRCC home improvement contract notice may be omitted if the contract is not required to be registered under Texas Property Code, §426.003. The TRCC builder notice may be omitted if the contractor is not required to register with the TRCC.~~]

(14) [~~(15)~~] Assignment. The parties may use a different assignment or a separate document for the assignment without having to submit the contract to the agency as a non-standard contract. The model assignment in which the contractor transfers and assigns the lien to the licensee [~~lender~~] reads:

Figure: 7 TAC §90.603(b)(14)
[~~Figure: 7 TAC §90.603(b)(15)~~]

(15) [~~(16)~~] Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

(c) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan promissory note for use in a transaction that does not allow for withdrawals or multiple advances.[~~:~~]

(1) Identification. The model identification clause lists the account or contract number, the name and address of the [~~creditor or~~] lender, the date of the note, the name and address of the borrower, the property address, the principal amount, and the terms of payment. The model clause identifying the pronouns used for the borrower and the lender reads:
Figure: 7 TAC §90.603(c)(1) (No change.)

(2) Truth in Lending Act [~~(TILA)~~] disclosure box. The model Truth in Lending Act [~~(TILA)~~] disclosure box reads:
Figure: 7 TAC §90.603(c)(2) (No change.)

(3) Itemization of amount financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth in Lending Act. An itemization of amount financed box which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

(4) Security for payment. The model clause relating to the security for payment reads: "Liens created in the Contract secure this Note."

(5) Definitions. The model definitions section reads:

(A) [~~"~~]"Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies.

(C) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement and Power of Sale dated _____ between Contractor and Owner.

(D) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(E) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest. I have promised to pay this debt in regular periodic payments and to pay the debt in full not later than _____.[~~"~~]

(6) Promise to pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The model clause options for the borrower's promise to pay read:

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(7) Late charge. The model late charge provision for contracts using the scheduled installment earnings method or the true daily earnings method reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(8) After maturity interest. The model clause specifies the maximum interest rate allowed by law for after maturity interest. A licensee [~~creditor~~] may always choose a lower rate. The model provision for after maturity interest reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(9) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(10) Finance charge earnings and refund method. The model provision options specifying the finance charge earnings and refund method read:

(A) For contracts using the scheduled installment earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(c)(10)(A) (No change.)

(B) For contracts using the scheduled installment earnings method with prepayments option - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(c)(10)(B) (No change.)

(C) For contracts using the true daily earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(c)(10)(C) (No change.)

(11) Deferment. The model provision regarding deferment reads: "If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules."

(12) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~creditor~~] may always choose a lesser amount. The model fee for dishonored check provision reads: "I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately."

(13) Default. The model provision specifying the conditions causing default reads:
Figure: 7 TAC §90.603(c)(13) (No change.)

(14) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.603(c)(14) (No change.)

(15) Credit insurance. If single premium credit insurance is offered, a permissible change to the disclosure can be to offer a single charge for the entire term of the loan. The term for the single premium charge should be shown for the original term of the loan, unless otherwise specified. The licensee has the option of including language that reads: "The insurance will cancel on the date when the total past due premiums equal or exceed (insert number) times the first month's premium." The industry standard regarding the relationship between total past due premiums and the first month's premium in this equation appears to be four times. However, if a different time frame is more appropriate, that time frame may be used. The model credit insurance disclosure box reads:
Figure: 7 TAC §90.603(c)(15) (No change.)

(16) Mailing of notices to borrower. The duty to give notice is satisfied when it is mailed by first class mail. The model provision regarding the mailing of notices to the borrower reads: "You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it."

(17) Statement of truthful information. The model provision specifying that the borrower gave truthful information reads: "I promise that all information I gave you is true."

(18) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration reads: "If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this loan agreement. You will not exercise this option if prohibited by law. If you exercise this option, you will give me notice that you are demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this loan agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the loan agreement."

(19) No waiver of the lender's rights. The model provision expressing no waiver of the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(20) Collection expenses. The model collection expenses clause reads: "If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this loan agreement to the extent not prohibited by applicable law. These expenses include, for example, reasonable attorneys' fees."

(21) Joint liability. The model provision providing for joint liability reads: "I understand that you may seek payment from only me without first looking to any other Borrower."

(22) Usury savings clause. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than applicable law allows."

(23) Savings clause. The savings model clause stating that if any part of the contract is invalid, the rest remains valid reads: "If any part of this loan agreement is declared invalid, the rest of the loan agreement remains valid. If any part of this loan agreement conflicts with any law, that law will control. The part of the loan agreement that conflicts with any law will be modified to comply with the law. The rest of the loan agreement remains valid."

(24) Prior agreements. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model clause stating that there are no prior agreements between the parties regarding the loan agreement reads: "This written loan agreement is the final agreement between you and me. It may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this loan agreement. Any change to this loan agreement must be in writing. Both you and I have to sign written agreements."

(25) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this loan agreement."

(26) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints [~~The model complaints and inquiries notice reads~~]: "The (name of lender or note holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of lender or note holder) should contact the Office of Consumer Credit Commissioner through one of the means indicated below: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207; www.occc.state.tx.us; (800) 538-1579."

(27) Collateral. The model clause regarding the collateral reads: "The Property is subject to the Contract lien. I am responsible for all obligations in this Note."

(28) Preservation of claims and defenses. In accordance with the Federal Trade Commission's Holder in Due Course Rule (16 C.F.R. §433), it is an unfair or deceptive act or practice to take or receive a consumer credit contract in connection with the sale or lease of goods or services to consumers that does not include the following notice. The notice regarding the preservation of claims and defenses reads: "NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(29) Signature blocks. Documents for a home improvement loan on a homestead must be signed at the office of the lender, an attorney at law, or a title company. If this provision applies, the model clause, "This document must be signed at the office of the Lender, an

attorney at law, or a title company" should appear above the signature of the borrower. The licensee may also provide additional signature lines for witness signatures. The model signature block reads:
Figure: 7 TAC §90.603(c)(29) (No change.)

(d) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan contract for use in a transaction that allows for withdrawals or multiple advances.[:]

(1) Identification. The model identification clause listing the date and the account or contract number reads:
Figure: 7 TAC §90.603(d)(1) (No change.)

(2) Definitions. The model definitions section reads:

(A) "Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker. "I" or "me" means the Owner.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies. "You" or "your" means the Contractor.

(C) "Lender" means (name of Lender), whose address is (address of Lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(I) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest.

(J) "Loan Agreement" means the Note, Contract, and any other related document under which Lender has made a loan to me.

(K) "Applicable Law" means all controlling applicable federal, state, and local law.

(L) "Tenant at Sufferance" means a person who continues to possess the Property with no current right to possess it.

(M) "Forcible Detainer" means a lawsuit to remove a person from the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amount under this Contract.

(O) "Successor in Interest" means any party that has taken title to the Property.

(P) "Lien" means the Mechanic's and Materialman's Lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.["]

(3) Construction of improvements. The model clause regarding construction of improvements reads: "You agree to furnish and pay for all labor and material needed to complete the Work within _____ days from the date of this Contract. The Work will be performed on the Property in a good and workmanlike manner."

(4) Contract price. The model clause establishing the contract price reads: "I agree to pay, or cause to be paid, to you, or to your order, the sum of _____ dollars (U.S. $_____) when the Work is completed."

(5) Note payable to lender. The model clause specifying that the note is payable to the lender reads: "In exchange for money from the Lender to you, I have signed a Note to the Lender in the amount of _____ dollars (U.S. $_____)."

(6) Lien to secure note. The model clause regarding security for the note reads: "To secure the amounts Lender provides to you, and the interest payable to Lender, I give you, and you transfer to Lender, the Lien. The Note is secured by a deed of trust, which I will sign. The deed of trust will renew and extend the Lien created by this Contract."

(7) Transfer of lien. The model clause regarding the transfer of the lien reads: "You transfer to Lender all of your rights and interests in this Contract."

(8) Exceptions to conveyance and warranty. Any exceptions to conveyance and warranty should be specified in the contract. The model clause regarding the exceptions to conveyance and warranty reads: "The exceptions to conveyance and warranty are: (List any exceptions to conveyance and warranty.)"

(9) Completion by contractor, but not lender. The model clause specifying that the lender is not responsible for completing the construction reads: "You will complete the Work by the Completion Date. Lender is not responsible for completing the Work. Lender is not a guarantor of your performance. You will indemnify and hold Lender harmless against all claims related to the Work."

(10) Partial lien. The model clause regarding a partial lien reads: "If you do not complete the Work by the Completion Date in a good and workmanlike manner, then Lender will have a valid lien for the contract price, less the amount reasonably necessary to complete the Work. As an alternative, Lender may choose to complete the Work and the lien will be valid for the contract price."

(11) Changes and extras. The model clause regarding changes and extras reads: "All labor or material furnished outside of this Contract must be agreed upon in writing or it will be considered as performed under the original Contract and you will receive no extra money."

(12) Receipts and releases. The model clause regarding receipts and releases reads: "If I ask, you will give me valid receipts and releases for the Work from any subcontractor, worker, and supplier."

(13) No work commenced. The model clause specifying that no work has commenced prior to execution of the contract reads: "This Contract is executed, acknowledged, and delivered before any labor has been performed and any material has been furnished for the Work."

(14) Owner's promises and rights. The model clause regarding the owner's promises and rights reads:
Figure: 7 TAC §90.603(d)(14) (No change.)

(15) Owner's duties. The model clause regarding the owner's duties reads:
Figure: 7 TAC §90.603(d)(15) (No change.)

(16) Contractor's duties. The model clause regarding the contractor's duties reads:
Figure: 7 TAC §90.603(d)(16) (No change.)

(17) Contractor's rights. The model clause regarding the contractor's rights reads:
Figure: 7 TAC §90.603(d)(17) (No change.)

(18) Trustee's duties. The model clause regarding the trustee's duties reads:
Figure: 7 TAC §90.603(d)(18) (No change.)

(19) General provisions. The model clause regarding general contract provisions reads:
Figure: 7 TAC §90.603(d)(19) (No change.)

(20) Preservation of claims and defenses. In accordance with the Federal Trade Commission's Holder in Due Course Rule (16 C.F.R. §433), it is an unfair or deceptive act or practice to take or receive a consumer credit contract in connection with the sale or lease of goods or services to consumers that does not include the following notice. The notice regarding the preservation of claims and defenses reads: "NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(21) Owner and contractor responsible. Texas Property Code, §41.007 specifies that a home improvement contract must contain a notice specifying that the owner and the contractor are responsible for meeting the terms of the contract. The notice must appear in either this contract or the residential construction contract. The Property Code requires that the notice must be conspicuously printed, stamped, or typed in a font size equal to at least 10-point boldfaced type or computer equivalent and appear next to the owner's signature line on the contract. The wording of the notice is specified by the Property Code, which uses the pronouns "you" and "your" to refer to the owner. Licensees are encouraged to explain in the contract, prior to the notice, that "you" and "your" refer to the owner in this notice. The parties' signatures must be notarized. The licensee may use a different notary acknowledgment without having to submit the contract to the agency as a non-standard contract. The notice specifying that the owner and the contractor are responsible for meeting the terms of the contract, the model explanatory clause regarding the use of "you" and "your" in the notice, and the signature blanks read:
Figure: 7 TAC §90.603(d)(21) (No change.)

~~[(22) Texas Residential Construction Commission (TRCC) disclosures.]~~

~~[(A) TRCC home improvement contract notice. If a contract for the construction of a new home or an improvement to an existing home is required to be registered under the Texas Residential Construction Commission Act, Texas Property Code, §426.003, the contract must contain a TRCC home improvement contract notice. The disclosure or notice must contain:]~~

~~[(i) the builder's name and certificate of registration number; and]~~

~~[(ii) the notice required by the Texas Residential Construction Commission Act, Texas Property Code, §420.001, including the telephone number of the TRCC, in at least 10-point bold type or the computer equivalent.]~~

~~[(B) TRCC builder notice. If the contractor is required to register as a builder with the TRCC, the contract for improvements to an existing residence must incorporate a TRCC builder notice. The disclosure or notice must contain:]~~

~~[(i) the contractor's certificate of registration number; and]~~

~~[(ii) the address and telephone number at which the owner may file a complaint with the TRCC about the conduct of the contractor.]~~

~~[(C) Omission permitted if not applicable. The TRCC home improvement contract notice may be omitted if the contract is not required to be registered under Texas Property Code, §426.003. The TRCC builder notice may be omitted if the contractor is not required to register with the TRCC.]~~

(22) [~~(23)~~] Assignment. The parties may use a different assignment or a separate document for the assignment without having to submit the contract to the agency as a non-standard contract. The model assignment in which the contractor transfers and assigns the lien to the licensee [~~lender~~] reads:
Figure: 7 TAC §90.603(d)(22)
[~~Figure: 7 TAC §90.603(d)(23)~~]

(23) [~~(24)~~] Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

(e) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan promissory note for use in a transaction that allows for withdrawals or multiple advances.[~~:~~]

(1) Identification. The model identification clause lists the account or contract number, the name and address of the [~~creditor or~~] lender, the date of the note, the name and address of the borrower, the property address, the principal amount, and the terms of payment. The model clause identifying the pronouns used for the borrower and the lender reads:
Figure: 7 TAC §90.603(e)(1) (No change.)

(2) Truth in Lending Act [~~(TILA)~~] disclosure box. The model Truth in Lending Act [~~(TILA)~~] disclosure box reads:
Figure: 7 TAC §90.603(e)(2) (No change.)

(3) Itemization of amount financed box. The itemization of amount financed box is not required if the licensee provides the borrower with a good faith estimate or a settlement statement as permitted by the Truth in Lending Act. An itemization of amount financed box

which complies with Regulation Z is considered to be in compliance with this paragraph and will not require a non-standard submission.

(4) Security for payment. The model clause relating to the security for payment reads: "The Deed of Trust and the Lien created in the Contract secure this Note."

(5) Definitions. The model definitions section reads:

(A) "Owner" means (name of Owner), whose address is (address of Owner, including county). If Owner and Maker are not the same person, the word "Owner" includes Maker.

(B) "Contractor" means (name of Contractor), whose address is (address of Contractor, including county) and includes those to whom the Contractor has assigned or transferred Contractor's rights and remedies.

(C) "Lender" means (name of Lender), whose address is (address of Lender, including county) and includes those to whom the Lender has assigned or transferred Lender's rights and remedies.

(D) "Trustee" means (name of Trustee), whose address is (address of Trustee, including county).

(E) "Property" means the Property at (list address of the Property), whose legal description is (list legal description of the Property).

(F) "Work" means the construction project as agreed to in writing between the Owner and Contractor.

(G) "Completion Date" means (date on which the Work will be completed).

(H) "Contract" means this Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(I) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe you is _____ dollars (U.S. $_____) plus interest.

(J) "Loan Agreement" means the Note, Contract, and any other related document under which lender has made a loan to me.

(K) "Applicable Law" means all controlling applicable federal, state, and local law.

(L) "Tenant at Sufferance" means a person who continues to possess the Property with no current right to possess it.

(M) "Forcible Detainer" means a lawsuit to remove a person from the Property.

(N) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amount under this Contract.

(O) "Successor in Interest" means any party that has taken title to the Property.

(P) "Lien" means the Mechanic's and Materialman's Lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.["]

(6) Promise to pay. One permissible change to the model language for the scheduled installment earnings method would be to allow partial prepayments of the principal during the term of the loan. This variation on the scheduled installment earnings method would allow periodic reductions of the principal balance by partial prepayments. This variation would allow reductions of the principal balance that were not originally scheduled. The model clause options for the borrower's promise to pay read:

(A) For contracts using the scheduled installment earnings method: "I promise to pay the Total of Payments to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(B) For contracts using the true daily earnings method: "I promise to pay the cash advance plus the accrued interest to the order of you. (The "principal" or "cash advance" is $_____. This amount plus interest must be paid by _____ (maturity date).) I will make payments to you at the address above or as you direct. I will make the payments on the dates and in the amounts shown in the Payment Schedule."

(7) Late charge. The model late charge provision for contracts using the scheduled installment earnings method or the true daily earnings method reads: "If I don't pay all of a payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(8) After maturity interest. The model clause specifies the maximum interest rate allowed by law for after maturity interest. A licensee [~~creditor~~] may always choose a lower rate. The model provision for after maturity interest reads: "If I don't pay all I owe when the final payment becomes due, I will pay interest on the amount that is still unpaid. That interest will be the higher of the rate of 18% per year or the maximum rate allowed by law. That interest will begin the day after the final payment becomes due."

(9) Prepayment clause. The model prepayment clause options read:

(A) For contracts using the scheduled installment earnings method: "I can make a whole payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(B) For contracts using the true daily earnings method: "I can make any payment early. Unless you agree otherwise in writing, I may not skip payments. If I make a payment early, my next payment will still be due as scheduled."

(10) Finance charge earnings and refund method. The model provision options specifying the finance charge earnings and refund method read:

(A) For contracts using the scheduled installment earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(e)(10)(A) (No change.)

(B) For contracts using the scheduled installment earnings method with prepayments option - Section 342.301 rate loans, the model language reads
Figure: 7 TAC §90.603(e)(10)(B) (No change.)

(C) For contracts using the true daily earnings method - Section 342.301 rate loans, the model language reads:
Figure: 7 TAC §90.603(e)(10)(C) (No change.)

(11) Deferment. The model provision regarding deferment reads: "If I ask for more time to make any payment and you agree, I will pay more interest to extend the payment. The extra interest will be figured under the Finance Commission rules."

(12) Fee for dishonored check clause. The model clause specifies the maximum allowable dishonored check fee. A licensee [~~creditor~~] may always choose a lesser amount. The model fee for dishonored check provision reads: "I agree to pay you a fee of up to $30 for a returned check. You may add the fee to the amount I owe or collect it separately."

(13) Default. The model provision specifying the conditions causing default reads:
Figure: 7 TAC §90.603(e)(13) (No change.)

(14) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.603(e)(14) (No change.)

(15) Credit insurance. If single premium credit insurance is offered, a permissible change to the disclosure can be to offer a single charge for the entire term of the loan. The term for the single premium charge should be shown for the original term of the loan, unless otherwise specified. The licensee has the option of including language that reads: "The insurance will cancel on the date when the total past due premiums equal or exceed (insert number) times the first month's premium." The industry standard regarding the relationship between total past due premiums and the first month's premium in this equation appears to be four times. However, if a different time frame is more appropriate, that time frame may be used. The model credit insurance disclosure box reads:
Figure: 7 TAC §90.603(e)(15) (No change.)

(16) Mailing of notices to borrower. The duty to give notice is satisfied when it is mailed by first class mail. The model provision regarding the mailing of notices to the borrower reads: "You or I may mail or deliver any notice to the address above. You or I may change the notice address by giving written notice. Your duty to give me notice will be satisfied when you mail it."

(17) Statement of truthful information. The model provision specifying that the borrower gave truthful information reads: "I promise that all information I gave you is true."

(18) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate, and notice of acceleration reads: "If all or any interest in the Property is sold or transferred without your prior written consent, you may require immediate payment in full of all that I owe under this Loan Agreement. You will not exercise this option if prohibited by law. If you exercise this option, you will give me notice that you are demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, you may use any remedy allowed by the Loan Agreement."

(19) No waiver of the lender's rights. The model provision expressing no waiver of the lender's rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(20) Collection expenses. The model collection expenses clause reads: "If you require me to pay all that I owe at once, you will have the right to be paid back by me for all of your costs and expenses in enforcing this Loan Agreement to the extent not prohibited by Applicable Law. These expenses include, for example, reasonable attorneys' fees."

(21) Joint liability. The model provision providing for joint liability reads: "I understand that you may seek payment from only me without first looking to any other Borrower."

(22) Usury savings. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than Applicable Law allows."

(23) Savings clause. The model savings clause stating that if any part of the contract is invalid, the rest remains valid reads: "If any part of this Loan Agreement is declared invalid, the rest of the Loan Agreement remains valid. If any part of this Loan Agreement conflicts with any law, that law will control. The part of the Loan Agreement that conflicts with any law will be modified to comply with the law. The rest of the Loan Agreement remains valid."

(24) Prior agreements. For loan agreements exceeding $50,000 [~~$50,000.00~~], this notice must be boldfaced, capitalized, underlined, or otherwise set out from the surrounding written material to be conspicuous. The model clause stating that there are no prior agreements between the parties regarding the loan agreement reads: "This written Loan Agreement is the final agreement between you and me. It may not be changed by prior, current, or future oral agreements between you and me. There are no oral agreements between you and me relating to this Loan Agreement. Any change to this Loan Agreement must be in writing. Both you and I have to sign written agreements."

(25) Note secured by deed of trust. The model clause stating that the note is secured by a deed of trust reads: "In addition to this Note, the Deed of Trust protects the Note holder from losses that might result if I do not keep the promises that I make in this Note. The Deed of Trust describes how and under what conditions I may have to make immediate payment of all that I owe under this Note."

(26) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this Loan Agreement."

(27) Complaints and inquiries notice. Under §90.105 of this title (relating to Complaints and Inquiries Notice), the following required notice must be given by licensees to let consumers know how to file complaints [~~The model complaints and inquiries notice reads~~]: "The (name of lender or note holder) is licensed and examined under the laws of the State of Texas and by state law is subject to regulatory oversight by the Office of Consumer Credit Commissioner. Any consumer wishing to file a complaint against the (name of lender or note holder) should contact the Office of Consumer Credit Commissioner through one of the means indicated below: Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207; www.occc.state.tx.us; (800) 538-1579."

(28) Collateral. The model clause regarding the collateral reads: "The Property is subject to the Contract lien. I am responsible for all obligations in this Note."

(29) Preservation of claims and defenses. The notice regarding the preservation of claims and defenses reads: "NOTICE. ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER."

(30) Signature blocks. Documents for a home improvement loan on a homestead must be signed at the office of the lender, an attorney at law, or a title company. If this provision applies, the model clause, "This document must be signed at the office of the Lender, an attorney at law, or a title company" should appear above the signature

of the borrower. The licensee may also provide additional signature lines for witness signatures. The model signature block reads:
Figure: 7 TAC §90.603(e)(30) (No change.)

(f) Model clauses for [~~For~~] a Chapter 342, Subchapter G second lien home improvement loan deed of trust for use in a transaction that allows for withdrawals or multiple advances.[:]

(1) Definitions. The model definitions section reads:

(A) "Borrower" is _____. Borrower's address is _____.

(B) "Contractor" is _____. Contractor's address is _____.

(C) "Lender" is _____. Lender's address is _____.

(D) "Trustee" is _____. Trustee's address is _____.

(E) "I" or "me" means _____, the grantor under this Deed of Trust and the person who signed the Note ("Borrower").

(F) "Loan Agreement" means the Contract, Note, Security Document, Deed of Trust, any other related document, or any combination of those documents, under which Lender has made a loan to me.

(G) "Deed of Trust" means this document, which is dated _____, together with all riders to this document.

(H) "Note" means the Texas Home Improvement Mechanic's Lien Note signed by me and dated _____ and includes all amounts secured by this Contract. The Note states that the amount I owe Lender is _____ dollars (U.S. $_____) plus interest.

(I) "Property" means the property at (list address of the Property), whose legal description is (list legal description of the Property).

(J) "Applicable Law" means all controlling applicable federal, state, and local law.

(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on me or the Property by a condominium association, homeowners association, or similar organization.

(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. The term includes point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) "Escrow Items" means those items that are described in Section ___ of this Deed of Trust.

(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than proceeds paid under my insurance) for: damage or destruction of the Property; condemnation or other taking of all or any part of the Property; conveyance instead of condemnation; or misrepresentations or omissions related to the value or condition of the Property.

(O) "Periodic Payment" means the regularly scheduled amount due for principal and interest under the Note plus any amounts under this Deed of Trust.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Deed of Trust, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan Agreement does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest" means any party that has taken title to the Property.

(R) "Ground Rents" means amounts I owe if I rented the real property under the buildings covered by this Deed of Trust. Such an arrangement usually takes the form of a long-term "ground lease."

(S) "Contract" means the Texas Home Improvement Mechanic's Lien Contract for Improvement, Power of Sale, and Deed of Trust.

(T) "Lien" means the Mechanic's and Materialman's Lien on the Property that results from the Contract and the Work performed. The Lien includes all existing and future improvements, easements, and rights in the Property.["]

(2) Transfer of rights in [~~the~~] property. The model provision regarding a transfer of rights in the property reads:
Figure: 7 TAC §90.603(f)(2) (No change.)

(3) Payment of late charges and prepayment. The model provision regarding the payment of late charges and prepayment of principal and interest reads:
Figure: 7 TAC §90.603(f)(3) (No change.)

(4) Funds for escrow items. The model provision regarding the funds for escrow items reads:
Figure: 7 TAC §90.603(f)(4) (No change.)

(5) Charges and liens. The model provision regarding charges and liens reads:
Figure: 7 TAC §90.603(f)(5) (No change.)

(6) Property insurance. The model provision regarding property insurance reads:
Figure: 7 TAC §90.603(f)(6) (No change.)

(7) Preservation, maintenance, protection, and inspection of [~~the~~] property. The model provision regarding preservation, maintenance, protection, and inspection of the property reads: "I will not destroy, damage, or impair the Property, allow it to deteriorate, or commit waste. Whether or not I live in the Property, I will maintain it in order to prevent it from deteriorating or decreasing in value due to its condition. I will promptly repair the damage to the Property to avoid further deterioration or damage unless Lender and I agree in writing that it is economically unreasonable. I will be responsible for repairing or restoring the Property only if Lender releases the insurance or condemnation proceeds for the damage to or the taking of the Property. Lender may release proceeds for the repairs and restoration in a single payment or in a series of payments as the Work is completed. I still am obligated to complete repairs or restoration of the Property even if there are not enough proceeds to complete the Work. If this Deed of Trust secures a unit in a condominium or planned unit development, I will perform all of my obligations under the declaration or covenants creating or governing the condominium or planned unit development, and any other relevant document. Lender or Lender's agent may inspect the Property. Lender may inspect the interior of the Property with reason-

able cause. Lender will give me notice stating reasonable cause when or before the interior inspection occurs."

(8) Protection of lender's interest in the property and rights under the deed of trust. The model provision regarding protection of the lender's interest in the property and rights under the deed of trust reads:
Figure: 7 TAC §90.603(f)(8) (No change.)

(9) Assignment of miscellaneous proceeds and forfeiture. The model provision regarding the assignment of miscellaneous proceeds and forfeiture reads:
Figure: 7 TAC §90.603(f)(9) (No change.)

(10) Forbearance not a waiver. The model provision specifying that the borrower is not released from liability if the lender modifies the payment schedule reads: "If Lender doesn't enforce Lender's rights every time, Lender can still enforce them later."

(11) Joint and several liability, deed of trust execution, successors obligated. The model provision regarding joint and several liability and specifying that the person who signs the contract grants [~~his~~] ownership in the homestead and binds the person's [~~his~~] successors and assigns reads:
Figure: 7 TAC §90.603(f)(11) (No change.)

(12) Usury savings clause. The model usury savings clause reads: "I do not have to pay interest or other amounts that are more than Applicable Law allows."

(13) Mailing of notices to borrower. The duty to give notice is satisfied when it is mailed by first class mail. The model provision regarding the mailing of notices to the borrower reads: "Lender or I may mail or deliver any notice to the address above. Lender or I may change the notice address by giving written notice. Lender's duty to give me notice will be satisfied when Lender mails it."

(14) Application of law. The model clause specifying that federal law and Texas law apply to the contract reads: "Federal law and Texas law apply to this Loan Agreement."

(15) Rules of construction. The model provision regarding rules of clause construction reads:
Figure: 7 TAC §90.603(f)(15) (No change.)

(16) Loan agreement copies. The model provision specifying that the lender will give the borrower a copy of all signed documents at the time the loan agreement is made reads: "At the time the Loan Agreement is made, Lender will give me copies of all documents I sign."

(17) Due on sale clause, notice of intent to accelerate, and notice of acceleration. The model provision regarding the due on sale clause, notice of intent to accelerate and notice of acceleration reads: "If all or any interest in the Property is sold or transferred without Lender's prior written consent, Lender may require immediate payment in full of all that I owe under this Loan Agreement. Lender will not exercise this option if Applicable Law prohibits. If Lender exercises this option, Lender will give me notice that Lender is demanding payment of all that I owe. This notice will give me a period of not less than 21 days from the date of the notice within which I must pay all that I owe under this Loan Agreement. If I fail to pay all that I owe before the end of this period, Lender may use any remedy allowed by the Loan Agreement."

(18) Lender, contractor, and borrower's promises and agreements. The model provision regarding the lender, contractor, and borrower's promises and agreements reads: "LENDER, CONTRACTOR, AND I PROMISE AND AGREE:".

(19) Acceleration and remedies. The model provision regarding acceleration and remedies reads:
Figure: 7 TAC §90.603(f)(19) (No change.)

(20) Power of sale. The model provision regarding the power of sale reads:
Figure: 7 TAC §90.603(f)(20) (No change.)

(21) Borrower's right to reinstate after acceleration. The model provision regarding the borrower's right to reinstate after acceleration reads:
Figure: 7 TAC §90.603(f)(21) (No change.)

(22) Assignment of rents, appointment of receiver, and lender in possession. The model provision regarding the assignment of rents, appointment of receiver, and the lender in possession reads: "As additional security, I assign to you the rents of the Property, provided that you have the right, prior to acceleration or abandonment of the Property, to collect and retain the rents as they become due. Upon acceleration or abandonment, you, by agent or by court-appointed receiver, will be entitled to enter, take possession, manage the Property, and collect due and past due rents. All rents you or the court-appointed receiver collect will be applied first to payment of the cost of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorneys' fees, and then to the sums secured by this Deed of Trust. You and the receiver will be liable to account only for rents received."

(23) Release. The model provision regarding the release of the lien securing the loan agreement reads: "Lender will cancel and return the Note to me and give me, in recordable form, a release of lien securing the Loan Agreement or a copy of any endorsement of the Note and assignment of the Lien to a Lender that is refinancing the Loan Agreement. I will pay only the cost of recording the release of lien."

(24) Trustees and trustee liability. The model provision regarding trustees and trustee liability reads:
Figure: 7 TAC §90.603(f)(24) (No change.)

(25) Assignment of contractor's lien, and commencement of work. The model provision regarding the assignment of the contractor's lien and specifying that no work was commenced before the contract was executed reads: "Contractor and I have entered into the Contract for improvements to be made to the Property. I will perform my duties under the Contract. Under the Contract, I gave Contractor a Lien on the Property. Contractor permanently transfers the Lien and any other interest Contractor has in the Property to Lender. As additional security, Contractor also agrees that the lien created by this Deed of Trust has priority over the Lien. The purpose of the Note is to pay in whole or in part the improvements to be made to the Property by the Contractor. Contractor and I agree that the Lien is for Lender's sole benefit. Any other interest Contractor has in the Property will be merged with the Lien, and may be enforced by Lender according to the terms of this Deed of Trust. Contractor and I further agree that no Work was performed or material delivered before the Contract was executed."

(26) Subrogation. The model provision regarding subrogation reads: "If I ask, Lender will use proceeds from the Loan Agreement to pay off all valid outstanding liens against the Property. Lender will then own all rights, superior titles, liens, and interests owned or claimed by any owner or holder of an outstanding lien or debt. Lender owns these things whether the lien or debt is transferred to Lender or whether it is released by the holder upon payment."

(27) Partial invalidity. The model provision regarding what happens if the sums secured and other charges violate applicable

law reads: "If any portion of the sums secured by this Deed of Trust cannot be lawfully secured, payments minus those sums will be applied first to the portions not secured. If any charge provided for in this Loan Agreement, separately or together with other charges that are considered part of this Loan Agreement, violates Applicable Law, the charge is reduced to the extent necessary to eliminate the violation. Lender will refund the amount of interest or other charges paid to Lender in excess of the amount permitted by Applicable Law. At Lender's option, the amount in excess will either be refunded directly to me or will be applied to reduce the principal of the debt."

(28) Renewal and extension. The model provision regarding the renewal and extension of the note secured by the deed of trust reads: "The Note secured by this Deed of Trust is renewed and extended, but not in extinguishment of the debt under the Contract identified in the paragraph entitled "Assignment of Contractor's Lien, Commencement of Work" and the Note."

(29) Sale of loan, change of loan servicer, notice of grievance, and lender's right to comply. The model provision regarding the sale of the loan, change of loan servicer, notice of grievance, and the lender's right to comply reads: "A full or partial interest in the Loan Agreement can be sold one or more times without prior notice to me. The sale may result in a change of the company servicing or handling the Loan Agreement. The company servicing or handling the Loan Agreement will collect my monthly payment and will comply with other servicing conditions required by the Loan Agreement or Applicable Law. In some cases, the company servicing or handling the Loan Agreement may change even if the Loan Agreement is not sold. If the company servicing or handling the Loan Agreement is changed, I will be given written notice of the change. The notice will state the name and address of the new company, the address to which my payments should be made, and any other information required by RESPA. Any notice of acceleration and opportunity to cure under the Loan Agreement will satisfy the notice and opportunity to address the alleged violation provisions of this Section. No agreement between Lender and me or any third party will limit Lender's ability to comply with Lender's duties under the Loan Agreement and Applicable Law. Lender and I are limiting all agreements so that all current or future interest or fees in connection with this Loan Agreement will not be greater than the highest amount allowed by Applicable Law. Lender and I intend to conform the Loan Agreement to the provisions of Applicable Law. If any part of the Loan Agreement is in conflict with the Applicable Law, then that part will be corrected or removed. This correction will be automatic and will not require any amendment or new document. Lender's right to cure any violation will survive my paying off the Loan Agreement. My right to cure will override any conflicting provision of the Loan Agreement. Lender's right to comply as provided in this Section will survive the payoff of the Loan Agreement. The provisions of this Section will supersede any inconsistent provision of the Loan Agreement."

(30) Hazardous substances. The model provision regarding hazardous substances reads:
Figure: 7 TAC §90.603(f)(30) (No change.)

(31) Lender's rights and Borrower's responsibilities. The model provision regarding the lender's rights and the borrower's responsibilities reads:
Figure: 7 TAC §90.603(f)(31) (No change.)

(32) Default. The model provision regarding the borrower's default reads: "Any default of my agreements with Lender will be a default of this Deed of Trust."

(33) Request for notice of default and foreclosure under superior mortgages or deeds of trust. The model provision regarding the lender and borrower's request for notice of default and foreclosure under superior mortgages or deeds of trust reads:
Figure: 7 TAC §90.603(f)(33) (No change.)

~~[(34) Texas Residential Construction Commission (TRCC) disclosures.]~~

~~[(A) TRCC home improvement contract notice. If a contract for the construction of a new home or an improvement to an existing home is required to be registered under the Texas Residential Construction Commission Act, Texas Property Code, §426.003, the contract must contain a TRCC home improvement contract notice. The disclosure or notice must contain:]~~

~~*[(i)* the builder's name and certificate of registration number; and]~~

~~*[(ii)* the notice required by the Texas Residential Construction Commission Act, Texas Property Code, §420.001, including the telephone number of the TRCC, in at least 10-point bold type or the computer equivalent.]~~

~~[(B) TRCC builder notice. If the contractor is required to register as a builder with the TRCC, the contract for improvements to an existing residence must incorporate a TRCC builder notice. The disclosure or notice must contain:]~~

~~*[(i)* the contractor's certificate of registration number; and]~~

~~*[(ii)* the address and telephone number at which the owner may file a complaint with the TRCC about the conduct of the contractor.]~~

~~[(C) Omission permitted if not applicable. The TRCC home improvement contract notice may be omitted if the contract is not required to be registered under Texas Property Code, §426.003. The TRCC builder notice may be omitted if the contractor is not required to register with the TRCC.]~~

(34) [~~(35)~~] Signature blocks. The parties' signatures must be notarized. The licensee may use a different notary acknowledgment without having to submit the deed of trust to the agency as non-standard. Documents for a home improvement loan on a homestead must be signed at the office of the lender, an attorney at law, or a title company. If this provision applies, the model clause, "This document must be signed at the office of the Lender, an attorney at law, or a title company" should appear above the signature of the borrower. The model provision regarding signature blocks reads:
Figure: 7 TAC §90.603(f)(34)
[~~Figure: 7 TAC §90.603(f)(35)~~]

(35) [~~(36)~~] Notice of confidentiality rights disclosure. The security document must incorporate a "Notice of Confidentiality Rights" disclosure. The disclosure or notice must:

(A) appear on the top of the first page of the security document;

(B) be in at least 12-point boldfaced type or 12-point uppercase lettering; and

(C) be substantially similar to the required notice or disclosure under Texas Property Code, §11.008(b). The model notice of confidentiality rights reads: "NOTICE OF CONFIDENTIALITY RIGHTS: I MAY REMOVE OR STRIKE MY SOCIAL SECURITY NUMBER OR MY DRIVER'S LICENSE NUMBER FROM THIS DOCUMENT BEFORE IT IS FILED IN THE PUBLIC RECORDS."

§90.604. Permissible Changes.

(a) A licensee may consider making the following types of changes to the second lien home improvement contracts plain language model clauses:

(1) Regulation Z of the Truth in Lending Act provides a right of rescission form that must be provided to consumers in a transaction involving the consumer's principal dwelling. The Truth in Lending Act [~~TILA~~] right of rescission form for use in a transaction involving the consumer's principal dwelling reads:
Figure: 7 TAC §90.604(a)(1) (No change.)

(2) If the Texas constitutional homestead requirements apply to the transaction, the licensee must add a clause regarding notice of cancellation, place of singing the contract, and the five-day waiting period. The model clause regarding the notice of cancellation, place of signing the contract, and the five-day waiting period reads:
Figure: 7 TAC §90.604(a)(2) (No change.)

(3) Article 16, Section 50(a)(5) of the Texas Constitution provides that a contract for improvements on a homestead must expressly provide the owner with notice of the owner's right to cancel the contract. The model notice regarding the owner's right to cancel the contract reads: "NOTICE OF RIGHT TO CANCEL. THE OWNER MAY CANCEL THE CONTRACT WITHOUT PENALTY OR CHARGE WITHIN THREE DAYS AFTER THE EXECUTION OF THE CONTRACT BY ALL PARTIES, UNLESS THE WORK AND MATERIAL ARE NECESSARY TO COMPLETE IMMEDIATE REPAIRS TO CONDITIONS ON THE HOMESTEAD PROPERTY THAT MATERIALLY AFFECT THE HEALTH OR SAFETY OF THE OWNER OR PERSON RESIDING IN THE HOMESTEAD AND THE OWNER OF THE HOMESTEAD ACKNOWLEDGES SUCH IN WRITING."

(4) Texas Business and Commerce Code, Chapter 601 [~~39~~] requires that notice must be given to the consumer regarding the consumer's right to cancel certain types of transactions. If this chapter is applicable, the notice that must be given by the licensee must appear in immediate proximity to the consumer's signature, or on the front page of the receipt if a contract is not used. The notice must be in boldfaced type and must be the equivalent of at least 10 points in the Times typeface. The statement to which the notice must be substantially similar reads: "YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."

(5) Texas Business and Commerce Code, Chapter 601 [~~39~~] also requires, if applicable, that a completed notice of cancellation form in duplicate be attached to the loan documents or receipt of the consumer transaction. This notice must be easily detachable from the contract or receipt, be in the same language as the contract or receipt, be in boldfaced type, and be the equivalent of at least 10 points in the Times typeface. The required notice of cancellation reads:
Figure: 7 TAC §90.604(a)(5) (No change.)

(6) The licensee may add information related to information set forth in the model clauses that is not otherwise prohibited by law.

(7) The licensee may substitute another term for "Lender" or "Borrower" that has the same meaning, or use pronouns such as "you," "we," and "us."

(8) The model clauses may be presented in any order, and may be combined or further segregated at the licensee's option.

(9) The licensee may insert descriptive headings or number provisions.

(10) The licensee may change the case of a word if otherwise permitted by the Texas Finance Code.

(11) The licensee may make other changes that do not affect the substance of the disclosures.

(12) A sample model contract that does not allow for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(12)
[~~Figure: 7 TAC §90.604(a)(12)~~]

(13) A sample model promissory note that does not allow for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(13) (No change.)

(14) A sample model contract that allows for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(14)
[~~Figure: 7 TAC §90.604(a)(14)~~]

(15) A sample model promissory note that allows for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(15) (No change.)

(16) A sample model deed of trust that allows for withdrawals or multiple advances is presented in the following example.
Figure: 7 TAC §90.604(a)(16)
[~~Figure: 7 TAC §90.604(a)(16)~~]

(b) A licensee has considerable flexibility to arrange the format of the model form if the revised format does not significantly adversely affect the substance, clarity, or meaningful sequence of the disclosures.

This 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 June 18, 2010.

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7621

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SUBCHAPTER G. SPANISH DISCLOSURES

7 TAC §§90.701 - 90.703, 90.706

The amendments are proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §342.551 grants the commission the authority to adopt rules to enforce the consumer loans chapter.

The statutory provisions affected by the proposed amendments are contained in Texas Finance Code, Chapter 342.

§90.701. Applicability.

(a) If a contract for loan under Chapter 342, Subchapters E, F, or G is negotiated in Spanish, then a licensee must deliver a disclosure to the debtor in Spanish no later than consummation of the contract.

(b) If a retail installment transaction under Chapter 348 is negotiated in Spanish, then a licensee [~~creditor~~], may but is not required

to, deliver a disclosure specified in §90.703 of this title (relating to Form of Disclosure) to the debtor in Spanish.

(c) The disclosure requirement does not apply to open-end transactions.

§90.702. Negotiation in Spanish.

(a) Negotiation terms. The disclosure specified in §90.703 of this title (relating to Form of Disclosure) must be given if a licensee [~~creditor~~] provides information in relation to a credit transaction with a debtor or the debtor's representative regarding any of the following credit terms in Spanish:

(1) amount financed;

(2) finance charge;

(3) annual percentage rate;

(4) the amount of any payment or schedule of payments;

(5) total of payments; or

(6) security interest.

(b) Advertising exception. A licensee [~~creditor~~] is not required to provide a disclosure specified in §90.703 of this title if a creditor advertises credit terms in Spanish that are specified in this section.

§90.703. Form of Disclosure.

(a) The licensee [~~creditor~~] may at its option provide a debtor one of the following:

(1) a Spanish translation of the contract form that includes a Spanish translation of the disclosure form under 12 C.F.R. §226.18;

(2) for transactions subject to Chapter 342, Subchapter E, a copy of the "Notificación de Crédito Al Consumidor (Préstamo a Plazos)" as prescribed in the following figure: [~~Figure: 7 TAC §90.703(a)(2)~~]
Figure: 7 TAC §90.703(a)(2) (No change.)

(3) for transactions subject to Chapter 342, Subchapter F:

(A) a copy of the "Notificación de Crédito Al Consumidor (Préstamo)," as prescribed in the following figure [~~Figure: 7 TAC §90.703(a)(3)(A)~~], selecting the appropriate late charge payment option; and
Figure: 7 TAC §90.703(a)(3)(A) (No change.)

(i) Late Charge Option 1: "Late Charge: If I don't pay an entire payment within 10 days after it is due, you can charge me a late charge. The late charge will be 5% of the scheduled payment."

(ii) Late Charge Option 1 Spanish Translation: "Cargos por Retrasos: Si no doy un pago completo dentro de 10 días después de vencerse, me puedes cobrar un cargo por retraso. El cargo por retraso será el 5% de la cantidad del pago."

(iii) Late Charge Option 2: "Late Charge: For a loan that has an amount financed of less than $100, the late charge for a payment that is unpaid for 10 days after it is due is 5% of the amount of the installment. For a loan that has an amount financed of $100 or more, the late charge for a payment that is unpaid for 10 days after it is due is the greater of $10 or 5% of the amount of the installment."

(iv) Late Charge Option 2 Spanish Translation: "Cargos por Retrasos: Para un préstamo en el cual la cantidad financiada es menor de $100, el cargo por retraso en un pago que no se liquida por 10 días después de vencerse es 5% de la cantidad del pago. Para un préstamo en el cual la cantidad financiada es de $100 o más, el cargo por retraso en un pago que no se liquida por 10 días después de vencerse es de $10 o 5% de la cantidad del pago atrasado, lo que sea mayor."

(B) a copy of the "Conceptos Financieros," as prescribed in the following figure [~~Figure: 7 TAC §90.703(a)(3)(B)~~];
Figure: 7 TAC §90.703(a)(3)(B) (No change.)

(4) for transactions subject to Chapter 342, Subchapter G, a copy of the "Notificación de Crédito Al Consumidor (Préstamo de Segunda Hipoteca)" as prescribed in the following figure [~~Figure: 7 TAC §90.703(a)(4)~~]; or
Figure: 7 TAC §90.703(a)(4) (No change.)

(5) for transactions subject to Chapter 348, a copy of the "Notificación de Crédito Al Consumidor (Contrato de Menudeo a Plazos para Vehículo Automotor)" as prescribed in the following figure [~~Figure: 7 TAC §90.703(a)(5)~~], selecting the appropriate late charge payment option.
Figure: 7 TAC §90.703(a)(5) (No change.)

(b) Licensees [~~Creditors~~] may delete inapplicable provisions contained in the model disclosure. Licensees [~~Creditors~~] may also delete any of the English portions of Figure[~~:~~] 7 TAC §90.703(a)(4) or the lower portion of the disclosure below the payment schedule box of Figure 7 TAC §90.703(a)(3)(A).

§90.706. Legal Document.

(a) The agreement entered in the English language is the legal document and determines the rights and obligations of the parties. The disclosures required by federal law entered in the English language are the legal disclosures and determine the disclosure obligations of the licensee [~~creditor~~].

(b) The licensee [~~creditor~~] may at its option add the following disclaimer:

(1) "NOTICE REGARDING THE TRANSLATION INTO SPANISH: The English document is the legal document and reflects the parties' rights and obligations. The translation into Spanish of the document is provided for the convenience of the Borrower."

(2) Spanish Translation: "AVISO CON RESPECTO A LA TRADUCCIÓN AL ESPAÑOL: El documento en inglés es el documento legal y refleja los derechos y obligaciones de las partes. La traducción al español del documento se ofrece para la conveniencia del Prestatario."

This 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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Office of Consumer Credit Commissioner
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PART 6. CREDIT UNION DEPARTMENT

CHAPTER 91. CHARTERING, OPERATIONS, MERGERS, LIQUIDATIONS

SUBCHAPTER G. LENDING POWERS

7 TAC §91.701

The Credit Union Commission (the Commission) proposes amendments to §91.701, concerning lending powers. The amendments incorporate and expand on the loan documentation requirements of §91.702. The Commission proposes to repeal §91.702 concurrent with the amendments to this rule. The amendments also add required elements to the loan policies, update and refine the credit underwriting criteria, and provide that a line of credit have payments sufficient to amortize the outstanding balance over a reasonable period of time and not cause negative amortization. Finally, the amendments rewrite some provisions for clarity and correct a typographical error.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.701. Lending Powers.

(a) Authorization. A credit union may originate, invest in, sell, purchase, service, or participate in loans or otherwise extend credit in accordance with the Act, these Rules, and other applicable law.

(b) Written Policies. Before [~~Each credit union, before~~] engaging in any lending activity, each credit union shall establish written lending policies [~~approved by its board of directors~~] that set [~~establish~~] prudent credit underwriting and documentation standards for each specific type of lending activity. The lending policies shall contain a general outline of the manner in which loans are made, serviced, and collected. In addition the policies must:

(1) Be consistent with safe and sound credit union practices;

(2) Be appropriate to the size and financial condition of the credit union and the nature and scope of its operations;

(3) Be compatible with the size and expertise of the credit union's lending staff;

(4) Be compliant with all related laws and regulations;

(5) Be reviewed and approved by the credit union's board of directors at inception and [~~least~~] annually, thereafter;

(6) Address loan portfolio diversification standards to avoid undue concentrations of risk;

(7) Address loan documentation and underwriting standards that are clear and measurable;

(8) Address loan administration procedures for monitoring the loss exposure from the loan portfolio; [~~and~~]

(9) Address loan pricing guidelines to ensure that the rate of return is consistent with the risk from the lending activity; and

(10) [~~(9)~~] State the lending authority delegated to any individuals or committees by the board of directors.

(c) Loan Documentation. The lending policies shall include loan documentation practices that:

(1) Enable the credit union to make an informed lending decision and to assess risk, as necessary, on an ongoing basis;

(2) Identify the purpose of a loan and the source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner; and

(3) Ensure that any claim against a member is legally enforceable.

(d) Credit Underwriting. A credit union shall establish and maintain prudent credit underwriting practices that:

(1) Are commensurate with the types of loans the credit union will make and consider the terms and conditions under which they will be made;

(2) Consider the nature of the markets in which loans will be made;

(3) Provide for consideration of the member's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the member's character and willingness to repay as agreed;

(4) Take adequate account of concentration of credit risk; and

(5) Are appropriate to the size of the credit union and the nature and scope of its activities.

[~~(c) Underwriting Standards. To be considered prudent, a credit union's underwriting standards should reflect consideration of all credit evaluation factors relevant to the type of loan, including:~~]

[~~(1) The capacity of the member to adequately service the debt from the source(s) specified by the member;~~]

[~~(2) The value of the collateral;~~]

[~~(3) The overall creditworthiness of the member;~~]

[~~(4) The level of equity invested in the collateral (loan-to-value ratio);~~]

[~~(5) The type of information and documentation necessary to approve new credit, renew credit, increase credit to existing borrowers, and change terms in previously approved credits;~~]

[~~(6) A co-signer or other secondary source of repayment;~~]

[~~(7) Any additional collateral or credit enhancement (such as guarantees or mortgage insurance);~~]

[(8) Maximum loan maturities that relate to the anticipated source of repayment, the purpose of the loan, and the useful life of any collateral;]

[(9) Loan pricing that reflects the credit union's cost of funds, overhead, credit risk premium, and a reasonable return;]

[(10) The need for collateral protection insurance; and]

[(11) Filing/recordation standards to ensure a valid lien.]

(e) [(d)] Loan Maturity Limit. Except when a higher maturity date is provided for elsewhere in this chapter, the maturity of any [a] loan or extension of credit to a member may not exceed 15 years. Minimum payments, [Open-end credit is not subject to a regulatory maturity limit. However the amortization scheduling] on a line of credit balance must be sufficient to amortize the outstanding balance over a reasonable period of time and not cause negative amortization [shall not exceed 15 years].

(f) [(e)] Liquidity. In addition to establishing controls for credit risks, credit unions shall establish procedures and guidelines to monitor and limit the total volume of loans outstanding, to ensure adequate liquidity. In setting such guidelines, the credit union shall consider various factors such as credit demand, the volatility of shares and deposits, and availability of alternative funding sources.

(g) [(f)] Waivers. The commissioner in the exercise of discretion may grant a waiver in writing of any lending requirement described in this chapter. A decision to deny a waiver, however, is not subject to appeal. A waiver [wavier] request must contain the following:

(1) The requirement to be waived, the higher limit or the ratio sought;

(2) An explanation of the need for the waiver or to raise the limit or ratio; and

(3) Documentation supporting the credit union's ability to manage the additional risk from this activity.

This 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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Harold E. Feeney
Commissioner
Credit Union Department
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7 TAC §91.702

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

The Credit Union Commission (the Commission) proposes the repeal of §91.702, concerning records for lending transactions. The substance of the rule is proposed to be incorporated into §91.701 and this rule is no longer necessary.

The repeal is proposed as a result of the Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed repeal is in effect there will be no fiscal implications for state or local government.

Ms. Loar has also determined that for each year of the first five years the proposed repeal is in effect, the public benefits anticipated will be greater clarity and ease of use of the rules in the chapter. There will be no effect on small or micro businesses as a result of repealing the rule. There is no economic cost anticipated to credit unions or individuals if the rule is repealed.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The repeal is proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed repeal is Texas Finance Code, §124.001.

§91.702. Records for Lending Transactions.

This 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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7 TAC §91.703

The Credit Union Commission (the Commission) proposes amendments to §91.703, concerning interest. The amendments rename the rule "Interest Rates" and clarify that the board of directors sets the interest rates but can delegate this authority.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.703. Interest Rates.

(a) Loans made by each credit union shall bear interest at a rate or rates as may be determined by the credit union's board of directors. A [~~credit union's~~] board [~~of directors~~] may delegate all or part of its power to determine the interest rates on any [~~all~~] lending transactions. The board may also authorize a [~~any~~] refund of interest on loans under the conditions it may prescribe.

(b) A loan may provide for variable interest rates, so long as the factor or index governing the extent of the variation is not under the control of the credit union and can be readily ascertained from sources available to the public or any other index approved in writing by the commissioner which is not available to the public.

This 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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Credit Union Department
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7 TAC §91.704

The Credit Union Commission (the Commission) proposes amendments to §91.704, concerning real estate lending. The amendments define improved real estate, further explain the lending policies a board of directors must establish, and clarify the conditions for excluded transactions. The amendments also incorporate the new federal requirement that residential mortgage loan originators register with the Nationwide Mortgage Licensing System and Registry, and make other editing changes for clarity.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.704. Real Estate Lending.

(a) Definitions. For the purposes of this section, the following words and terms shall have the following meanings, unless the context clearly indicates otherwise.

(1) First lien means any mortgage that takes priority over any other lien or encumbrance on the same property and that must be satisfied before other liens or encumbrances may share in proceeds from the property's sale.

(2) Home loan means a loan that is:

(A) made to one or more individuals for personal, family, or household purposes; and

(B) secured in whole or part by:

(i) a manufactured home, as defined by Finance Code §347.002, used or to be used as the borrower's principal residence; or

(ii) real property improved by a dwelling designed for occupancy by four or fewer families and used or to be used as the borrower's principal residence.

(3) Improved residential real estate means residential real estate containing offsite improvements, such as access to streets, curbs, and utility connections, sufficient to make the property ready for residential construction, and real estate in the process of being improved by a building.

(4) [~~(3)~~] Other acceptable collateral means any collateral in which the credit union has a perfected security interest, that has a quantifiable value, and is accepted by the credit union in accordance with safe and sound lending practices.

(5) [~~(4)~~] Owner-occupied means that the owner of the underlying real property occupies a dwelling unit of the real property as a principal residence.

(6) [~~(5)~~] Readily marketable collateral means insured deposits, financial instruments, and bullion in which the credit union has a perfected interest. Financial instruments and bullion must be saleable under ordinary circumstances with reasonable promptness at a fair market value determined by quotations based on actual transactions, on an auction or similarly available daily bid and ask price market.

(b) Written Policies. Before engaging in any real estate lending, a credit union shall adopt and maintain written policies that are appropriate for the size of the credit union and the nature and scope of its operation. When formulating the real estate lending policy, the credit union should consider both internal and external factors, such as its size and condition, expertise of its lending staff, avoidance of undue concentrations of risk, compliance with all real estate laws and rules, and general market conditions. Each policy must be consistent with safe and sound lending practices and establish appropriate limits and standards for extensions of credit that are secured by liens on or interests in real estate, or that are made for the purpose of financing

permanent improvements to real estate. The policies shall, in addition to the general requirements of §91.701(d) [~~§91.701(c)~~] of this title (relating to Lending Powers), address the following, as applicable:

(1) Title insurance;

(2) Escrow administration;

(3) Loan payoffs;

(4) Collection and foreclosure; and

(5) Servicing and participation agreements.

(c) Loan to Value Limitations.

(1) The board of directors shall establish its [~~their~~] own internal loan-to-value limits for real estate loans based on type of loan. These internal limits, however, shall not exceed the following regulatory limits:

(A) Unimproved land held for investment/speculation--Loan to value limit 60%

(B) Construction and Development: commercial, multifamily, and other nonresidential--Loan to value limit 75%

(C) Interim Construction: owner-occupied residential real estate--Loan to value limit 90%

(D) Owner occupied residential real estate (other than home equity)--Loan to value limit 95%

(E) Other residential real estate such as a second or vacation home--Loan to value limit 90%

(F) Home equity--Loan to value limit 80%

(G) All Other--Loan to value limit 80%

(2) The regulatory loan-to-value limits should be applied to the underlying property that collateralizes the loan. In determining the loan to-value ratio, a credit union shall include the aggregate amount of all sums borrowed, including the outstanding balances, plus any unfunded commitment or line of credit from all sources on an item of collateral, divided by the market value of the collateral used to secure the loan.

(d) Maximum Maturities. Notwithstanding the general 15-year maturity limit on lending transactions to members, the board of directors shall establish [~~in~~] written [~~policy~~] internal maximum maturities for real estate lending transactions. These maturities should not exceed the following regulatory limits:

(1) Improved residential real estate loans (owner-occupied, first lien)--40 years

(2) Improved residential real estate loans (not owner-occupied, first lien)--30 years

(3) Interim construction loans--18 months

(4) Manufactured home (first lien)--20 years

(5) Home equity loans--20 years (second lien)--30 years (first lien)

(6) Home improvement loans--20 years

(7) All other loans--15 years

(e) Mortgage Fraud Notice. A credit union must provide to each applicant for a home loan a written notice at closing. The notice must be provided on a separate document, be in at least 14-point type, and have the following or substantially similar language: "Warning: Intentionally or knowingly making a materially false or misleading written statement to obtain property or credit, including a mortgage loan, is a violation of §32.32, Texas Penal Code, and, depending on the amount of the loan or value of the property, is punishable by imprisonment for a term of 2 years to 99 years and a fine not to exceed $10,000. "I/we, the undersigned home loan applicant(s), represent that I/we have received, read, and understand this notice of penalties for making a materially false or misleading written statement to obtain a home loan. "I/we represent that all statements and representations contained in my/our written home loan application, including statements or representations regarding my/our identity, employment, annual income, and intent to occupy the residential real property secured by the home loan, are true and correct as of the date of loan closing." On receipt of the notice, the applicant shall verify the information and execute the notice. A credit union must keep the signed notice on file with the records required under §91.701 of this title [~~§91.702~~].

(f) Excluded Transactions. It is recognized that there are a number of lending situations in which other factors significantly outweigh the need to apply the regulatory loan-to-value limits. As a result, an exception to the loan-to-value limits is permissible for the following loan categories [~~These include~~]:

(1) Loans that are covered through appropriate credit enhancements in the form of readily marketable collateral or other acceptable collateral.

(2) Loans guaranteed or insured by the U.S. government or its agencies, provided that the amount of the guaranty or insurance is at least equal to the portion of the loan that exceeds the regulatory loan-to-value limit.

(3) Loans guaranteed, insured, or otherwise backed by the full faith and credit of the state, a municipality, a county government, or an agency thereof, provided that the amount of the guaranty, insurance, or assurance is at least equal to the portion of the loan that exceeds the regulatory loan-to-value limit.

(4) Loans that are to be sold promptly after origination, without recourse, to a financially responsible third party.

(5) Loans that are renewed, refinanced, or restructured without the advancement of new funds or an increase in the line of credit (except for reasonable closing costs) where consistent with safe and sound credit union practices and part of a clearly defined and well-documented program to achieve orderly liquidation of the debt, reduce risk of loss, or maximize recovery on the loan.

(6) Loans that facilitate the sale of real estate acquired by the credit union in the ordinary course of collecting a debt previously contracted in good faith.

(g) Loans to 100% of Value. A credit union may make a loan in an amount up to 100% of the value of real property security if that part of the loan that exceeds the regulatory loan-to-value limit is guaranteed or insured by a private corporation, organization, or other entity. The board of directors must ensure that the credit union exercises appropriate due diligence to ensure that any such guarantor or insurer has the financial capacity and willingness to perform under the terms of the guaranty or insurance agreement.

(h) Registration of residential mortgage loan originators. Title V of the Housing and Economic Recovery Act of 2008 (Public Law 110-289) requires employees of a credit union who engage in the business of a mortgage loan originator to register with the Nationwide Mortgage Licensing System and Registry and to obtain a unique identifier. A credit union must comply with the requirements imposed by Part 761 of the NCUA Rules and Regulations.

This 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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Harold E. Feeney
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7 TAC §91.708

The Credit Union Commission (the Commission) proposes amendments to §91.708, concerning real estate appraisals or evaluations. The amendments substitute the phrase "amount of the loan or extension of credit" for the phrase "transaction value" for better accuracy, clarify when the commissioner may require an appraisal, allow a credit union to substitute a certification of value in certain renewal instances, and make other editing changes for clarity.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.708. Real Estate Appraisals or Evaluations.

(a) Policies and Procedures. A credit union's board of directors is responsible for reviewing and adopting policies and procedures that establish and maintain an effective, independent real estate appraisal and evaluation program. A credit union's selection criteria for individuals who may perform appraisals or evaluations must provide for the independence of the individual performing the evaluation. That is, the individual has neither a direct nor indirect interest, financial or otherwise, in the property or transaction. The individual selected must also be competent to perform the assignment based upon the individual's qualifications, experience, and educational background. An individual may be an employee of a credit union if the individual qualifies under the conditions and requirements contained in Part 722 of the National Credit Union Administration Rules and Regulations.

(b) Loans Over $250,000. For real estate loans in which the amount of the loan or extension of credit [~~transaction value~~] exceeds $250,000, the credit union shall obtain a professional appraisal report by a state certified or licensed appraiser. The appraisal report shall be in writing and conform to generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice promulgated by the Appraisal Standards Board of the Appraisal Foundation, in Washington, D.C.

(c) Loans $250,000 or Less. For a real estate loans with an amount of the loan or extension of credit [~~a transaction value~~] of $250,000 or less, the services of a state certified or licensed appraiser is not necessary; however, the credit union must obtain an appropriate evaluation of real property collateral that is [~~shall be~~] supported by a written estimate of market value either performed by a qualified individual who has demonstrated competency in performing evaluations or from tax appraisal data of a governmental entity.

(d) Right to Require an Appraisal. The commissioner may require an appraisal under this section [~~Reappraisals may be required by the commissioner on real estate or other property or interests therein securing loans~~], at the expense of the credit union, when the commissioner has reasonable cause to believe the value of the collateral [~~security~~] is overstated.

(e) Existing Loans. In the case of renewal of a loan where there has been no obvious and material change in market conditions or physical aspects of the property that threatens the adequacy of the credit union's real estate collateral protection after the transaction, even with the advancement of additional funds [~~are advanced by the credit union~~], a written certification of current value by the original appraiser or an acceptable substitute shall satisfy this section.

(f) Other Appraisal Requirements. A [~~As applicable, a~~] credit union shall also comply with applicable [~~the~~] real estate appraisal requirements contained within Part 722 of the National Credit Union Administration Rules and Regulations.

This 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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7 TAC §91.710

The Credit Union Commission (the Commission) proposes amendments to §91.710, concerning overdraft protection. The amendments provide that the credit union comply with the overdraft service requirements of the Federal Reserve System and make non-substantive editing changes for clarity.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there

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

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.710. Overdraft Protection.

(a) Written Policy [~~policy~~]. A credit union may advance money to a member to cover an account deficit without having a credit application from the borrower on file if the credit union has written policies and procedures adequate to address the credit, operational, and other risks associated with this type of program. The policy must:

(1) Set a cap on the total dollar amount of all overdrafts the credit union will honor consistent with the credit union's ability to absorb losses;

(2) Establish a time limit no later than 60 calendar days from the date first overdrawn to charge off the overdraft balance if the [~~for a~~] member does not [~~to~~] repay the overdraft balance, or does not obtain an approved loan from the credit union[~~, otherwise the overdraft balance should be charged off~~];

(3) Limit the dollar amount of overdrafts the credit union will honor per account;

(4) Institute prudent practices related to suspension of overdraft protection services; and

(5) Establish the fee, if any, the credit union will charge members for honoring overdrafts.

(b) Safety and Soundness Requirements. A credit union must manage the risks associated with an overdraft protection program in accordance with safe and sound credit union principles. Accordingly, a credit union must establish and maintain effective risk management and control processes over its program. Such processes include appropriate recognition, treatment, and financial reporting, in accordance with generally accepted accounting principles, of income, expenses, assets, liabilities, and all expected and unexpected losses associated with the program. A credit union also shall assess the adequacy of its internal control and risk mitigation activities in view of the nature and scope of its overdraft protection program.

(c) Communications with Member. A credit union shall carefully review its overdraft protection program to ensure that marketing and other communications concerning the program do not mislead members to believe that the program is a traditional line of credit or that payment of overdrafts is guaranteed. In addition, a credit union shall take reasonable precautions to make sure members are not misled about the correct amount of their account balance, or the costs or scope of the overdraft protection offered, and that it does not encourage irresponsible member financial behavior that potentially may increase risk to the credit union.

(d) Other Requirements. A credit union shall also comply with the overdraft service requirements contained within Part 205 of the Federal Reserve System Rules and Regulations (Regulation E).

This 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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7 TAC §91.711

The Credit Union Commission (the Commission) proposes amendments to §91.711, concerning loan participations. The amendments rename the rule "Purchase and Sale of Member Loans" and rework subsection (b) of the rule to clarify terminology and requirements for written policies. The amendments also specify that purchase and sale agreements be in writing with minimum terms and define the term "member loan." Finally, the amendments also formalize the requirement that the credit union exercise independent judgment before purchasing a participation interest, incorporate the requirements of Part 741 of National Credit Union Administration's rules for some participation interests, and define sales with recourse.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.711. Purchase and Sale of Member Loans [~~Loan Participations~~].

(a) Policies. A credit union may sell or purchase all or part of a participation interest in a member loan or pool of member loans in accordance with [~~participations in any type of loan it is authorized to make from other credit unions, credit union organizations, corporations or other financial organizations pursuant to~~] written policies adopted [~~established~~] by the board of directors that address the following matters [~~. Such policies shall~~]:

(1) The type of entities to which the credit union is authorized to sell participation interests in member loans;

(2) The types of member loans in which the credit union may purchase or sell a participation interest and the types of participation interests which may be purchased or sold;

(3) The underwriting standards to be applied in the purchase of participation interests in member loans;

(4) Limitations on the aggregate principal amount of participation interest in member loans that the credit union may purchase from a single entity as necessary to diversify risk, and limitations on the aggregate amount the credit union may purchase from all entities;

(5) Provision for the identification and reporting of member loans in which participation interests are sold or purchased; and

(6) Requirements for providing and securing in a timely manner adequate credit and other information needed to make an independent judgment.

[~~(1) Establish the standards for review;~~]

[~~(2) Set up the aggregate limits on the amount of loans participations purchased from any single outside source; and~~]

[~~(3) Require that all participations meet the underwriting, documentation, and compliance standards applied to loans of that type originated by the credit union. The credit union may also rely on the stated written underwriting standards of the originating lender, provided it performs a due diligence review of the loan(s) that, at a minimum, confirms compliance with this subsection.~~]

(b) Purchase and Sale Agreements. The sale or purchase of a member loan or participation interest must be based on a written agreement between the parties. Agreements to purchase or sell a member loan or a participation interest shall, at a minimum:

(1) Identify the particular member loan(s) to be covered by the agreement;

(2) Provide for the transfer of credit and other borrower information on a timely and continuing basis;

(3) Provide for sharing, dividing, or assigning collateral;

(4) Identify the nature of the participation interest(s) sold or purchased;

(5) Set forth the rights and obligations of the parties and the terms and conditions of the sale; and

(6) Contain any terms necessary for the appropriate administration of the member loan and the protection of the participation interests of the credit union.

[~~(b) For regulatory purposes, a credit union shall segregate and treat the purchase of a loan participation as an investment in accordance with Section 91.805 of this title (relating to Loan Participation Investments), unless the participation is in a loan of a type that the credit union is authorized to make and the borrower is a member of the credit union or a member of another participating credit union.~~]

(c) Member Loan Servicing. A credit union may sell to or purchase from any participant the servicing of any member loan in which it owns a participation interest. If a party other than the credit union will be servicing the member loan(s), the credit union shall ensure that all contracts require the servicer to administer the member loan(s) in accordance with prudent industry standards, and provide for a possible change of the servicer if performance is inadequate.

(d) Definition. For purposes of this section, a member loan means a loan or extension of credit where the borrower(s) is a member of the credit union or a member of another participating credit union.

(e) Independent Credit Judgment. A credit union that purchases a participation interest in a member loan has the responsibility of conducting member loan underwriting procedures on the member loan to determine that it complies with the policies of the credit union and meets the credit union's credit standards. The credit union shall make a judgment on the creditworthiness of the borrower that is independent of the originating lender and any intermediary seller prior to the purchase of the participation interest and prior to any servicing action that alters the terms of the original agreement. This credit judgment may not be delegated to any person that is not an employee or independent agent of the credit union. A credit union that purchases a participation interest in a member loan may use information, such as appraisals or collateral inspections, furnished by the originating lender, or any intermediary seller; however, the purchasing credit union shall independently evaluate such information when exercising its independent credit judgment. The independent credit judgment shall be documented by a credit analysis that considers the underwriting, documentation, and compliance standards that would be required by a prudent lender and shall include an evaluation of the capacity and reliability of the servicer.

(f) Other Requirements. A credit union purchasing a participation interest in a member loan from a lender that is not a credit union insured by the National Credit Union Share Insurance Fund, must also comply with applicable requirements contained within Part 741 of the National Credit Union Administration Rules and Regulations.

(g) Sales with Recourse. When a member loan or participation interest is sold with recourse, it shall be considered, to the extent of the recourse, an extension of credit by the purchaser to the seller, as well as an extension of credit from the seller to the borrower(s).

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

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7 TAC §91.713

The Credit Union Commission (the Commission) proposes amendments to §91.713, concerning indirect financing of motor vehicles or other chattels. The amendments rename the rule "Indirect Lending," add a requirement that the credit union periodically review statistics for compliance and concentration risk, and edit the rule for clarity.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.713. Indirect Lending [~~Financing of Motor Vehicles or Other Chattels~~].

(a) Indirect Lending [~~Financing~~] Program. Credit unions may implement a program of indirect financing of motor vehicles and other tangible personal property. As used in this chapter, an indirect financing is the credit union's purchase [~~by a credit union~~] of a member's retail installment contract [~~of a member~~] that is originated by a seller to finance the purchase of the motor vehicle or other property.

(b) Contracts Treated as a Loan. For the purposes of this chapter, a retail installment contract purchased under this authority may be treated as a loan on the books and records of the credit union and is subject to the same limitations and restrictions imposed upon loan transactions. As with other lending, the credit union is responsible for making the final underwriting decision. The seller may initially determine whether the prospective buyer is a member or eligible for membership in the credit union, but the final determination of membership eligibility is the credit union's responsibility [~~of the credit union~~].

(c) Authorization. Credit unions may purchase or [~~otherwise~~] hold retail installment contracts when authorized by applicable law. The retail installment contract must provide for a rate or amount of time price differential that does not exceed a rate or amount authorized by applicable law.

(d) Written Policies. The board of directors shall establish, implement, and maintain prudent and reasonable written policies that are appropriate for the size and complexity of the credit union's indirect lending program. The board must also ensure that the credit union has sufficient staff with the expertise to purchase, service, and monitor the program and the contract portfolio consistent with safe and sound credit union practices. The policies must be specific and detailed enough to foster prudent and compliant credit practices.

(e) Third Party Providers. A credit union may rely on services provided by third parties to support its indirect lending activities. The board of directors must ensure that the credit union exercises appropriate due diligence before entering into third party arrangements, and maintains effective oversight and control throughout the arrangement. This oversight and control should include a periodic review of each material seller's retail installment contract statistics to ensure compliance with credit union credit criteria and to avoid undue concentrations of risk.

(f) Subprime Indirect Lending. If a credit union conducts a program that includes subprime indirect lending, it must perform comprehensive due diligence before engaging in and during that type of activity. At a minimum, due diligence shall focus on understanding the higher levels of credit, compliance, reputation, and other risks involved, plus the likelihood that origination, servicing, collections, operating, and capital costs will increase. The strategic decision to engage in subprime indirect lending must also be supported by a sound business plan that establishes measurable financial objectives as well as limitations on growth, volume, and concentrations. For the purposes of this section, "subprime indirect lending" refers to programs that target borrowers with weakened credit histories typically characterized by payment delinquencies, previous charge-offs, judgments, or bankruptcies. Such programs may also target borrowers with questionable repayment capacity evidenced by low credit scores or high debt-burden ratios.

This 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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7 TAC §91.719

The Credit Union Commission (the Commission) proposes amendments to §91.719, concerning loans to officials and senior management employees. The amendments add titles to subsections for clarity, reduce the frequency of reports to the board, and add a requirement that the board of directors' review of these loans be made a part of the minutes.

The amendments are proposed as a result of the Texas Credit Union Department's general rule review.

Betsy Loar, General Counsel, has determined that for the first five year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amended rule.

Ms. Loar has also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the amended rule. There is no economic cost anticipated to credit unions or individuals for complying with the amended rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The amendments are proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subchapter D of the Texas Finance Code, and under Texas Finance

Code §124.001, which authorizes the Commission to adopt rules regarding loans to members.

The specific section affected by the proposed amendments is Texas Finance Code, §124.001.

§91.719. Loans to Officials and Senior Management Employees.

(a) Prohibition on Preferential Rates, Terms, and Conditions. The rates, terms, conditions, and availability of any loan or other extension of credit made to, or endorsed or guaranteed by, a director, senior management employee, member of the credit committee, or an immediate family member of any such individual shall not be more favorable than the rates, terms, conditions, and availability of comparable loans or credit to other credit union members.

(b) Approval of Governing Board. Before making a loan, extending credit, or becoming contractually liable to make a loan or extend credit to a director, senior management employee, member of the credit committee, or an immediate family member of such individual, the board of directors must approve the transaction if the loan or the extension of credit or aggregate of outstanding loans and extensions of credit to any one person, the person's business interests, and the members of the person's immediate family is greater than 15% of the credit union's net worth. A loan fully secured by shares in the credit union or deposits in other financial institutions shall not be subject to, or included in, the aggregate amounts included in this section.

(c) Definition. For purposes of this section, senior management employees shall include the chief executive officer, any assistant chief executive officers (e.g. vice presidents and above), and the chief financial officer; and immediate family members shall include a person's spouse or any other person living in the same household.

(d) Aggregate Limit on Insider Loans. The aggregate of all outstanding loans or extensions of credit made to, or endorsed or guaranteed by, all directors, credit committee members, senior management employees, and immediate family members of all such individuals, shall not exceed 20% of the credit union's total assets. The requirements described in this subsection shall apply unless waived in writing by the commissioner for good cause shown.

(e) Reports to Governing Board. At least annually [~~semiannually~~], the president shall make a report to the board of directors on the outstanding indebtedness of all directors, credit committee members, senior management employees, and immediate family members of such individuals. The Board's review shall be included as part of the minutes of the meeting at which the report was presented. [~~Each report must ordinarily be retained at the credit union for a period of three years and shall not be filed with the Department unless specifically requested.~~] The report required by this section shall include the following information:

(1) The amount of each indebtedness; and

(2) A description of the terms and conditions (including the interest rate, the original amount and date, maturity date, payment terms, security, if any, and any other unusual term or condition) of each extension of credit.

(f) Governing Board Option. At the discretion of the Board, the reporting requirement of subsection (e) of this section may be waived for any individual if the aggregate amount of all outstanding loans and extensions of credit to that person, the person's business interests, and the members of the person's immediate family do not exceed the greater of $25,000 or one-quarter of one percent (.25%) of the credit union's net worth.

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

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CHAPTER 97. COMMISSION POLICIES AND ADMINISTRATIVE RULES
SUBCHAPTER B. FEES

7 TAC §97.115

The Credit Union Commission (Commission) proposes new §97.115, concerning reimbursement of expenses for legal services. The proposed new rule permits the commissioner to recover the Credit Union Department's (the Department) legal costs that result from the actions or inactions of a specific credit union. The rule excludes costs from proceedings where the credit union's legal rights, duties, or privileges are being determined by the Department. The rule also excludes costs from proceedings where the individual credit union's legal rights, duties, or privileges are being determined as against the Department.

The new rule is proposed to more fairly allocate the cost of operating the Department among credit unions.

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

Ms. Loar has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the rule. There is no economic cost anticipated to the credit union system or individuals for complying with the rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The new rule is proposed under Texas Finance Code, §15.402, which authorizes the Commission to establish reasonable and necessary fees for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §16.003, which permits the Department to set the amount of fees, penalties, charges and revenues required to carry out its functions.

The specific sections affected by the proposed new rule are Texas Finance Code, §15.402 and §16.003.

§97.115. Reimbursement of Expenses for Legal Services.

(a) The commissioner may seek direct reimbursement of expenses, from an individual credit union for legal assistance incurred

solely and necessarily as a consequence of the actions or inactions of that credit union. To ensure that the rights and interest of all parties are protected, this section shall not apply to any adjudicative proceedings in which the legal rights, duties, or privileges of the credit union are being determined by the Department after an opportunity for hearing. This section also does not apply to court proceedings wherein the individual credit union's legal rights, duties, or privileges are being determined as against the Department.

(b) Unless the credit union appeals the charges, the full amount is due when the credit union receives the assessment from the Department.

(c) If a credit union files a written notice of appeal, the Commission shall hear the appeal at its next regularly scheduled meeting. The Commission may take any action it considers to be fair and reasonable.

(d) When possible, the Department will notify a credit union before the Department requests legal assistance which may be charged to a credit union under 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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Commissioner
Credit Union Department
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 837-9236

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7 TAC §97.116

The Credit Union Commission (Commission) proposes new §97.116, concerning recovery of cost for extraordinary services. The proposed new rule requires a credit union to reimburse the Credit Union Department (the Department) for expenses incurred if the credit union requires more than its proportionate share of Department resources.

The new rule is proposed to more fairly allocate the cost of operating the Department among credit unions.

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

Ms. Loar has also determined that for each year of the first five years the proposed new rule is in effect, the public benefits anticipated as a result of enforcing the rule will be greater clarity and ease of use of the rule. There will be no effect on small or micro businesses as a result of adopting the rule. There is no economic cost anticipated to the credit union system or individuals for complying with the rule if adopted.

Written comments on the proposal must be submitted within 30 days after its publication in the *Texas Register* to Betsy Loar, General Counsel, Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

The new rule is proposed under Texas Finance Code, §15.402, which authorizes the Commission to adopt reasonable rules for administering Title 2, Chapter 15 and Title 3, Subtitle D of the Texas Finance Code, and under Texas Finance Code §16.003, which permits the Department to set the amount of fees, penalties, charges and revenues required to carry out its functions.

The specific sections affected by the proposed new rule are Texas Finance Code, §15.402 and §16.003.

§97.116. Recovery of Cost for Extraordinary Services.

(a) In order to mitigate the financial stress placed on credit unions to fund the Department's operations, the commissioner may seek direct reimbursement for the time and actual expenses incurred by the Department, which are unique and directly attributable to an individual credit union. Expenses include personnel costs, transportation costs, meals, lodging, and other incidental expenses.

(b) In the event the commissioner determines that the nature of a service is unusual and recovery of costs associated with the extraordinary service is appropriate, the Department shall provide advance notice to the credit union of its intention to recover expenses. Unless the credit union appeals the determination, the full amount is due when the credit union receives the bill from the Department.

(c) In seeking reimbursement, the commissioner shall consider the amount of the costs involved, the nature of the service, the impact of the activity on other Department services, and other factors deemed appropriate. The commissioner may reduce the charges and bill the credit union less than the full amount of expenses associated with the service.

(d) If a credit union files a notice of appeal, the Commission shall hear the appeal at its next regularly scheduled meeting. The Commission may take any action it considers to be fair and reasonable.

This 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 June 21, 2010.

TRD-201003544
Harold E. Feeney
Commissioner
Credit Union Department
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 837-9236

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TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 61. COMBATIVE SPORTS

16 TAC §§61.1, 61.10, 61.20 - 61.23, 61.30, 61.40 - 61.42, 61.44, 61.47, 61.80, 61.105, 61.106

The Texas Department of Licensing and Regulation ("Department") proposes amendments to existing rules at 16 Texas Administrative Code ("TAC") §§61.1, 61.10, 61.20 - 61.23, 61.30, 61.40 - 61.42, 61.44, 61.47, 61.80, 61.105 and 61.106 regarding the combative sports program.

These proposed rule changes are necessary to make appropriate clarifications in the rules for combative sports and to ensure the safety of combative sports contestants. The proposed rule changes were recommended by the Medical Advisory Commit-

tee at its meeting on October 30, 2009, and at its meeting on April 30, 2010.

The Department proposes to amend §61.1 to change the reference from the rules to the chapter as well as remove the phrase "Combative Sports" and "Texas Department of Licensing and Regulation" to maintain consistency and uniformity of the text of the Authority section of all Department rule chapters.

The Department proposes to amend §61.10 to include a new definition of "Badge" which is a department-issued credential provided to ringside officials who officiate at a combative sports event. Also included is a new definition of "Federal Identification Card" which is a nationally recognized identification card required to compete in a combative sports event. The remaining definitions are renumbered appropriately.

The Department proposes to amend §61.20(a) to clarify the current rules which require referees and ringside physicians who officiate at regulated amateur events to be licensed or registered by the executive director.

The Department proposes to amend §61.21(a)(2) to conform with the Department's criminal conviction licensing standards which prohibit an applicant from having convictions for an offense directly relating to the duties and responsibilities of a referee.

Proposed amendments to §61.21(a)(3)(B)(ii) would allow a referee to qualify for a Texas license when currently licensed and in good standing in another state whose licensing requirements are equivalent to those of Texas.

Proposed new §61.21(b) would allow the executive director to waive licensing requirements for any applicant who is licensed and in good standing with any department-approved sanctioning body such as the World Boxing Council or the World Boxing Association.

There are currently three classes of endorsements that show the class of bouts at which a referee may officiate. The proposed amendments to §61.21(c)(2) combine mixed martial arts and kickboxing into the same category of endorsement in order to simplify the endorsement process.

The Department proposes to amend §61.22(a)(2) to conform with the Department's criminal conviction licensing standards which prohibit an applicant from having convictions for an offense that directly relates to the duties and responsibilities of a judge.

Proposed amendment §61.22(a)(3)(B)(ii) would allow a judge to qualify for a Texas license when currently licensed and in good standing in another state whose licensing requirements are equivalent to those of Texas.

Proposed new §61.22(b) would allow the executive director to waive licensing requirements for any applicant who is licensed and in good standing with any department-approved sanctioning body such as the World Boxing Council or the World Boxing Association.

The Department proposes to amend §61.22(c) to allow judges applying for a license or license renewal to provide the Department with the results of a visual acuity test that has been performed within three years instead of one year, as is currently required. Because few states require ophthalmologic exams for judges, at times, judges who reside out-of-state and who are contracted to work events in Texas, are not able to do so because they have not had an eye exam within the last year. This amendment is proposed to make it less burdensome for judges from out-of-state to officiate at events in Texas.

The Department proposes to amend §61.23(c) to specify that a medical examination submitted by a fighter 36 years or older must have been performed within the previous twelve months to ensure that medical evaluations are made based upon the fighter's current medical condition.

The Department proposes new §61.23(f) to prohibit a promoter from lending his or her license to another person to promote an event. Proposed new §61.23(g) provides clarification that a promoter may work with another promoter as long as both persons are licensed.

Section 61.30 is amended at its title to change "Department" to "Executive Director" to more accurately reflect the content of the section. The Department also proposes to amend §61.30(b), (c), (f), (g)(1), (h) - (l), and (o) - (q) to add the phrase "or his designee" after the term "executive director". The proposed amendments are added to provide clarification that the executive director may designate an individual to act on his behalf in regulating combative sports events and to conform with §61.30(a) which provides that the executive director, or his designee, has complete authority over all phases of an event.

The number of knockouts, suspensions and whether or not a fighter has the physical or mental ability to defend him or herself are critical health and safety concerns to look at when determining an athlete's suitability for licensure. For this reason, the Department proposes new §61.30(d)(1) - (10) to include specific indicators that the executive director may use to evaluate a fighter's overall physical condition.

The Department proposes new §61.30(g)(2)(A) - (C) to include procedures for issuing badges to ring officials working an assigned event. Because the technical zone must be kept clear so that injured fighters get unimpeded medical care and so that ringside officials are not hindered in the performance of their duties, the proposed rule will ensure that only ringside officials authorized to work the specific event will be in the technical zone.

Proposed new §61.30(g)(6) provides that a ring official who uses his or her badge to gain entrance to an unassigned event may be removed from the rotation list.

Existing regulation permits changing a rendered decision only when the compilation of a score card shows an error that would mean the decision was given to the wrong contestant. The Department proposes new §61.30(n)(1)(A) - (C) and (n)(2) to allow the executive director to also change a rendered decision when there was a violation of the rules and regulations which affected the results of a bout or when the winner of a bout tests positive for prohibited substances.

The Department proposes to amend §61.40(a)(1)(A) to increase the surety bond requirement for promoters from $10,000 to $15,000 for guaranteeing payment of all obligations. This rule amendment is proposed to ensure that participants in a combative sports event will be compensated for their services when the promoter fails to bear financial all responsibility for the event. The Department has determined that of the claims made on surety bonds in the last several years, the $10,000 amount was not sufficient for payment of all claims. Increasing the bond amount will provide greater coverage for future claims.

The Department proposes to amend §61.40(b)(3) to add the term "boxing" before registry and to include the national registry for Mixed Martial Arts ("MMA") contestants. These amendments

are proposed to distinguish the national boxing registry from the national mixed martial arts registry and to require promoters to provide current results for MMA contestants from the MMA national registry.

The Department proposes new §61.40(b)(8) to require that the promoter designate a seating area near the technical zone for ring officials and other individuals assigned to work the event to ensure that all personnel have seating during bouts at which they are not officiating.

The Department proposes to add §61.40(b)(15) to require that a promoter schedule a minimum of six bouts for each MMA event and a maximum of 15 bouts. The remaining paragraphs are renumbered appropriately.

The Department proposes to amend §61.40(b)(16)(A) to change the term cameramen to camera operators and to add the phrase "or his designee" after the term "Executive Director".

The Department proposes to amend §61.40(b)(16)(B) to add the phrase "or his designee" after the term "Executive Director".

The Department proposes to amend §61.40(b)(16)(C) to include the terms neck brace, defibrillator, backboard, and portable suction to the portable medical equipment required to be on site for all contests. These items are currently being provided on site for all contests and this amendment reflects current emergency medical technical practices. The Department also proposes to add the phrase "or his designee" after the term "Executive Director".

The Department proposes new §61.40(b)(17) to require the promoter to pay by check or money order the licensing fees of seconds, managers or ringside physicians who are not licensed at the time of the weigh-in. This expands the current requirement the promoter has to pay the licensing fees of contestants.

The Department proposes to amend §61.40(d)(4) to change the term "sworn inventory" to "verified report" to conform to the statutory language of Texas Occupations Code §2052.152. The Department proposes an additional requirement that the report be on a department-approved form to conform to agency reporting standards.

The Department proposes to amend §61.40(d)(7) to change boxing event to combative sport event to include mixed martial arts. The proposed amendment to §61.40(d)(11) includes the phrase "or his designee" after the term "Executive Director".

The Department proposes to amend §61.40(d)(8) to include the term "deadwood" to the type of tickets the promoter is required to hold in order to conform with current industry practices.

The Department proposes new §61.40(d)(9) to specify that complimentary tickets issued in excess of twenty-five percent will be subject to the gross receipts tax.

Proposed new §61.40(d)(10) amends the method of calculating gross receipts.

Proposed new §61.40(f) clarifies the time frame in which a departmental audit will be conducted.

The Department proposes to amend §61.41(d) to clarify that the safety of the contestants "shall" be the primary concern of the referee rather than "should" be the concern of the referee to more accurately reflect the referee's responsibilities.

The Department proposes to amend §61.42(g) to clarify that judges "shall" maintain focus during the bout rather than "will" in order to more accurately reflect the judges responsibilities.

The Department proposes to amend §61.44(c) to require that the manager "or his designee" attend the referee's rules meeting prior to the first contest of an event. This amendment is proposed to address circumstances when a manager with contestants in different locations is unable to be present at both rule meetings.

The proposed amendment to §61.47(a) and new paragraphs (1) - (4) extends the age of medical examinations that a contestant must submit from thirty days to one year and ophthalmologic examinations from thirty days to six months in order to reduce the financial costs associated with medical testing.

The Department proposed amendment to §61.47(o) and new subsections (p) - (q) prohibits the use of any drugs, alcohol, stimulants or injections before or during a bout, to require an applicant or licensee to provide a urine sample at the executive director's direction and to codify a list of prohibited substances that would be conclusive evidence of a violation. The drugs proposed for inclusion in §61.47(q) are those covered by the World Anti-Doping Agency 2010 Prohibited List.

The Department, after conducting an annual fee review pursuant to Texas Occupations Code §51.202 and determining that there is sufficient revenue to cover costs of the combative sports program, proposes to amend §61.80 to reduce the licensing fees for managers, seconds, matchmakers, referees, judges and timekeepers.

The Department proposes to amend §61.105(b) to change "physicians scales" to "a department-approved scale" to also allow for the use of digital scales.

The Department proposes new §61.106(f) to include guidelines for proper hand bandaging which is regarded as an important factor in maintaining fighters' hands from being damaged. The proposed change conforms to the hand bandage requirements established by the Association of Boxing Commissions and is the current national standard.

In addition to the changes identified above, the Department has made a few grammatical and technical corrections to the rules as proposed which include changing the terms "Commission", "Department," and "Executive Director" to lower case to match the use of the terms in the statute and changing the term "contest" to "bout" to more accurately reflect the terminology of the industry.

William H. Kuntz, Jr., Executive Director has determined that, for the first five-year period the proposed amendments are in effect there will be a fiscal impact to state or local government as a result of changing the calculation of gross receipts to exempt twenty-five percent of complimentary tickets issued. Many states that host large combative sports events exempt a percentage of complimentary tickets from the calculation of gross receipts. In addition, local governments will benefit from the increased revenue generated by local hotel and motel taxes. The proposed amendment will allow the state of Texas to effectively compete with other states for televised major combative sports events that will provide significant revenue to the state's general revenue fund and offset reductions in gross receipts revenues.

Mr. Kuntz also has determined that, for each year of the first five-year period the amendments are in effect, the public will benefit from the proposed amendments to the rules as local communities hosting major combative sports events will benefit from the

increased revenue generated by hotel and motel taxes. In addition, the proposed rules will provide greater clarity and, therefore, certainty in the administration of the combative sports program.

There will be an economic effect on small or micro-businesses or to persons who are required to comply with the rules as proposed. There are approximately 55 combative sports promoters who are currently licensed with the Department all of whom would be considered micro-businesses under Texas Government Code, Chapter 2006. The anticipated economic effect on the promoters, who are required to comply with §61.40(a)(1)(A) would be the cost of underwriting a surety bond for an additional $5,000. On average, a $10,000 surety bond costs between $250 and $300 for a promoter with a good credit rating and it is anticipated that the cost of the additional coverage would increase the cost of the bond by approximately fifty percent. This would increase a promoter's cost to purchase a bond by approximately $125 to $150. Costs to promoters with substandard credit would also increase by approximately fifty percent however the amount of the increase could vary widely because of the many subjective factors bond underwriters use in setting bond costs.

While the increase in surety bonds will have an economic impact on promoters, the Executive Director is authorized to establish the amount of the surety bond under Texas Occupations Code, Chapters 51 and 2052 and the increase is necessary to ensure that contestants and other combative sports participants are compensated for their services when a promoter fails to pay.

Under Texas Government Code, Chapter 2006, the Department is required to consider alternative regulatory methods if they would be consistent with the health, safety, and environmental and economic welfare of the state. The Department has determined that there is not an alternative method to achieving the purpose of the proposed rule. Surety bonds are required to ensure that combative sports participants are compensated for their labor when a promoter fails to be responsible for the costs associated with a combative sport event. While the surety bond is necessary to protect participants, the Department has taken steps to minimize the adverse economic impact on promoters. The proposed surety bond increase has been set to be commensurate with, and not in excess of, the surety bond amount required for gross receipts taxes.

Comments on the proposal may be submitted to Caroline Jackson, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically to erule.comments@license.state.tx.us. The deadline for comments is 30 days after publication in the *Texas Register.*

The amendments are proposed under Texas Occupations Code, Chapters 51 and 2052, 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 2052. No other statutes, articles, or codes are affected by the proposal.

§61.1. Authority.

This chapter is [~~These rules are~~] promulgated under the authority of [~~the~~] Texas Occupations Code, Chapter 2052[~~, "Combative Sports"~~] and [~~the~~] Texas Occupations Code, Chapter 51[~~, "Texas Department of Licensing and Regulation"~~].

§61.10. Definitions.

The following words and terms have the following meanings:

(1) Badge--A department-issued credential provided to timekeepers, judges, referees and ringside physicians who officiate at combative sports events.

(2) [~~(1)~~] Chief second--The second designated by the contestant as the primary advisor or assistant to the contestant.

(3) [~~(2)~~] Code--The Texas Occupations Code, Chapter 2052, "Combative Sports".

(4) [~~(3)~~] Contestant--Any participant, including a professional combative sports contestant, who competes in a combative sport event regulated by the Code.

(5) [~~(4)~~] Deadwood--The numerical difference between tickets printed and tickets used.

(6) Federal Identification Card--A nationally recognized identification card issued by the National Boxing Registry or the National Mixed Martial Arts Registry required for competition in a combative sport event.

(7) Full Contact--Contact made while intentionally striking a blow with any part of the body to an opponent when the contact has the potential to temporarily disable or to injure an opponent.

(8) [~~(5)~~] Knock-down--A knock-down occurs when any part of a contestant's body, other than his feet, contacts the floor of the ring or fighting area as a result of a blow struck to the contestant by an opponent.

(9) [~~(6)~~] License or Registration--A document issued by the executive director [~~Executive Director~~] permitting a person to participate at an event or perform a function regulated by the Code.

(10) [~~(7)~~] Manager--A person who, under contract, agreement, or other arrangement with a contestant undertakes to directly or indirectly, control, or administer a professional combative sports contestant's affairs.

(11) [~~(8)~~] Matchmaker--One who arranges matches for professional combative sports contestants.

(12) [~~(9)~~] Person--Any natural person, corporation, partnership, association or other similar entity.

(13) [~~(10)~~] Purse--The financial guarantee or any other remuneration promised to contestants for participating in an event and includes guarantees for cable pay per view, radio, television or motion picture rights.

(14) [~~(11)~~] Ring Officials--Referees, judges, ringside physicians and timekeepers.

(15) [~~(12)~~] Ringside Physician--An individual licensed to practice medicine by the Texas Medical Board [~~Texas State Board of Medical Examiners~~], and registered with the department [~~Department~~].

(16) [~~(13)~~] Second--A person who provides assistance or advice to a contestant during a contest.

(17) [~~(14)~~] Technical Zone--A restricted access alcoholic beverage free area located between the ringside and a department-approved [~~department approved~~] barrier.

(18) [~~(15)~~] Timekeeper--A person who is the official timer of the length of rounds/heats and the intervals between rounds/heats and counts when a contestant is down.

[~~(16) Full Contact--Contact made while intentionally striking a blow with any part of the body to an opponent when the contact has the potential to temporarily disable or to injure an opponent.~~]

§61.20. General Licensing Requirements.

(a) Professional combative sports contestants, promoters, referees, judges, seconds, matchmakers, managers, timekeepers, ringside physicians, and event coordinators who officiate or participate in a regulated professional event[~~, other than a regulated amateur event,~~] authorized by the Code must be licensed or registered by the executive director. Referees and ringside physicians who officiate at regulated amateur events must also be licensed or registered by the executive director [~~Executive Director~~].

(b) Amateur combative sports associations must be registered by the executive director [~~Executive Director~~].

(c) If a licensee or registrant, other than a contestant or a second, changes his address of record, the licensee or registrant shall inform the executive director [~~Executive Director~~] in writing of the change within 30 days of the change.

(d) Each applicant must submit a completed application or renewal form and the appropriate fees.

(e) All licensing requirements for contestants should be completed at least 72 hours before an event [~~a contest~~].

§61.21. Licensing Requirements--Referees.

(a) To qualify for a new license as a referee, an applicant must:

(1) be at least 21 years of age;

(2) provide information sufficient for the department to verify that the applicant has not been convicted of an offense that directly relates to the duties and responsibilities of a referee [~~not have been convicted of a felony~~];

(3) demonstrate the ability to perform the functions of a referee by:

(A) having completed a training program provided by, or approved by the executive director [~~Executive Director~~], that consists of classroom training and an internship program; or,

(B) meeting one or more of the following:[~~:~~]

(i) having at least three years active experience as a referee in the combative sport in which he seeks endorsement by having officiated in at least ten combative sporting events per year;

(ii) being currently licensed and in good standing as a referee in a state that the executive director [~~Executive Director~~] has determined has licensing requirements that are equivalent to Texas' requirements; or

(iii) having formerly held a Texas referee's license that lapsed in good standing.

(b) These requirements may be waived by the executive director for any applicant who is licensed and in good standing as a referee with any department-approved sanctioning body such as the World Boxing Council, World Boxing Association, International Boxing Federation, or World Boxing Organization.

(c) [~~(b)~~] Referee licenses will be endorsed showing each class of bouts in which they may officiate with one or more of the following legends:

(1) B (Boxing); and

(2) M (Mixed martial arts and Kickboxing). [~~K (Kick-boxing); and~~]

[~~(3) M (Mixed martial arts).~~]

(d) [~~(c)~~] An endorsement may be obtained by completion of classroom training and an internship program provided or approved by the executive director [~~Executive Director~~] for that class of endorsement.

(e) [~~(d)~~] Persons renewing licenses, or obtaining new licenses on the basis of holding a license from another state or formerly having held a Texas license, may obtain one or more endorsements by providing proof acceptable to the executive director [~~Executive Director~~] of previous experience refereeing contests in the class of endorsement(s) sought.

(f) [~~(e)~~] Referees must have an endorsement for a class in order to referee events in that class.

§61.22. Licensing Requirements--Judges.

(a) To qualify for a new license as a judge, an applicant must:

(1) be at least 21 years of age;

(2) provide information sufficient for the department to verify that the applicant has not been convicted of an offense that directly relates to the duties and responsibilities of a judge; [~~not have been convicted of a felony; and,~~]

(3) demonstrate the ability to perform the functions of a judge by:

(A) having observed and completed score cards for all contests in at least five events while under the supervision of the department [~~Department~~] and scoring the contests in keeping with standards established by the executive director [~~Executive Director~~]; or,

(B) meeting one or more of the following:

(i) having at least three years active experience as a judge and/or referee by having officiated in at least ten combative sporting events per year;

(ii) being currently licensed and in good standing as a judge in a state that the executive director [~~Executive Director~~] has determined has licensing requirements that are equivalent to Texas' requirements; or

(iii) having formerly held a Texas judge's license that lapsed in good standing.

(b) These requirements may be waived by the executive director for any applicant who is licensed and in good standing as a judge with any department-approved sanctioning body such as the World Boxing Council, World Boxing Association, International Boxing Federation, or World Boxing Organization.

(c) [~~(b)~~] To obtain or renew a license, a judge must provide test results showing visual acuity in each eye of at least 20/40 corrected. The test must have been performed by a licensed Optometrist or licensed Ophthalmologist no more than three years [~~one year~~] before the application for licensure or license renewal is filed.

§61.23. General Prohibitions.

(a) Judges, Timekeepers, Matchmakers, Referees and Ringside Physicians may not have a direct or indirect financial interest in any contestant.

(b) Contestants and ring officials licensed under the Code may not participate in an illegal event.

(c) Persons under the age of 17 will not be issued a license. Minors age 17 but not yet 18 may be issued a contestant's license with a notarized written consent from a parent or guardian. A person age

36 or older applying for a contestant's license shall also submit a report of favorable physical testing conducted within the previous twelve months including but not limited to an EEG (electroencephalography), and an EKG (electrocardiogram). The applicant may request an administrative hearing if the executive director [~~Executive Director~~] determines the physical testing results are not favorable in any way and fails to issue a license for that reason.

(d) A matchmaker may not act as, and may not be licensed as; a contestant, ring official or second.

(e) A promoter may not act as, and may not be licensed as; a referee, timekeeper, or judge. A promoter may be licensed as a manager and as a second. A promoter may be licensed as a contestant unless prohibited by Federal law.

(f) A promoter shall not permit his promoter's license to be used by another person.

(g) Licensed promoters may engage in promotions with other licensed promoters so long as each promoter holds a valid unexpired license.

(h) [~~(f)~~] No person shall be allowed to participate in an event [~~a contest~~] performing a function for which a license is required, unless the person has proof of identification and a current license. Acceptable proof of identification includes driver's licenses, passport, state issued identification cards, federal identification [~~boxing~~] cards, or any other identification required by the executive director [~~Executive Director~~].

(i) [~~(g)~~] A contestant [~~Contestant~~] may not act as, and may not be licensed as a judge [~~Judge~~].

(j) [~~(h)~~] A person [~~Person~~] who is an officer or director of a Ranking Organization may not act as, and may not be licensed as a judge [~~Judge~~].

§61.30. Responsibilities and Authority of the Executive Director [~~Department~~].

(a) The executive director [~~Executive Director~~], or his designee, has complete authority over all phases of an event, including, but not limited to the weigh-in, matching of contestants, entrance to the forum, access [~~passes~~] to the technical zone, audit of ticket sales, [~~and~~] payment of purses and changing of a rendered decision in accordance with subsection (n).

(b) For all professional events [~~contests~~] the executive director, or his designee, [~~Executive Director~~] will assign the timekeepers, referees, ringside physicians and judges.

(c) In title and championship bouts [~~contests,~~] the executive director, or his designee, [~~Executive Director~~] will consult with the sponsoring or sanctioning bodies on the assignment of judges and referees. The executive director, or his designee, [~~Executive Director~~] will make assignments for such bouts [~~contests~~].

(d) The executive director, or his designee, will evaluate an applicant's or licensee's fitness for licensure as a contestant based on the totality of his or her physical condition, taking into account the following indicators:

(1) under the age of 18;

(2) actual age;

(3) number of bouts;

(4) number of rounds fought;

(5) number of identified injuries;

(6) number of knockouts and technical knockouts suffered within the last 12 months, specifically those where the contestant lost consciousness;

(7) periods of inactivity in excess of 12 calendar months;

(8) ring record for the past twenty-four months;

(9) weight, including fluctuations in weight; and

(10) any health or mental condition that may contribute to the lack of ability to perform.

(e) [~~(d)~~] The executive director [~~Executive Director~~] may request medical tests to prove gender of a contestant.

(f) [~~(e)~~] The executive director, or his designee, [~~Executive Director~~] may recognize and enforce disciplinary sanctions, disqualification, or medical suspensions imposed by other combative sport authorities. If the executive director, or his designee, [~~Executive Director~~] proposes to deny licensure based on action of another jurisdiction, the applicant has a right to an opportunity for a hearing.

(g) [~~(f)~~] Selection and Assignment of Ring Officials

(1) The executive director, or his designee, [~~Executive Director~~] will assign ring officials on a rotational basis from lists of licensees and registrants. Assignments will be made to ensure the highest degree of safety for contestants. The department [~~Department~~] will assist license holders and registrants in developing expertise in the combative sports of their choice, to include training and shadow officiating.

(2) To officiate at an assigned event, a ring official will be issued a department badge after executing a signed acknowledgement agreeing to the following terms.

(A) The badge is the property of the department and may only be used at an event to which the ring official has been assigned.

(B) A ring official shall surrender the badge at any time at the direction of the executive director, or his designee, if used to gain access to a regulated event the ring official has not been assigned to work or for any other reason that violates department rules or the code.

(C) Failure to surrender the badge upon direction of the executive director, or his designee, may result in disciplinary action and removal from the rotation list.

(3) [~~(2)~~] The key determining factors for assigning ring officials are:

(A) the ring official's level of expertise in connection with the level of expertise required for a particular bout [~~contests~~] and a particular combative sport;

(B) the location of the event;

(C) the location of the licensee's residence; and

(D) any other factors as determined by the executive director [~~Executive Director~~].

(4) [~~(3)~~] A ring official who declines to work an event, will miss his rotation.

(5) [~~(4)~~] The name of a ring official who declines to work an event five times in succession will be taken off of the rotation [~~rotational~~] list.

(6) A ring official who uses his badge to gain access to a regulated event to which he has not been assigned or who violates department rules or the code may be removed from the rotation list.

(7) [~~(5)~~] In order to be reinstated on the rotation list, an official may be required to complete additional training as determined by the executive director [~~Executive Director~~].

(8) [~~(6)~~] If a ring official under this subsection substitutes for another who declined to work an event, the substituting official does not lose his place on the rotation [~~rotational~~] list.

(h) [~~(g)~~] The executive director, or his designee, [~~Executive Director~~] shall assign two timekeepers for each event, one to keep time and one to count for knock-downs.

(i) [~~(h)~~] The executive director, or his designee, [~~Executive Director~~] may eject any person from an event who violates department [~~Department~~] rules or the Code.

(j) [~~(i)~~] The executive director, or his designee, [~~Executive Director~~] will not approve matches between contestants in different weight categories, except by weight tolerances as stated in §61.105.

(k) [~~(j)~~] The executive director, or his designee, [~~Executive Director~~] will not approve matches between genders.

(l) [~~(k)~~] The executive director, or his designee, [~~Executive Director~~] may waive the application of a rule to an event if he determines that such waiver will not negatively affect the safety of any contestant and that the spirit of the Code and this chapter [~~these rules~~] is served by such waiver. The waiver must be in writing or later confirmed in writing.

(m) [~~(l)~~] Licensure or registration does not automatically authorize an individual to participate in an event.

(n) [~~(m)~~] A decision rendered after a contest is final and shall not be changed unless :

(1) following the rendition of a decision the executive director determines that any one of the following occurred: [~~Executive Director, after a review of the judges' scorecards, finds that a clerical or mathematical error resulted in an incorrect decision.~~]

(A) the compilation of the score card of the judges shows an error which would mean that the decision was given to the wrong contestant;

(B) there was a violation of the laws or rules and regulations governing combative sports which affected the result of any bout; or

(C) the winner of a bout tested positive immediately after the bout for a substance listed in §61.47(q).

(2) If the executive director determines that any of paragraph (1)(A) - (C) occurred with regards to any bout then the decision rendered shall be changed as the executive director may direct.

(o) [~~(n)~~] The executive director, or his designee, [~~Executive Director~~] may approve championship or title bouts [~~contests~~] if the department [~~Department~~] has recognized the sponsoring sanctioning organization as a legitimate combative sport organization.

(p) [~~(o)~~] The executive director, or his designee, [~~Executive Director~~] may require of a contestant, neurological or other medical testing.

~~[(p) The Executive Director may order a drug screen at any time for good cause. If a drug screen is performed the contestant is responsible for paying the costs of the drug screen.]~~

(q) The executive director, or his designee, [~~Executive Director~~] shall have sole control over the technical zone [~~Technical Zone~~] including but not limited to who may be admitted to the zone.

§61.40. Responsibilities of the Promoter.

(a) Bond and Insurance Requirements for Promoters

(1) At the time of licensure and upon each renewal, a promoter applicant must submit to the department [~~Department~~] proof of financial responsibility by:

(A) submitting a $15,000 [~~$10,000~~] surety bond written by a bonding company authorized to do business in the State [~~state~~] of Texas guaranteeing payment of all obligations, except gross receipts taxes, arising out of events promoted by the applicant which shall remain in effect for four years after the effective cancellation date; and

(B) submitting a $15,000 surety bond, written by a bonding company authorized to do business in the State of Texas, guaranteeing payment of gross receipts taxes owed for promoted events, which shall remain in effect for four years after the effective cancellation date.

(2) The promoter shall provide insurance and pay all deductibles for contestants, to cover medical, surgical and hospital care with a minimum limit of $50,000 for injuries sustained while participating in a contest and $100,000 to a contestant's estate if he dies of injuries received while participating in a contest. The insurance premium and deductibles shall not be deducted from the contestant's purse. At least ten calendar days before an event, the promoter shall provide to the department [~~Department~~] for each event sponsored, a certificate of insurance showing proper coverage. The promoter shall supply to those participating in the event the proper information for filing a medical claim.

(b) A promoter [~~Promoter~~] shall:

(1) Bear all financial responsibility for the event.

(2) Provide the department [~~Department~~] written notice of all proposed event dates, ticket prices, and participants of the main event, at least 21 days before the proposed event date and obtain written approval from the department [~~Department~~] to promote the event prior to advertising or selling tickets. Promoters who have cancelled or postponed two events in sequence after having obtained departmental [~~Departmental~~] approval for the events will be required to pay the permit fee set out in §61.80(c) [~~(b)~~] at the time the 21 day notice is filed. The fee will not be refunded.

(3) Obtain written departmental approval for the fight card at least 10 working days before the event date. The request shall contain the full legal name, address, date-of-birth, Texas contestant license number, Federal Identification number, weight, previous fight record (by supplying current results from the contestant's boxing registry recognized by the Professional Boxing Safety Act of 1996, 15 USC §§6301-6313 or from Mixed Martial Arts, LLC the national registry for MMA contestants), and number of rounds to be fought for each contestant. In addition, the department [~~Department~~] may require submission of certified birth certificates or other official evidence of identification.

(4) Provide written notice to the department [~~Department~~] of any change in the card before the scheduled weigh-in. Notices announcing changes or substitutions in the card must also be conspicuously posted at the box office and announced from the ring before the opening bout [~~contest~~].

(5) Provide to the department [~~Department~~], written notice of any change in the announced or advertised location, time or card cancellations before the scheduled weigh-in.

(6) Provide two ringside physicians, registered by the department [~~Department~~], for each event.

(7) Provide at least one registered physician to conduct pre-fight physicals. The department [~~Department~~] may require additional physicians depending on the event size. Provide a private area for the ringside physician to perform pre-fight examinations.

(8) Provide a sufficient number of seats in a department-designated area located in close proximity to the technical zone for use by ring officials and other individuals authorized and/or assigned by the department to work the event.

(9) [~~(8)~~] Assure that beverages are only allowed in paper or plastic cups at the event.

(10) [~~(9)~~] Immediately after the event, compensate the ringside physicians, timekeepers, judges, referees and contestants. Payment of percentage contracts shall be made when the amount can be determined. Payments that do not require additional accounting or auditing, shall be made in the presence of an authorized department [~~Department~~] representative.

(11) [~~(10)~~] Provide no less than two private dressing rooms of adequate size for the contestants and their licensed managers, and seconds, and separate dressing rooms for male and female contestants. Only working department [~~Commission~~] employees, contract inspectors, media, physicians, licensed working ring officials, promoter, matchmaker, manager and seconds will be allowed in the dressing rooms.

(12) [~~(11)~~] Ensure that no alcoholic beverages or illegal drugs are in the dressing room.

(13) [~~(12)~~] Ensure the safety of the contestants, officials, and spectators.

(A) There shall be a pre-fight plan and route to remove an injured contestant from the ring and arena. The [~~Upon request, the~~] promoter shall inform the department [~~Department~~] of the plan which [~~these plans. The plan~~] shall include the name and location of a local hospital emergency room.

(B) A sufficient number of security personnel shall be retained to maintain order.

(14) [~~(13)~~] Schedule no less than 24 or more than 60 rounds for each boxing event. No bout [~~event~~] shall exceed 10 rounds, except a championship or title bout [~~contest,~~] which shall not exceed 12 rounds. A sparring or exhibition bout [~~event~~] shall not exceed three rounds.

(15) Schedule no less than 6 or more than 15 bouts for each mixed martial arts event.

(16) [~~(14)~~] Ensure that the rules in §61.106 [~~set forth herein below~~] regarding equipment and gloves that apply to a particular type of event are followed and that each event is conducted in compliance with the following:

(A) The ring apron shall be kept clear at all times of objects including, but not limited to: cameras, microphones, and advertisements. A separate camera platform at a neutral corner of the ring for use by camera operators [~~cameramen~~] may be provided. Camera operators [~~Cameramen~~] may be allowed on the ring apron during rest periods, between bouts, or at the discretion of the executive director, or his designee [~~Executive Director~~]. No seats may be sold at the ring apron.

(B) The technical zone [~~Technical Zone~~] shall be set up for the department [~~Department~~], according to the instructions of the executive director or his designee [~~Executive Director's instructions~~].

(C) All emergency medical personnel and portable medical equipment shall be located within the technical zone [~~Technical Zone~~] during the event. There must be a resuscitator, oxygen, stretcher, a certified ambulance, neck brace, defibrillator, backboard, portable suction, and an emergency medical technician on site for all contests. The executive director, or his designee, [~~Executive Director~~] may require additional medical personnel and equipment depending on the number of matches scheduled.

(D) The judges' chairs shall be high enough that their shoulders shall be no lower than the ring floor. Physician ringside seats shall be in the neutral corner(s).

(E) There shall be at least one, but no more than three, authorized promoter representative(s) at ringside at all times. Only the promoter's representative(s), department [~~Department~~] officials, the press, physicians, representatives of sanctioning bodies, and judges shall sit at the ringside tables. For purposes of this subparagraph [~~rule~~], an event coordinator is a representative of the promoter.

(17) Pay by check or money order the licensing fee of any contestant, second, manager, or ringside physician who intends to participate in a scheduled combative sports event and who is not licensed at the time of the event weigh-in.

~~[(15) In the event that a person who is intended to be a Contestant is not licensed at the time of the weigh-in it is the promoter's responsibility to pay the licensing fee by check or money order. No cash will be accepted.]~~

(18) [~~(16)~~] Supervise the activities of employees and event coordinators to assure that promoted events are conducted in compliance with this chapter [~~these rules~~] and applicable statutes.

(19) [~~(17)~~] Ensure that all advertising concerning an event he promotes accurately describes the event and does not include the names of any person or entity, other than the promoter, as a presenter of the event.

(c) Contract requirements between Promoter and Contestant.

(1) The promoter for an event shall have contracts with contestants executed in triplicate on department [~~Department~~] forms showing the amount of guarantee or percentage promised the number and time limit of rounds, when and where the contestants are scheduled to appear, weight category, and other pertinent details governing the event. If applicable, the compensation section must include the specifics of television, radio and cable rights. The contract must define and provide for agreement on compensation if the opponent fails to appear at the weigh-in or bout. All contracts must state the dollar amount or percentage withheld for expenses, taxes, advances, sanctions or any other items the promoter seeks to subtract from a contestant's purse.

(2) The promoter shall furnish one executed copy of the contract to the contestants or their managers, retain one, and submit one to the department [~~Department~~].

(3) All required information must be typed or legibly printed, and the contestant and promoter shall initial any changes or addenda.

(d) Tickets

(1) All tickets shall have printed on each half, the price including any service surcharge or handling fee, and event date.

(2) Roll tickets with consecutive numbers shall be sold only at the box office on the day of the event [~~show~~].

(3) If there is no ticket manifest, tickets of different prices shall be printed on different colored ticket stock.

(4) The promoter shall submit a verified report [~~sworn inventory~~] to the department [~~Department~~] of tickets delivered to any outlet or event sponsor. The report [~~inventory~~] shall account for any known overprints, changes, or extras and must be on a department-approved form.

(5) Tickets shall not be sold for more than the actual capacity of the location where the event is held.

(6) All tickets shall be torn in half and one half returned to the ticket holder at the entrance gate. The other half shall be immediately deposited in a sealed container, where it is to remain until the department's [~~Department's~~] representative witnesses the opening of the container. No one shall pass through the gate without having their ticket torn or shall occupy a seat unless holding a ticket half or have a working pass or credential with a specific seat assignment indicated on them. Passes and or credentials may not be sold or bartered.

(7) If a main event or special added attraction is postponed or cancelled for any reason, the promoter shall promptly refund ticket sales. A special added attraction is the appearance of any person or persons at any combative sports [~~boxing~~] event whose reputation or ability is calculated to increase attendance. Tickets in the hands of ticket services shall be returned to the promoter not later than when the box office at the combative sports [~~boxing~~] event site has closed.

(8) Promoters shall hold tickets of every description used for any event, including deadwood, for at least 30 days after the event. The tickets shall be kept in separate packages for each event for audit purposes.

(9) The promoter shall be responsible to pay the gross receipts tax for complimentary tickets issued in excess of 25%.

(10) Gross receipts shall be calculated as 3% of the face value of all tickets sold plus 3% of the face value of all complimentary tickets issued in excess of 25%.

[~~(9) When computing gross receipts, the face value of tickets, except deadwood, shall be included whether the tickets were sold for cash, given away, or bartered for services provided.~~]

(11) [~~(10)~~] Tickets shall be accounted for after the event and the executive director, or his designee, [~~Executive Director~~] may review the process, and may check the number of gate ticket containers and their seals or padlocks.

(e) A promoter shall submit to the department [~~Department~~] a tax report and a 3% gross receipts tax payment within three business days of an event.

(f) In the event of a departmental audit of a tax report authorized by §2052.152, of the Texas Occupations Code, a person subject to the financial audit shall make available used tickets, deadwood and additional exhibits to the department in the form and at a time established by the executive director, or his designee.

§61.41. Responsibilities of the Referee.

(a) Referees are responsible for enforcing the rules of the bouts [~~contest~~] and shall exercise immediate authority, direction and control over bouts [~~contests~~]. The referee shall conduct a rules meeting before the first bout of the event.

(b) The referee may eject from an event any person who violates the Code or department [~~Department~~] rules. If a second violates this chapter [~~these rules~~] or the Code, the referee may disqualify the seconds' contestant.

(c) If an assigned referee is unable to officiate, he shall notify the department [~~Department~~] at least five hours before the event [~~contest~~].

(d) The safety of contestants shall [~~should~~] be the primary concern of the referee at all times. The referee may stop any bout [~~contest~~]:

(1) where there is reason to believe that continuing may result in serious injury to either contestant;

(2) if a contestant cannot defend himself;

(3) because of an injury or a contestant's poor physical condition; or

(4) if the referee feels that a contestant is not fighting in earnest.

(e) If a contestant is accidentally fouled, including a head butt but can continue, the referee may stop the bout [~~contest,~~] for a reasonable time, and inform the judges and the contestant's second of the accidental injury.

(f) If a mouthpiece is knocked out, the referee shall call time during a break in the action, the contestant's second will clean and reinsert the mouthpiece. If the mouthpiece is spit out the same procedure will be followed and the referee may [~~can~~] charge the contestant with a foul.

(g) The referee or executive director [~~Executive Director~~] may disqualify a contestant and declare the opponent the winner after one warning by the referee or a department [~~Department~~] representative for the use of profanity, obscene or threatening gestures by a contestant, his manager, or his second.

(h) When a foul occurs, the referee shall call time and advise the judges of the foul and the number of points they should deduct.

(i) Before each bout, the referee shall call the contestants and their chief seconds together for final instructions. The referee shall hold the chief second responsible for his contestant's conduct during the bout [~~contest~~].

(j) When a low blow incapacitates a contestant, the referee shall give him reasonable time to recover. The referee may confer with the ringside physician. If a contestant shows an unwillingness to continue because of a low-blow claim, and the referee has resumed the fight, that contestant shall be declared the loser by a technical knockout.

(k) Knock-downs.

(1) When a blow to a contestant causes a knock-down, the referee shall order the opponent to go to the ring's farthest neutral corner, pointing to the corner, and immediately pick up the timekeeper's count.

(2) The referee shall audibly announce the passing of the seconds, accompanying the count with upward motions of his arm for each second and indicating the count with visual finger counts after each second.

(3) The referee shall stop counting if the opponent does not remain in the neutral corner until the count is complete.

(4) A contestant who is knocked down shall not be allowed to resume until the referee has finished counting to eight.

(5) If a contestant who is knocked down rises before the count of ten and goes down again without being struck, the referee shall resume the count where he stopped.

(6) When a round ends before a contestant who was knocked down rises, the bell shall not ring, and the count shall continue. If the contestant rises before the count of ten, the bell shall ring ending the round.

(7) If the contestant who is knocked down does not rise before the count of ten, the referee shall declare the opponent the winner by a knockout.

(8) If the contestant appears to be seriously injured, without beginning a count, the referee may summon the ringside physician into the ring, and declare the bout terminated by knockout.

(9) The referee's count is the official count.

(l) If a contestant does not answer the bell signifying the start of a round, the referee shall give a ten count and declare him the loser by a technical knockout.

(m) If a contestant who has been knocked out of the ring or has fallen out of the ring during the bout [~~contest~~] fails to return immediately, the referee shall give the contestant 20 seconds to return to the ring. After a 20 second count, if the contestant has not returned to the ring, the referee shall count the contestant out as if he were down. No one may help contestants back into the ring.

(n) If during the first four rounds a contestant is accidentally injured, and is unable to continue, or is pushed, knocked or falls out of the ring, and is injured by the fall and unable to return, the referee shall declare the bout a no decision. If such injury occurs during later rounds, all completed rounds and the partial round in which the bout is terminated shall be scored and the contestant ahead on points shall be declared the winner by technical decision.

(o) A licensed referee may act as a judge or a timekeeper.

(p) All referees must attend the rules meeting prior to the first bout [~~contest~~] of an event.

§61.42. Responsibilities of Judges.

(a) A majority vote of the judging officials decides the outcome of the bout [~~contest~~].

(b) If an assigned judge is unable to officiate, he shall notify the department [~~Department~~] at least five hours before the event [~~contest~~].

(c) If a contest is stopped before the end of the fourth round because of an accidental foul, the bout [~~contest~~] shall be declared a no decision. If after the fourth round an accidental foul injury occurs or worsens and the bout [~~contest~~] is stopped, all completed and partial rounds shall be scored. The contestant ahead on points shall be declared the winner by technical decision.

(d) Scoring shall be recorded only on a department [~~Department-approved~~] form. Once the form is completed, checked and signed by the official it must be given directly to the department [~~Department~~] supervisor for the event. Scoring forms are the property of the department [~~Department~~] and will be maintained in the official records of the event.

(e) In all bouts [~~contests~~], the total points the judges give each contestant may be announced.

(f) A licensed judge may act as a timekeeper.

(g) A judge shall [~~will~~] at all times during a bout [~~contest~~] maintain focus on the bout [~~contest~~] even during rest periods. In order to maintain focus, judges shall [~~will~~] not engage in distractions including but not limited to: eating, talking, taking photographs, or carrying materials not related to the bout [~~contest~~].

§61.44. Responsibilities of Managers.

(a) Managers shall deal fairly with contestants.

(b) It is the contestant and manager's joint responsibility to comply with all requirements, including rest periods and medical suspensions.

(c) Managers or their designees, must attend the referee's rules meeting conducted prior to the first bout [~~contest~~] of an event.

§61.47. Responsibilities of Contestants.

(a) Medical Examinations. Each contestant applying for a license, or license renewal, shall submit on a department-approved [~~department approved~~] form signed by an examining physician and an examining ophthalmologist or optometrist:

(1) Proof [~~proof~~] of having passed a comprehensive medical examination within the previous twelve months; and

(2) Proof of having passed an ophthalmologic medical examination within the previous six months.

(3) The comprehensive medical examination must also include proof [~~thirty days of the date the application is signed by the applicant. Examining physicians, optometrists, and ophthalmologists must be licensed by a state, district or territory of the United States of America. The exam must include an ophthalmologic medical examination completed by an Ophthalmologist or Optometrist and must indicate~~] that within the last six months, the applicant has been tested for and is free of the Hepatitis C virus and the human immunodeficiency virus (HIV), and that the applicant is not acutely or chronically infected with the Hepatitis B virus by testing the Hepatitis B surface antigen for a non-reactive result, or by other medically acceptable testing procedure that establishes the absence of Hepatitis B infectivity.

(4) Examining physicians, optometrists, and ophthalmologists must be licensed by a state, district or territory of the United States of America.

(b) A contestant applicant must submit to the department [~~Department~~] all information required by the department's [~~Department's~~] application.

(c) A contestant may not perform under any name that does not appear in departmental records.

(d) Contestants shall report to the weigh in at the scheduled time.

(e) Contestants shall in good faith perform to the best of their abilities.

(f) A contestant who commits a foul under this chapter [~~these rules~~] is subject to administrative sanctions and or penalties in addition to losing points during a contest.

(g) Arguing with an official or refusing to obey the orders of an official is prohibited.

(h) Contestants shall compete in proper ring attire. The trunks' waistband shall not extend above the waistline and the hem may not extend more than two inches below the knee. Ring attire may not have sequins, buttons, tassels or any other decorative items that may become detached during a bout [~~contest~~]. A fitted mouthpiece shall be worn while competing. Shoes shall be of soft material and shall not be fitted with spikes, cleats, or hard heels. Contestants may not participate in any bout [~~contest~~] while wearing jewelry, including but not limited to, watches, rings, necklaces, bracelets, earrings, any type of stud used to penetrate body piercings.

(i) All contestants shall be in the dressing room at least 45 minutes before the event is scheduled to begin. The contestants shall be ready to enter the ring immediately after the preceding bout [~~contest~~] is finished.

(j) After receiving final instructions from the referee, contestants may touch gloves or shake hands and then shall retire to their corners.

(k) After the referee or judge's decision has been announced, both contestants and their seconds shall leave the ring when requested to do so by the referee.

(l) Every contestant shall undergo a pre-fight physical examination. If a contestant's physical exam shows him unfit for competition, the contestant shall not participate in the contest. The manager, chief second, or contestant shall make an immediate report of the facts to the promoter and the department [~~Department~~].

(m) If a contestant becomes ill or injured and cannot take part in a bout [~~contest~~] for which he is under contract, he, his chief second, or his manager shall immediately report the facts to the promoter and the department [~~Department~~]. The contestant must submit to the department [~~Department~~] medical proof of the injury or illness.

(n) A positive Hepatitis C, or human immunodeficiency virus (HIV) test, or a positive Hepatitis B surface antigen test or other indication of Hepatitis B infectivity will result in disqualification.

(o) The administration or use of any drugs, [~~or~~] alcohol, stimulants, or injections in any part of the body, either before or during[~~, or up to 24 hours before~~] a bout to or by a contestant [~~contest~~] is prohibited unless a drug is prescribed, administered or authorized by a licensed physician and the executive director [~~Executive Director~~] authorizes the contestant to use the drug. If a contestant is taking prescribed or over the counter medication, he/she must inform the executive director [~~Executive Director~~] of such usage at least 24 hours prior to the bout [~~contest~~].

(p) A person who applies for or holds a license as a contestant shall provide a urine specimen for drug testing either before or after the bout, if directed by the executive director or his designee. The applicant or licensee is responsible for paying the costs of the drug screen.

(q) A positive test (which has been confirmed by a laboratory authorized by the executive director or his designee) for any of the following substances shall be conclusive evidence of a violation of subsection (o).

(1) Stimulants

(2) Narcotics

(3) Cannabinoids (marijuana)

(4) Anabolic agents (exogenous and endogenous)

(5) Peptide hormones

(6) Masking agents

(7) Diuretics

(8) Glucocorticosteroids

(9) Beta--2 agonists (asthma medications)

(10) Anti-estrogenic agents

(11) Alcohol

(r) [~~(p)~~] As a condition of licensure, contestants waive right of confidentiality of medical records relating to treatment or diagnosis of any condition that relates to the contestant's ability to participate in a bout [~~contest~~]. All medical records submitted to the department [~~Department~~] are confidential, and shall be used only by the executive director [~~Executive Director~~] or his [~~his/her~~] representative for the purpose of ascertaining the contestant's ability to be licensed or participate in a bout [~~contest~~].

(s) [~~(q)~~] Medical disqualification of a contestant is for his own safety and may be made at the recommendation of the examining physician or the department [~~Department~~]. If a contestant disagrees with a medical disqualification, medical suspension or rest period set at the discretion of a ringside physician or a disqualification set by the department [~~Department~~], he may request a hearing to show proof of fitness. The hearing shall be provided at the earliest opportunity after the department [~~Department~~] receives a written request from the contestant or his manager.

(t) [~~(r)~~] The following are gender specific provisions.

(1) Male contestants must wear a protection cup, which shall be firmly adjusted before entering the ring.

(2) Female contestants:

(A) Must wear garments that cover their breasts;

(B) Shall submit to a pregnancy test at weigh-in;

(C) Will be disqualified by a positive pregnancy test; and,

(D) May wear breast protection plates.

(u) [~~(s)~~] Contestants must attend the referee's rules meeting conducted prior to the first bout [~~contest~~] of an event.

§61.80. Fees.

(a) The annual fee shall accompany each license or registration application or renewal as follows.

(1) Promoter--$900

(2) Contestant--$20

(3) Manager--$100 [~~$200~~]

(4) Second--$20 [~~$30~~]

(5) Matchmaker--$100 [~~$175~~]

(6) Referee--$125 [~~$250~~]

(7) Judge--$100 [~~$200~~]

(8) Timekeeper--$30 [~~$40~~]

(9) Ringside Physician--$25

(10) Amateur Combative Sports Association--$50[~~.~~]

(11) Event Coordinator--$200

(b) Four year Federal Identification card--$20

(c) Permit Fee--$100 per live professional event and the simultaneous telecast of a live contest on a closed circuit telecast in which fees are charged for admission.

(d) A fee submitted to obtain a license, permit or registration is nonrefundable.

§61.105. Weight Categories and Weigh-in--Boxing and Kickboxing.

(a) A promoter [~~Promoter~~] shall assure that the weigh-in takes place at a specific time set by the promoter and approved by the department [~~Department~~], generally between the hours of 2 p.m. of the day before the contest and 12 noon the day of the contest. The department [~~Department~~] must be notified ten days before the event.

(b) A department-approved scale [~~Physician's scales~~] must be used for weighing-in contestants. The department [~~Department~~] may require that the scales be certified.

(c) Contestants failing to meet contract weight shall have two hours to meet the allowances and be reweighed.

(d) No contestant may engage in a contest where the weigh-in weight difference between contestants exceeds the allowance shown in the following "WEIGHT ALLOWANCE" schedule:

(1) 112 lbs. or under--3 lbs.

(2) 113-118 lbs.--4 lbs.

(3) 119-126 lbs.--5 lbs.

(4) 127-135 lbs.--6 lbs.

(5) 136-147 lbs.--8 lbs.

(6) 148-160 lbs.--10 lbs.

(7) 161-175 lbs.--12 lbs.

(8) 176-200 lbs.--15 lbs.

(9) 201 lbs. or over--No limit

(e) If a contestant's body weight at the time of weigh-in is 5% or more over his contracted weight, he shall be disqualified for the contest.

(f) If in an attempt to make weight, a contestant shows evidence of dehydration, having taken diuretics, or other drugs, or having used any other harsh modality, the department [~~Department~~] shall disqualify the contestant on the advice of the examining physician.

(g) Weight Divisions. The weight classes for boxing and kickboxing contests or exhibitions are shown in paragraphs (1) - (15) [~~the schedule below~~]. A contestant in a weight class may participate in a bout with a contestant in an adjacent weight class so long as their weight difference falls within the weight allowance shown in subsection (d) [~~of this section above~~] for the weight of the contestant weighing the least.

(1) Flyweight--up to 112 lbs.

(2) Super Flyweight--over 112 to 115 lbs.

(3) Bantamweight--over 115 to 118 lbs.

(4) Super Bantamweight--over 118 to 122 lbs.

(5) Featherweight--over 122 to 126 lbs.

(6) Super Featherweight--over 126 to 130 lbs.

(7) Lightweight--over 130 to 135 lbs.

(8) Super Lightweight--over 135 to 140 lbs.

(9) Welterweight--over 140 to 147 lbs.

(10) Super Welterweight--over 147 to 154 lbs.

(11) Middleweight--over 154 to 160 lbs.

(12) Super Middleweight--over 160 to 168 lbs.

(13) Light Heavyweight--over 168 to 175 lbs.

(14) Cruiserweight--over 175 to 200 lbs.

(15) Heavyweight--over 200 lbs.

§61.106. Ring and Glove Requirements--Boxing and Kickboxing Contests.

(a) The ring shall be set up at least two hours before the contest is scheduled to begin.

(b) Except as specifically otherwise authorized by the executive director [~~Executive Director~~], rings shall meet the following:

(1) Rings shall be square with sides not less than 16 feet or more than 24 feet inside the ropes, and the floor shall extend at least 24 inches beyond the ropes on all sides, and shall be of at least 3/4-inch material, adequately supported, and padded with ensolite or similar closed-cell foam that is at least 1-inch thick;

(2) The padding shall extend over the edge of the ring platform and have a top covering of canvas, duck, or similar material approved by the department [~~Department~~];

(3) The covering shall be clean and be tightly stretched and laced to the ring platform and may not have tears, holes or overlapping seams;

(4) The ring platform shall have at least three sets of steps into the ring during a contest: one set for each contestant's corner and one set in the neutral corner to be used for the ringside physician and the department [~~Department~~];

(5) The ring corners shall be protected inside the ring with a urethane pad at least six inches wide, and shall be covered with material similar to the ring floor covering, and the covering must be long enough to cover all the rope joints;

(6) Ring posts shall be made of a strong material, preferably steel, and shall be at least three inches in diameter, and shall be secured under the ring to prevent spreading;

(7) There shall be four ring ropes at least one inch in diameter evenly spaced, one foot apart with the lower rope being 18 inches above the ring floor;

(8) The ropes shall be attached to the ring posts with turnbuckles and shall be stretched taut during all contests, and the bottom rope shall be padded with at least 2 inches of soft material;

(9) Be equipped with a bell that makes a sound loud enough to be heard by the contestants, referee, and other officials; and,

(10) Include in each contestant's corner an appropriate receptacle for spitting, a clean water bucket for the contestant's use, and at least three chairs or stools labeled "seconds" to be used by the contestant's official seconds.

(c) New gloves must be used for all professional main events. If gloves used in preliminary contests have been used before, they shall be whole, clean, in sanitary condition, and subject to inspection by the referee and department [~~Department~~] representatives. Any gloves found unfit shall not be used and must be replaced with acceptable gloves. There shall be extra sets of gloves on hand to be used in case gloves are broken or in any way damaged during a contest.

(d) Contestants in all weight categories up to, and including 147 lbs, shall use eight-ounce gloves. In heavier classes, they may wear ten-ounce gloves. Female contestants may wear 10-ounce gloves.

(e) Promoters of professional events shall keep gloves used in an event in their possession for a minimum of seven days after the event and shall make them available for inspection by the department [~~Department~~] upon request.

(f) Hand wraps shall be restricted to no more than twenty yards of soft gauze, not more than two inches wide. The gauze shall be held in place by no more than eight feet of adhesive tape, no more than one and one-half inches wide. The adhesive tape shall not cover any part of the knuckles when the hand is clenched to make a fist. The use of water, or any other liquid or material, on the tape is strictly prohibited. Hand wraps shall be applied in the dressing room in the presence of a department representative.

This 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 June 21, 2010.

TRD-201003555

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-7348

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 133. HOSPITAL LICENSING

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§133.2, 133.41, and 133.163 and proposes adding new §133.49, concerning the regulation of general hospitals.

BACKGROUND AND PURPOSE

The amendments and new section are necessary to comply with legislation passed during the 81st Legislature, 2009, Regular Session.

House Bill (HB) 643 added Health and Safety Code, Chapter 259, which requires hospitals to comply with qualification standards for employment of surgical technologists.

HB 2626 amended Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims.

Senate Bill (SB) 1932 amended Health and Safety Code, Chapter 251, which allows hospitals to provide outpatient dialysis during declared disasters.

SB 476 added Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited.

SB 203 amended Health and Safety Code, Chapter 98, involving the reporting of health care-associated infections and preventable adverse events in certain health care facilities to the department.

The department regulates general hospitals as required by Health and Safety Code, Chapter 241.

SECTION-BY-SECTION SUMMARY

Amendments to §133.2 add definitions for nurse and surgical technologist.

An amendment to §133.41(e) requires hospitals to provide, with documented consent, care to a sexual assault victim age 18 years or older who has not reported the assault to a law enforcement agency, if the victim has arrived at the hospital not later than 96 hours after the time the assault occurred.

An amendment to §133.41(g) requires hospitals to require a written, implemented, and enforced policy for reporting to the department certain healthcare-associated infections and preventable adverse events.

Amendments to §133.41(f) and (o) require the governing body of a hospital to adopt, implement, and enforce a written nurse staffing policy; require hospitals to create a nurse staffing committee as a standing committee, establish committee membership, require the committee to meet at least quarterly, and define responsibilities of the committee; require a nurse services staffing plan and policies; require annual reporting to the department on the nurse staffing policy, nurse staffing plan, nurse staffing committee, and nurse sensitive outcome measures used in the nurse staffing plan; require the adoption, implementation and enforcement of policies on use of mandatory overtime; prohibit hospitals from requiring a nurse to work mandatory overtime or using on-call time as a substitute for mandatory overtime; prohibit scheduling nurses for procedures expected to last beyond their scheduled shift; provide exceptions to the mandatory overtime prohibition in certain situations, including disasters or emergencies, and require the hospital to make and document a good faith effort to meet staffing needs through other measures; and require that a hospital may not suspend, terminate, discipline, or discriminate against a nurse who refuses to work mandatory overtime.

An amendment to §133.41(t) allows hospitals to provide outpatient dialysis services when the Governor or the President of the United States declares a disaster in this state or another state.

An amendment to §133.41(w) requires hospitals to adopt, implement, and enforce policies related to the employment of surgical technologists.

The new §133.49 requires hospitals to comply with reporting certain healthcare-associated infections and preventable adverse events to the department in accordance with Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events). The department will promulgate rules to set forth the detailed requirements for reporting. This information will allow the department to make available patient safety information in Texas, including information related to healthcare-associated infections and preventable adverse events in a format that is available on an Internet website.

An amendment to §133.163 establishes that outpatient renal dialysis shall not be performed in a hospital's inpatient renal dialysis suite unless authorized during a disaster declaration, as referenced in §133.41.

FISCAL NOTE

Renee Clack, Section Director, Health Care Quality Section, has determined that for each year of the first five-year period that the sections will be in effect, there will not be fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Clack has also determined that there may be an adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses may be required to alter their business practices in order to comply with the sections. Section 133.41(f) and (o) (SB 476), related to nurse staffing and mandatory overtime, may have an economic impact on hospitals.

Hospitals of any size, which have relied on the use of mandatory overtime, may incur costs in providing nursing coverage for nurse members of the nurse staffing committee to attend meetings. There is a potential cost to hospitals that choose to hire additional nurses or use staffing agencies if nursing services are currently provided by the use of mandatory overtime; this is a business decision of the facility. There is no historical data to

determine costs or how many hospitals have used mandatory overtime of nurses to provide staffing.

Hospitals that have relied on mandatory overtime have several options for providing nursing coverage, such as requesting currently employed nurses to voluntarily work overtime, hiring additional nurses, using a float pool of nurses, working with nurse staffing agencies, or implementing potential solutions developed by the mandated nursing staffing committee. Hospitals may also consider these options to provide coverage during nurse staffing committee meetings.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There may be economic costs to persons who are required to comply with §133.41(f) and (o) (SB 476) as described in the small and micro-business impact analysis. There are no costs to persons who are required to comply with the proposed §§133.41(e) (HB 2626), 133.41(g) and 133.49 (SB 203), 133.41(f) and 133.63 (SB 1932), or 133.41(w) (HB 643). There is no anticipated impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Clack has also determined that, for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The rules protect the health, safety, and welfare of patients receiving services in hospitals, hospital personnel, and the public. Alternative methods of compliance have been provided in these rules to allow facilities the flexibility to make business decisions based on their needs.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Beth Pickens, Health Care Quality Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 149347, Mail Code 2822, Austin, Texas 78714-9347, (512) 834-6752 or by email to beth.pickens@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §133.2

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §241.026; concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of health care-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects the Health and Safety Code, Chapters 98, 241, 257, 258, 259, 323, and 1001; and Government Code, Chapter 531.

§133.2. Definitions.

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

(1) - (30) (No change.)

(31) Nurse--A registered nurse or vocational nurse licensed under Occupations Code, Chapter 301.

(32) [~~(31)~~] Outpatient--An individual who presents for diagnostic or treatment services for an intended length of stay of less than 24 hours; provided, however, that an individual who requires continued observation may be considered as an outpatient for a period of time not to exceed a total of 48 hours.

(33) [~~(32)~~] Outpatient services--Services provided to patients whose medical needs can be met in less than 24 hours and are provided within the hospital; provided, however, that services that require continued observation may be considered as outpatient services for a period of time not to exceed a total of 48 hours.

(34) [~~(33)~~] Owner--One of the following persons or governmental unit which will hold or does hold a license issued under the statute in the person's name or the person's assumed name:

(A) a corporation;

(B) a governmental unit;

(C) a limited liability company;

(D) an individual;

(E) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(F) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(G) all co-owners under any other business arrangement.

(35) [~~(34)~~] Patient--An individual who presents for diagnosis or treatment.

(36) [~~(35)~~] Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, including surgery and related ancillary services.

(37) [~~(36)~~] Person--An individual, firm, partnership, corporation, association, or joint stock company, and includes a receiver, trustee, assignee, or other similar representative of those entities.

(38) [~~(37)~~] Physician--A physician licensed by the Texas Medical Board.

(39) [~~(38)~~] Physician assistant--A person licensed as a physician assistant by the Texas State Board of Physician Assistant Examiners.

(40) [~~(39)~~] Podiatrist--A podiatrist licensed by the Texas State Board of Podiatric Medical Examiners.

(41) [~~(40)~~] Practitioner--A health care professional licensed in the State of Texas, other than a physician, podiatrist, or dentist. A practitioner shall practice in a manner consistent with their underlying practice act.

(42) [~~(41)~~] Premises--A premises may be any of the following:

(A) a single building where inpatients receive hospital services; or

(B) multiple buildings where inpatients receive hospital services provided that the following criteria are met:

(i) all buildings in which inpatients receive hospital services are subject to the control and direction of the same governing body;

(ii) all buildings in which inpatients receive hospital services are within a 30-mile radius of the primary hospital location;

(iii) there is integration of the organized medical staff of each of the hospital locations to be included under the single license;

(iv) there is a single chief executive officer for all of the hospital locations included under the license who reports directly to the governing body and through whom all administrative authority flows and who exercises control and surveillance over all administrative activities of the hospital;

(v) there is a single chief medical officer for all of the hospital locations under the license who reports directly to the governing body and who is responsible for all medical staff activities of the hospital;

(vi) each hospital location to be included under the license that is geographically separate from the other hospital locations contains at least one nursing unit for inpatients which is staffed and maintains an active inpatient census, unless providing only diagnostic or laboratory services, or a combination of diagnostic or laboratory services, in the building for hospital inpatients; and

(vii) each hospital that is to be included in the license complies with the emergency services standards:

(I) for a general hospital, if the hospital provides surgery or obstetrical care or both; or

(II) for a special hospital, if the hospital does not provide surgery or obstetrical care.

(43) [~~(42)~~] Presurvey conference--A conference held with department staff and the applicant or the applicant's representative to review licensure rules and survey documents and provide consultation prior to the on-site licensure inspection.

(44) [~~(43)~~] Psychiatric disorder--A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful syndrome (distress) or impairment in one or more important areas of behavioral, psychological, or biological function and is more than a disturbance in the relationship between the individual and society.

(45) [~~(44)~~] Quality improvement--A method of evaluating and improving processes of patient care which emphasizes a multidisciplinary approach to problem solving, and focuses not on individuals, but systems of patient care which might be the cause of variations.

(46) [~~(45)~~] Registered nurse (RN)--A person who is currently licensed by the Board of Nurse Examiners for the State of Texas as a registered nurse or who holds a valid registered nursing license with multi-state licensure privilege from another compact state.

(47) [~~(46)~~] Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;

(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities, or other definitive medical treatment;

(C) has a medical staff in regular attendance; and

(D) maintains records of the clinical work performed for each patient.

(48) [~~(47)~~] Stabilize--With respect to an emergency medical condition, to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or that the woman has delivered the child and the placenta.

(49) Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(50) [~~(48)~~] Transfer--The movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who has been declared dead, or leaves the facility without the permission of any such person.

(51) [~~(49)~~] Universal precautions--Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in hospitals.

(52) [~~(50)~~] Violation--Failure to comply with the licensing statute, a rule or standard, special license provision, or an order issued by the commissioner of state health services (commissioner) or the commissioner's designee, adopted or enforced under the licensing statute. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

This 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 June 21, 2010.

TRD-201003558
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.41, §133.49

STATUTORY AUTHORITY

The amendment and new section are authorized by Health and Safety Code, §241.026; concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of health care-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment and new section affect the Health and Safety Code, Chapters 98, 241, 257, 258, 259, 323, and 1001; and Government Code, Chapter 531.

§133.41. Hospital Functions and Services.

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

(e) Emergency services. All licensed hospital locations, including multiple-location sites, shall have an emergency suite that complies with §133.161(a)(1)(A) of this title (relating to Requirements for Buildings in Which Existing Licensed Hospitals are Located) or §133.163(f) of this title, and the following.

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

(6) Emergency services for survivors of sexual assault.

(A) The hospital shall [~~must~~] develop, implement and enforce policies and procedures to ensure that a sexual assault survivor who presents to the hospital following a sexual assault receives one of the following [~~is~~]:

(i) [~~provided~~] the care specified under subparagraph (B) of this paragraph; or

(ii) stabilization and transfer [~~stabilized and transferred~~] to a health care facility designated in a community-wide plan as the health care facility for treating sexual assault survivors, where the survivor will receive the care specified under subparagraph (B) of this paragraph.

(B) A hospital providing [~~which provides~~] care to a sexual assault survivor shall provide the survivor with the following:

(i) a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B;

(I) if the examination has been requested by a law enforcement agency under Code of Criminal Procedure, Article 56.06, or is conducted under Code of Criminal Procedure, Article 56.065; or

(II) for a victim age 18 or older who has not reported the assault to a law enforcement agency, if the victim has arrived at the facility not later than 96 hours after the time the assault occurred, and consents to the examination;

(ii) a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;

(iii) access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;

(iv) the information form required by Health and Safety Code, §323.005;

(v) a private treatment room, if available;

(vi) if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and

(vii) the name and telephone number of the nearest sexual assault crisis center.

~~[*(i)* a private area, if available, to wait and to speak with the appropriate medical, legal and sexual assault crisis center staff or volunteers until a physician, nurse, or other qualified medical personnel is able to treat the survivor;]~~

~~[*(ii)* a private treatment room, if available;]~~

~~[*(iii)* a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B, if the examination has been approved by a law enforcement agency;]~~

~~[*(iv)* access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;]~~

~~[*(v)* the department's standard Information Form for Sexual Assault Survivors, which may be obtained through the department's website or by contacting the hospital licensing program at (512) 834-6648;]~~

~~[*(vi)* the name and telephone number of the nearest sexual assault crisis center; and]~~

~~[*(vii)* if indicated, access to appropriate prophylaxis for exposure to sexually transmitted infections.]~~

(C) The hospital must obtain documented consent before providing the forensic medical examination and treatment.

(D) [~~(C)~~] Upon request, the hospital shall submit to the department their plan for the provision of service to sexual assault survivors. The plan must describe how the hospital will ensure that the services required under subparagraph (B) of this paragraph will be provided.

(i) The hospital shall submit the plan by the 60th day after the department makes the request.

(ii) The department will approve or reject the plan not later than 120th day following the submission of the plan.

(iii) If the department is not able to approve the plan, the department will return the plan to the hospital and will identify the specific provisions with which the hospital's plan failed to comply.

(iv) The hospital shall correct and resubmit the plan to the department for approval not later than the 90th day after the plan is returned to the hospital.

(f) Governing body.

(1) - (7) (No change.)

(8) Nurse Staffing. The governing body shall adopt, implement and enforce a written nurse staffing policy to ensure that an adequate number and skill mix of nurses are available to meet the level of patient care needed. The governing body policy shall require that hospital administration adopt, implement and enforce a nurse staffing plan and policies that:

(A) require significant consideration be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(B) are based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(C) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(D) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(E) protect from retaliation nurses who provide input to the nurse staffing committee; and

(F) comply with subsection (o) of this section.

(g) Infection control. The hospital shall provide a sanitary environment to avoid sources and transmission of infections and communicable diseases. There shall be an active program for the prevention, control, and surveillance of infections and communicable diseases.

(1) Organization and policies. A person shall be designated as infection control professional. The hospital shall ensure that policies governing prevention, control and surveillance of infections and communicable diseases are developed, implemented and enforced.

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

(C) A written policy shall be adopted, implemented and enforced for reporting all reportable diseases to the local health authority and the Infectious Disease Surveillance and Epidemiology Branch, Department of State Health Services, MC 2822, P. O. Box 149347, Austin, Texas 78714-9347 [~~1100 West 49th Street, Austin, Texas 78756-3199~~], in accordance with Chapter 97 of this title (relating to Communicable Diseases) , and Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events).

(D) (No change.)

(2) - (3) (No change.)

(h) - (n) (No change.)

(o) Nursing services. The hospital shall have an organized nursing service that provides 24-hour nursing services as needed.

(1) Organization. The hospital shall have a [~~an organized nursing service that provides 24-hour nursing care. The nursing service shall be~~] well-organized service with a plan of administrative authority and delineation of responsibilities for patient care.

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

(2) Staffing and delivery of care.

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

~~[(F) At a minimum, the following critical factors shall be considered in the determination of staffing levels:]~~

~~*[(i)* patient characteristics and number of patients for whom care is being provided, including number of admissions, discharges and transfers on a unit;]~~

~~*[(ii)* intensity of patient care being provided and variability of patient care across a nursing unit;]~~

~~*[(iii)* scope of services provided;]~~

~~*[(iv)* context within which care is provided, including architecture and geography of the environment, and the availability of technology; and]~~

~~*[(v)* nursing staff characteristics, including staff consistency and tenure, preparation and experience, and the number and competencies of clinical and nonclinical support staff the nurse must collaborate with or supervise.]~~

~~[(G) The hospital shall adopt, implement and enforce a written process for setting staffing levels that takes into account the critical factors specified in subparagraph (F) of this paragraph. The process shall include:]~~

~~*[(i)* establishing presumptive or initial staffing levels that are recalculated at least annually or as necessary;]~~

~~*[(ii)* setting staffing levels on a unit by unit basis or other bases appropriate to the hospital;]~~

~~*[(iii)]* adjusting of staffing levels from shift to shift based on factors, such as, the intensity of patient care; and]~~

~~*[(iv)* reporting to the advisory committee, as referenced in subparagraph (H) of this paragraph, showing variance between desired and actual staffing levels, and an explanation for the variance. The reports shall be confidential and not subject to disclosure under Government Code, Chapter 552, and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release.]~~

(F) [~~(H)~~] The hospital shall establish a nurse staffing [~~designate an advisory~~] committee as a standing committee of the hospital. The committee shall be established in accordance with Health and Safety Code (HSC), §§161.031 - 161.033, to be responsible for soliciting and receiving input from nurses on the development, ongoing monitoring, and evaluation of the staffing plan. As provided by HSC, §161.032, the hospital's records and review relating to evaluation of these outcomes and indicators are confidential and not subject to disclosure under Government Code, Chapter 552 and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release. As used in this subsection, "committee" or "staffing committee" means a nurse staffing committee established under this subparagraph.

(i) The committee shall be composed of:

(I) [~~(i)~~] at least 60% [~~have, as one-half of its members,~~] registered nurses who are involved in direct patient care at least 50% of their work time and selected by their peers who provide direct care during at least 50% of their work time;

(II) [~~(ii)~~] [~~include~~] at least one representative from either infection control, quality assessment and performance [~~program~~] improvement or risk management; [~~and~~]

(III) [~~(iii)~~] members who are representative of the types of nursing services provided at the hospital; and [~~to the extent feasible, represent multiple areas of nursing practice.~~]

(IV) the chief nursing officer of the hospital who is a voting member.

(ii) Participation on the committee by a hospital employee as a committee member shall be part of the employee's work time and the hospital shall compensate that member for that time accordingly. The hospital shall relieve the committee member of other work duties during committee meetings.

(iii) The committee shall meet at least quarterly.

(iv) The responsibilities of the committee shall be to:

(I) develop and recommend to the hospital's governing body a nurse staffing plan that meets the requirements of subparagraph (G) of this paragraph;

(II) review, assess and respond to staffing concerns expressed to the committee;

(III) identify the nurse-sensitive outcome measures the committee will use to evaluate the effectiveness of the official nurse services staffing plan;

(IV) evaluate, at least semiannually, the effectiveness of the official nurse services staffing plan and variations between the plan and the actual staffing; and

(V) submit to the hospital's governing body, at least semiannually, a report on nurse staffing and patient care outcomes, including the committee's evaluation of the effectiveness of the official nurse services staffing plan and aggregate variations between the staffing plan and actual staffing.

(G) [~~(I)~~] The hospital shall adopt, implement and enforce a written official nurse services staffing plan. As used in this subsection, "patient care unit" means a unit or area of a hospital in which registered nurses provide patient care.

(i) The official nurse services staffing plan and policies shall:

(I) require significant consideration to be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(II) be based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(III) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(IV) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(V) protect from retaliation nurses who provide input to the nurse staffing committee; and

(VI) comply with subsection (o) of this section.

(ii) The plan shall:

(I) set minimum staffing levels for patient care units that are:

(-a-) based on multiple nurse and patient considerations including:

(-1-) patient characteristics and number of patients for whom care is being provided, including number of admissions, discharges and transfers on a unit;

(-2-) intensity of patient care being provided and variability of patient care across a nursing unit;

(-3-) scope of services provided;

(-4-) context within which care is provided, including architecture and geography of the environment, and the availability of technology; and

(-5-) nursing staff characteristics, including staff consistency and tenure, preparation and experience, and the number and competencies of clinical and non-clinical support staff the nurse must collaborate with or supervise.

(-b-) determined by the nursing assessment and in accordance with evidence-based safe nursing standards; and

(-c-) recalculated at least annually, or as necessary;

(II) include a method for adjusting the staffing plan shift to shift for each patient care unit based on factors, such as, the intensity of patient care to provide staffing flexibility to meet patient needs;

(III) include a contingency plan when patient care needs unexpectedly exceed direct patient care staff resources;

(IV) [~~(I)~~] reflect current standards established by private accreditation organizations, governmental entities, national nursing professional associations, and other health professional organizations [~~be consistent with standards established by the Texas nurse licensing board~~] and should be developed based upon a review of the codes of ethics developed by the nursing profession through national nursing organizations;

(V) [~~(II)~~] include a mechanism for evaluating the effectiveness of the official nurse services staffing plan based on patient needs, nursing sensitive quality indicators, nurse satisfaction measures collected by the hospital and evidence based nurse staffing standards. [~~utilize outcomes and nursing-sensitive indicators as an integral role in setting and evaluating the adequacy of the staffing plan.~~] At least one from each of the following three types of outcomes shall be correlated to the adequacy of staffing:

(-a-) nurse-sensitive patient outcomes selected by the nurse staffing committee [~~that are nursing-sensitive~~], such as, patient falls, adverse drug events, injuries to patients, skin breakdown, pneumonia, infection rates, upper gastrointestinal bleeding, shock, cardiac arrest, length of stay, or patient readmissions;

(-b-) operational outcomes, such as, work-related injury or illness, vacancy and turnover rates, nursing care hours per patient day, on-call use, or overtime rates; and

(-c-) substantiated patient complaints related to staffing levels;

(VI) [~~(III)~~] incorporate a process that facilitates the timely and effective identification of concerns about the adequacy of the staffing plan by the nurse staffing [~~advisory~~] committee established pursuant to subparagraph (F) [~~(II)~~] of this paragraph. This process shall include:

(-a-) a prohibition on retaliation for reporting concerns;

(-b-) a requirement that nurses report concerns timely through appropriate channels within the hospital;

(-c-) orientation of nurses on how to report concerns and to whom;

(-d-) encouraging nurses to provide input to the committee relating to nurse staffing concerns;

(-e-) review, assessment, and response by the committee to staffing concerns expressed to the committee;

(-f-) [~~(-d-)~~] a process for providing feedback during the [~~advisory~~] committee meeting on how concerns are addressed by the [~~advisory~~] committee established under subparagraph (F) [~~(II)~~] of this paragraph; and

(-g-) [~~(-e-)~~] use of the nurse safe harbor peer review process pursuant to Occupations Code, §303.005;

(VII) [~~(IV)~~] include policies and procedures that require:

(-a-) orientation of nurses and other personnel who provide nursing care to all patient care units to which they are assigned on either a temporary or permanent basis;

(-b-) that the orientation of nurses and other personnel and the competency to perform nursing services is documented in accordance with hospital policy;

(-c-) that nursing assignments be congruent with documented competency; and

(VIII) be used by the hospital as a component in setting the nurse staffing budget and guiding the hospital in assigning nurses hospital wide.

~~[(V) when utilized as a means for meeting staffing needs, include policy and procedures for mandatory overtime. The policy and procedures shall include:]~~

~~[(-a-) documentation of the basis and justification for mandatory overtime;]~~

~~[(-b-) an action plan for the reduction or elimination of the use of mandatory overtime to meet staffing needs;]~~

~~[(-c-) a process for monitoring and evaluating the use of mandatory overtime; and]~~

~~[(-d-) procedures for notifying nurses and other personnel who provide nursing care of the mandatory overtime policy. As used in this subsection, "mandatory overtime" means being required to work, other than on-call time, when not scheduled including beyond hours or days scheduled. Neither the length of the shift (whether 4, 8, 12, or 16 hours) nor the number of shifts scheduled to work (whether 4, 5, or 6 a week) is the determinative factor in defining mandatory overtime.]~~

(iii) The hospital shall make readily available to nurses on each patient care unit at the beginning of each shift the official nurse services staffing plan levels and current staffing levels for that unit and that shift.

(iv) [~~(ii)~~] There shall be a semiannual [~~an annual~~] evaluation by the staffing committee of the effectiveness of the official nurse services staffing plan and variations between the staffing plan and actual staffing. The[~~, including an~~] evaluation shall consider [~~of~~] the outcomes and nursing-sensitive indicators as set out in clause (ii)(V) [~~(i)(II)~~] of this subparagraph, patient needs, nurse satisfaction measures collected by the hospital, and evidence based nurse staffing standards. This evaluation shall be documented in the minutes of the [~~advisory~~] committee established under subparagraph (F) [~~(II)~~] of this paragraph and presented to the hospital's governing body. Hospitals may determine whether this evaluation is done on a unit or facility level basis. To assist the committee with the semiannual evaluation, the hospital shall report to the committee the variations between the staffing plan and actual staffing. This report of variations shall be confidential and not subject to disclosure under Government Code, Chapter 552 and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release.

(v) [~~(iii)~~] The staffing plan shall be retained for a period of two years.

(H) [~~(J)~~] Nonemployee licensed nurses who are working in the hospital shall adhere to the policies and procedures of the hospital. The CNO shall provide for the adequate orientation, supervision, and evaluation of the clinical activities of nonemployee nursing personnel which occur within the responsibility of the nursing services.

(I) The hospital shall annually report to the department on:

(i) whether the hospital's governing body has adopted a nurse staffing policy;

(ii) whether the hospital has established a nurse staffing committee that meets the membership requirements of subparagraph (F) of this paragraph;

(iii) whether the nurse staffing committee has evaluated the hospital's official nurse services staffing plan and has reported the results of the evaluation to the hospital's governing body; and

(iv) the nurse-sensitive outcome measures the committee adopted for use in evaluating the hospital's official nurse services staffing plan.

(3) Mandatory overtime. The hospital shall adopt, implement and enforce policies on use of mandatory overtime.

(A) As used in this subsection:

(i) "on-call time" means time spent by a nurse who is not working but who is compensated for availability; and

(ii) "mandatory overtime" means a requirement that a nurse work hours or days that are in addition to the hours or days scheduled, regardless of the length of a scheduled shift or the number of scheduled shifts each week. In determining whether work is mandatory overtime, prescheduled on-call time or time immediately before or after a scheduled shift necessary to document or communicate patient status to ensure patient safety is not included.

(B) A hospital may not require a nurse to work mandatory overtime, and a nurse may refuse to work mandatory overtime.

(C) This section does not prohibit a nurse from volunteering to work overtime.

(D) A hospital may not use on-call time as a substitute for mandatory overtime.

(E) The prohibitions on mandatory overtime do not apply if:

(i) a health care disaster, such as a natural or other type of disaster that increases the need for health care personnel, unexpectedly affects the county in which the nurse is employed or affects a contiguous county;

(ii) a federal, state, or county declaration of emergency is in effect in the county in which the nurse is employed or is in effect in a contiguous county;

(iii) there is an emergency or unforeseen event of a kind that:

(I) does not regularly occur;

(II) increases the need for health care personnel at the hospital to provide safe patient care; and

(III) could not prudently be anticipated by the hospital; or

(iv) the nurse is actively engaged in an ongoing medical or surgical procedure and the continued presence of the nurse through the completion of the procedure is necessary to ensure the health and safety of the patient. Scheduling nurses for procedures that could be anticipated to require the nurse to stay beyond the end of their scheduled shift constitutes mandatory overtime and shall be prohibited.

(F) If a hospital determines that an exception exists under subparagraph (E) of this paragraph, the hospital shall, to the extent possible, make and document a good faith effort to meet the staffing need through voluntary overtime, including calling per diems and agency nurses, assigning floats, or requesting an additional day of work from off-duty employees.

(G) A hospital may not suspend, terminate, or otherwise discipline or discriminate against a nurse who refuses to work mandatory overtime.

(4) [~~(3)~~] Drugs and biologicals. Drugs and biologicals shall be prepared and administered in accordance with federal and state laws, the orders of the individuals granted privileges by the medical staff, and accepted standards of practice.

(A) All drugs and biologicals shall be administered by, or under supervision of, nursing or other personnel in accordance with federal and state laws and regulations, including applicable licensing rules, and in accordance with the approved medical staff policies and procedures.

(B) All orders for drugs and biologicals shall be in writing, dated, timed, and signed by the individual responsible for the care of the patient as specified under subsection (f)(6)(A) of this section. When telephone or verbal orders must be used, they shall be:

(i) accepted only by personnel who are authorized to do so by the medical staff policies and procedures, consistent with federal and state laws;

(ii) dated, timed, and authenticated within 48 hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders; and

(iii) used infrequently.

(C) There shall be a hospital procedure for immediately reporting transfusion reactions, adverse drug reactions, and errors in administration of drugs to the attending physician and, if appropriate, to the hospital-wide quality assessment and performance improvement program.

(5) [~~(4)~~] Blood transfusions.

(A) Transfusions shall be prescribed in accordance with hospital policy and administered in accordance with a written protocol for the administration of blood and blood components and the use of infusion devices and ancillary equipment.

(B) Personnel administering blood transfusions and intravenous medications shall have special training for this duty according to written, adopted, implemented and enforced hospital policy.

(C) Blood and blood components shall be transfused through a sterile, pyrogen-free transfusion set that has a filter designed to retain particles potentially harmful to the recipient.

(D) The patient must be observed during the transfusion and for an appropriate time thereafter for suspected adverse reactions.

(E) Pretransfusion and posttransfusion vital signs shall be recorded.

(F) When warming of blood is indicated, this shall be accomplished during its passage through the transfusion set. The warming system shall be equipped with a visible thermometer and may have an audible warning system. Blood shall not be warmed above 42 degrees Celsius.

(G) Drugs or medications, including those intended for intravenous use, shall not be added to blood or blood components. A 0.9% sodium chloride injection, United States Pharmacopeia, may be added to blood or blood components. Other solutions intended for intravenous use may be used in an administration set or added to blood or blood components under either of the following conditions:

(i) they have been approved for this use by the Federal Drug Administration; or

(ii) there is documentation available to show that addition to the component involved is safe and efficacious.

(H) There shall be a system for detection, reporting and evaluation of suspected complications of transfusion. Any adverse event experienced by a patient in association with a transfusion is to be regarded as a suspected transfusion complication. In the event of a suspected transfusion complication, the personnel attending the patient shall notify immediately a responsible physician and the transfusion service and document the complication in the patient's medical record. All suspected transfusion complications shall be evaluated promptly according to an established procedure.

(I) Following the transfusion, the blood transfusion record or a copy shall be made a part of the patient's medical record.

(6) [~~(5)~~] Reporting and peer review of a vocational or registered nurse. A hospital shall adopt, implement, and enforce a policy to ensure that the hospital complies with the Occupations Code §§301.401-301.403, 301.405 and Chapter 303 (relating to Grounds for Reporting Nurse, Duty of Nurse to Report, Duty of Peer Review Committee to Report, Duty of Person Employing Nurse to Report, and Nursing Peer Review respectively), and with the rules adopted by the Board of Nurse Examiners in 22 TAC §217.16 (relating to Minor Incidents), §217.19 (relating to Incident-Based Nursing Peer Review and Whistleblower Protections), and §217.20 (relating to Safe Harbor Peer Review for Nurses and Whistleblower Protections).

(7) [~~(6)~~] Policies and procedures related to workplace safety.

(A) The hospital shall adopt, implement and enforce policies and procedures related to the work environment for nurses which:

(i) improve workplace safety and reduce the risk of injury, occupational illness, and violence; and

(ii) increase the use of ergonomic principles and ergonomically designed devices to reduce injury and fatigue.

(B) The policies and procedures adopted under subparagraph (A) of this paragraph, at a minimum, must include:

(i) evaluating new products and technology that incorporate ergonomic principles;

(ii) educating nurses in the application of ergonomic practices;

(iii) conducting workplace audits to identify areas of risk of injury, occupational illness, or violence and recommending ways to reduce those risks;

(iv) controlling access to those areas identified as having a high risk of violence; and

(v) promptly reporting crimes committed against nurses to appropriate law enforcement agencies.

(8) [~~(7)~~] Safe patient handling and movement practices.

(A) The hospital shall adopt, implement and enforce policies and procedures to identify, assess, and develop strategies to control risk of injury to patients and nurses associated with the lifting, transferring, repositioning, or movement of a patient.

(B) The policies and procedures shall establish a process that, at a minimum, includes the following:

(i) analysis of the risk of injury to both patients and nurses posed by the patient handling needs of the patient populations served by the hospital and the physical environment in which patient handling and movement occurs;

(ii) education of nurses in the identification, assessment, and control of risks of injury to patients and nurses during patient handling;

(iii) evaluation of alternative ways to reduce risks associated with patient handling, including evaluation of equipment and the environment;

(iv) restriction, to the extent feasible with existing equipment and aids, of manual patient handling or movement of all or most of a patient's weight to emergency, life- threatening, or otherwise exceptional circumstances;

(v) collaboration with and annual report to the nurse staffing committee;

(vi) procedures for nurses to refuse to perform or be involved in patient handling or movement that the nurse believes in good faith will expose a patient or a nurse to an unacceptable risk of injury;

(vii) submission of an annual report to the governing body on activities related to the identification, assessment, and development of strategies to control risk of injury to patients and nurses associated with the lifting, transferring, repositioning, or movement of a patient; and

(viii) development of architectural plans for constructing or remodeling a hospital or a unit of a hospital in which patient handling and movement occurs, with consideration of the feasibility of incorporating patient handling equipment or the physical space and construction design needed to incorporate that equipment at a later date.

(p) - (s) (No change.)

(t) Renal dialysis services.

(1) Hospitals may provide inpatient dialysis services without an additional license under HSC Chapter 251. Hospitals providing outpatient dialysis services shall be licensed under HSC Chapter 251.

(2) Hospitals may provide outpatient dialysis services when the governor or the president of the United States declares a disaster in this state or another state. The hospital may provide outpatient dialysis only during the term of the disaster declaration.

(3) [~~(1)~~] Equipment.

(A) Maintenance and repair. All equipment used by a facility, including backup equipment, shall be operated within manufacturer's specifications, and maintained free of defects which could be a potential hazard to patients, staff, or visitors. Maintenance and repair of all equipment shall be performed by qualified staff or contract personnel.

(i) Staff shall be able to identify malfunctioning equipment and report such equipment to the appropriate staff for immediate repair.

(ii) Medical equipment that malfunctions must be clearly labeled and immediately removed from service until the malfunction is identified and corrected.

(iii) Written evidence of all maintenance and repairs shall be maintained.

(iv) After repairs or alterations are made to any equipment or system, the equipment or system shall be thoroughly tested for proper operation before returning to service. This testing must be documented.

(v) A facility shall comply with the federal Food, Drug, and Cosmetic Act, 21 United States Code (USC), §360i(b), concerning reporting when a medical device as defined in 21 USC §321(h) has or may have caused or contributed to the injury or death of a patient of the facility.

(B) Preventive maintenance. A facility shall develop, implement and enforce a written preventive maintenance program to ensure patient care related equipment used in a facility receives electrical safety inspections, if appropriate, and maintenance at least annually or more frequently as recommended by the manufacturer. The preventive maintenance may be provided by facility staff or by contract.

(C) Backup machine. At least one complete dialysis machine shall be available on site as backup for every ten dialysis machines in use. At least one of these backup machines must be completely operational during hours of treatment. Machines not in use during a patient shift may be counted as backup except at the time of an initial or an expansion survey.

(D) Pediatric patients. If pediatric patients are treated, a facility shall use equipment and supplies, to include blood pressure cuffs, dialyzers, and blood tubing, appropriate for this special population.

(E) Emergency equipment and supplies. A facility shall have emergency equipment and supplies immediately accessible in the treatment area.

(i) At a minimum, the emergency equipment and supplies shall include the following:

(I) oxygen;

(II) mechanical ventilatory assistance equipment, to include airways, manual breathing bag, and mask;

(III) suction equipment;

(IV) supplies specified by the medical director;

(V) electrocardiograph; and

(VI) automated external defibrillator or defibrillator.

(ii) If pediatric patients are treated, the facility shall have the appropriate type and size emergency equipment and supplies listed in clause (i) of this subparagraph for this special population.

(iii) A facility shall establish, implement, and enforce a policy for the periodic testing and maintenance of the emergency equipment. Staff shall properly maintain and test the emergency equipment and supplies and document the testing and maintenance.

(F) Transducer protector. A transducer protector shall be replaced when wetted during a dialysis treatment and shall be used for one treatment only.

(4) [~~(2)~~] Water treatment and dialysate concentrates.

(A) Compliance required. A facility shall meet the requirements of this section. A facility may follow more stringent requirements than the minimum standards required by this section.

(i) The facility administrator and medical director shall each demonstrate responsibility for the water treatment and dialysate supply systems to protect hemodialysis patients from adverse effects arising from known chemical and microbial contaminates that may be found in improperly prepared dialysate, to ensure that the dialysate is correctly formulated and meets the requirements of all applicable quality standards.

(ii) The facility administrator and medical director must assure that policies and procedures related to water treatment and dialysate are understandable and accessible to the operator(s) and that the training program includes quality testing, risks and hazards of improperly prepared concentrate and bacterial issues.

(iii) The facility administrator and medical director must be informed prior to any alteration of, or any device being added to, the water system.

(B) Water treatment. These requirements apply to water intended for use in the delivery of hemodialysis, including the preparation of concentrates from powder at a dialysis facility and dialysate.

(i) The design for the water treatment system in a facility shall be based on considerations of the source water for the facility and designed by a water quality professional with education, training, or experience in dialysis system design.

(ii) When a public water system supply is not used by a facility, the source water shall be tested by the facility at monthly intervals in the same manner as a public water system as described in 30 TAC, §290.104 (relating to Summary of Maximum Contaminant Levels, Maximum Residual Disinfectant Levels, Treatment Techniques, and Action Levels), and §290.109 (relating to Microbial Contaminants) as adopted by the Texas Commission on Environmental Quality (TCEQ).

(iii) The physical space in which the water treatment system is located must be adequate to allow for maintenance, testing, and repair of equipment. If mixing of dialysate is performed in the same area, the physical space must also be adequate to house and allow for the maintenance, testing, and repair of the mixing equipment and for performing the mixing procedure.

(iv) The water treatment system components shall be arranged and maintained so that bacterial and chemical contaminant levels in the product water do not exceed the standards for hemodialysis water quality described in §4.2.1 (concerning Water Bacteriology) and §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the Association for the Advancement of Medical Instrumentation (AAMI). All documents published by the AAMI as referenced in this section may be obtained by writing the following address: 1110 North Glebe Road, Suite 220, Arlington, Virginia 22201.

(v) Written policies and procedures for the operation of the water treatment system must be developed and implemented. Parameters for the operation of each component of the water treatment system must be developed in writing and known to the operator. Each major water system component shall be labeled in a manner that identifies the device; describes its function, how performance is verified and actions to take in the event performance is not within an acceptable range.

(vi) The materials of any components of water treatment systems (including piping, storage, filters and distribution systems) that contact the purified water shall not interact chemically or physically so as to affect the purity or quality of the product water adversely. Such components shall be fabricated from unreactive materials (e.g. plastics) or appropriate stainless steel. The use of materials that are known to cause toxicity in hemodialysis, such as copper, brass, galvanized material, or aluminum, is prohibited.

(vii) Chemicals infused into the water such as iodine, acid, flocculants, and complexing agents shall be shown to be nondialyzable or shall be adequately removed from product water. Monitors or specific test procedures to verify removal of additives shall be provided and documented.

(viii) Each water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of two carbon tanks in series. If the source water is from a private supply which does not use chlorine/chloramine, the water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of one carbon tank.

(I) Reverse osmosis membranes. Reverse osmosis membranes, if used, shall meet the standards in §4.3.7 (concerning Reverse Osmosis) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(II) Deionization systems.

(-a-) Deionization systems, if used, shall be monitored continuously to produce water of one megohm-centimeter (cm) or greater specific resistivity (or conductivity of one microsiemen/cm or less) at 25 degrees Celsius. An audible and visual alarm shall be activated when the product water resistivity falls below this level and the product water stream shall be prevented from reaching any point of use.

(-b-) Patients shall not be dialyzed on deionized water with a resistivity less than 1.0 megohm-cm measured at the output of the deionizer.

(-c-) A minimum of two deionization (DI) tanks in series shall be used with resistivity monitors including audible and visual alarms placed pre and post the final DI tank in the system. The alarms must be audible in the patient care area.

(-d-) Feed water for deionization systems shall be pretreated with activated carbon adsorption, or a comparable alternative, to prevent nitrosamine formation.

(-e-) If a deionization system is the last process in a water treatment system, it shall be followed by an ultrafilter or other bacteria and endotoxin reducing device.

(III) Carbon tanks.

(-a-) The carbon tanks must contain acid washed carbon, 30-mesh or smaller with a minimum iodine number of 900.

(-b-) A minimum of two carbon adsorption beds shall be installed in a series configuration.

(-c-) The total empty bed contact time (EBCT) shall be at least ten minutes, with the final tank providing at least five minutes EBCT. Carbon adsorption systems used to prepare water for portable dialysis systems are exempt from the requirement for the second carbon and a ten minute EBCT if removal of chloramines to below 0.1 milligram (mg)/1 is verified before each treatment.

(-d-) A means shall be provided to sample the product water immediately prior to the final bed(s). Water from this port(s) must be tested for chlorine/chloramine levels immediately prior to each patient shift.

(-e-) All samples for chlorine/chloramine testing must be drawn when the water treatment system has been operating for at least 15 minutes.

(-f-) Tests for total chlorine, which include both free and combined forms of chlorine, may be used as a single analysis with the maximum allowable concentration of 0.1 mg/liter (L). Test results of greater than 0.5 parts per million (ppm) for chlorine or 0.1 ppm for chloramine from the port between the initial tank(s) and final tank(s) shall require testing to be performed at the final exit and replacement of the initial tank(s).

(-g-) In a system without a holding tank, if test results at the exit of the final tank(s) are greater than the parameters for chlorine or chloramine described in this subclause, dialysis treatment shall be immediately terminated to protect patients from exposure to chlorine/chloramine and the medical director shall be notified. In systems with holding tanks, if the holding tank tests <1mg/L for total chlorine, the reverse osmosis (RO) may be turned off and the product water in the holding tank may be used to finish treatments in process. The medical director shall be notified.

(-h-) If means other than granulated carbon are used to remove chlorine/chloramine, the facility's governing body must approve such use in writing after review of the safety of the intended method for use in hemodialysis applications. If such methods include the use of additives, there must be evidence the product water does not contain unsafe levels of these additives.

(ix) Water softeners, if used, shall be tested at the end of the treatment day to verify their capacity to treat a sufficient volume of water to supply the facility for the entire treatment day and shall be fitted with a mechanism to prevent water containing the high concentrations of sodium chloride used during regeneration from entering the product water line during regeneration.

(x) If used, the face(s) of timer(s) used to control any component of the water treatment or dialysate delivery system shall be visible to the operator at all times. Written evidence that timers are checked for operation and accuracy each day of operation must be maintained.

(xi) Filter housings, if used during disinfectant procedures, shall include a means to clear the lower portion of the housing of the disinfecting agents. Filter housings shall be opaque.

(xii) Ultrafilters, or other bacterial reducing filters, if used, shall be fitted with pressure gauges on the inlet and outlet water lines to monitor the pressure drop across the membrane. Ultrafilters shall be included in routine disinfection procedures.

(xiii) If used, storage tanks shall have a conical or bowl shaped base and shall drain from the lowest point of the base. Storage tanks shall have a tight-fitting lid and be vented through a hydrophobic 0.2 micron air filter. Means shall be provided to effectively disinfect any storage tank installed in a water distribution system.

(xiv) Ultraviolet (UV) lights, if used, shall be monitored at the frequency recommended by the manufacturer. A log sheet shall be used to record monitoring.

(xv) Water treatment system piping shall be labeled to indicate the contents of the pipe and direction of flow.

(xvi) The water treatment system must be continuously monitored during patient treatment and be guarded by audible and visual alarms which can be seen and heard in the dialysis treatment area should water quality drop below specific parameters. Quality monitor sensing cells shall be located as the last component of the water treatment system and at the beginning of the distribution system. No water treatment components that could affect the quality of the product water as measured by this device shall be located after the sensing cell.

(xvii) When deionization tanks do not follow a reverse osmosis system, parameters for the rejection rate of the membranes must assure that the lowest rate accepted would provide product water in compliance with §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition published by the AAMI.

(xviii) A facility shall maintain written logs of the operation of the water treatment system for each treatment day. The log book shall include each component's operating parameter and the action taken when a component is not within the facility's set parameters.

(xix) Microbiological testing of product water shall be conducted.

(I) Frequency. Microbiological testing shall be conducted monthly and following any repair or change to the water treatment system. For a newly installed water distribution system, or when a change has been made to an existing system, weekly testing shall be conducted for one month to verify that bacteria and endotoxin levels are consistently within the allowed limits.

(II) Sample sites. At a minimum, sample sites chosen for the testing shall include the beginning of the distribution piping, at any site of dialysate mixing, and the end of the distribution piping.

(III) Technique. Samples shall be collected immediately before sanitization/disinfection of the water treatment system and dialysis machines. Water testing results shall be routinely trended and reviewed by the medical director in order to determine if results seem questionable or if there is an opportunity for improvement. The medical director shall determine if there is a need for retesting. Repeated results of "no growth" shall be validated via an outside laboratory. A calibrated loop may not be used in microbiological testing of water samples. Colonies shall be counted using a magnifying device.

(IV) Expected results. Product water used to prepare dialysate, concentrates from powder, or to reprocess dialyzers for multiple use, shall contain a total viable microbial count less than 200 colony forming units (CFU)/millimeter (ml) and an endotoxin concentration less than 2 endotoxin units (EU)/ml. The action level for the total viable microbial count in the product water shall be 50 CFU/ml and the action level for the endotoxin concentration shall be 1 EU/ml.

(V) Required action for unacceptable results. If the action levels described at subclause (IV) of this clause are observed in the product water, corrective measures shall be taken promptly to reduce the levels into an acceptable range.

(VI) Records. All bacteria and endotoxin results shall be recorded on a log sheet in order to identify trends that may indicate the need for corrective action.

(xx) If ozone generators are used to disinfect any portion of the water or dialysate delivery system, testing based on the manufacturer's direction shall be used to measure the ozone concentration each time disinfection is performed, to include testing for safe levels of residual ozone at the end of the disinfection cycle. Testing for ozone in the ambient air shall be conducted on a periodic basis as rec-

ommended by the manufacturer. Records of all testing must be maintained in a log.

(xxi) If used, hot water disinfection systems shall be monitored for temperature and time of exposure to hot water as specified by the manufacturer. Temperature of the water shall be recorded at a point furthest from the water heater, where the lowest water temperature is likely to occur. The water temperature shall be measured each time a disinfection cycle is performed. A record that verifies successful completion of the heat disinfection shall be maintained.

(xxii) After chemical disinfection, means shall be provided to restore the equipment and the system in which it is installed to a safe condition relative to residual disinfectant prior to the product water being used for dialysis applications.

(xxiii) Samples of product water must be submitted for chemical analysis every six months and must demonstrate that the quality of the product water used to prepare dialysate or concentrates from powder, meets §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(I) Samples for chemical analysis shall be collected at the end of the water treatment components and at the most distal point in each water distribution loop, if applicable. All other outlets from the distribution loops shall be inspected to ensure that the outlets are fabricated from compatible materials. Appropriate containers and pH adjustments shall be used to ensure accurate determinations. New facilities or facilities that add or change the configuration of the water distribution system must draw samples at the most distal point for each water distribution loop, if applicable, on a one time basis.

(II) Additional chemical analysis shall be submitted if substantial changes are made to the water treatment system or if the percent rejection of a reverse osmosis system decreased 5.0% or more from the percent rejection measured at the time the water sample for the preceding chemical analysis was taken.

(xxiv) Facility records must include all test results and evidence that the medical director has reviewed the results of the water quality testing and directed corrective action when indicated.

(xxv) Only persons qualified by the education or experience may operate, repair, or replace components of the water treatment system.

(C) Dialysate.

(i) Quality control procedures shall be established to ensure ongoing conformance to policies and procedures regarding dialysate quality.

(ii) Each facility shall set all hemodialysis machines to use only one family of concentrates. When new machines are put into service or the concentrate family or concentrate manufacturer is changed, samples shall be sent to a laboratory for verification.

(iii) Prior to each patient treatment, staff shall verify the dialysate conductivity and pH of each machine with an independent device.

(iv) Bacteriological testing shall be conducted.

(I) Frequency. Responsible facility staff shall develop a schedule to ensure each hemodialysis machine is tested quarterly for bacterial growth and the presence of endotoxins. Hemodialysis machines of home patients shall be cultured monthly until results not exceeding 200 CFU/ml are obtained for three consecutive months, then quarterly samples shall be cultured.

(II) Acceptable limits. Dialysate shall contain less than 200 CFU/ml and an endotoxin concentration of less than 2 EU/ml. The action level for total viable microbial count shall be 50 CFU/ml and the action level for endotoxin concentration shall be 1 EU/ml.

(III) Action to be taken. Disinfection and retesting shall be done when bacterial or endotoxin counts exceed the action levels. Additional samples shall be collected when there is a clinical indication of a pyrogenic reaction and/or septicemia.

(v) Only a licensed nurse may use an additive to increase concentrations of specific electrolytes in the acid concentrate. Mixing procedures shall be followed as specified by the additive manufacturer. When additives are prescribed for a specific patient, the container holding the prescribed acid concentrate shall be labeled with the name of the patient, the final concentration of the added electrolyte, the date the prescribed concentrate was made, and the name of the person who mixed the additive.

(vi) All components used in concentrate preparation systems (including mixing and storage tanks, pumps, valves and piping) shall be fabricated from materials (e.g., plastics or appropriate stainless steel) that do not interact chemically or physically with the concentrate so as to affect its purity, or with the germicides used to disinfect the equipment. The use of materials that are known to cause toxicity in hemodialysis such as copper, brass, galvanized material and aluminum is prohibited.

(vii) Facility policies shall address means to protect stored acid concentrates from tampering or from degeneration due to exposure to extreme heat or cold.

(viii) Procedures to control the transfer of acid concentrates from the delivery container to the storage tank and prevent the inadvertent mixing of different concentrate formulations shall be developed, implemented and enforced. The storage tanks shall be clearly labeled.

(ix) Concentrate mixing systems shall include a purified water source, a suitable drain, and a ground fault protected electrical outlet.

(I) Operators of mixing systems shall use personal protective equipment as specified by the manufacturer during all mixing processes.

(II) The manufacturer's instructions for use of a concentrate mixing system shall be followed, including instructions for mixing the powder with the correct amount of water. The number of bags or weight of powder added shall be determined and recorded.

(III) The mixing tank shall be clearly labeled to indicate the fill and final volumes required to correctly dilute the powder.

(IV) Systems for preparing either bicarbonate or acid concentrate from powder shall be monitored according to the manufacturer's instructions.

(V) Concentrates shall not be used, or transferred to holding tanks or distribution systems, until all tests are completed.

(VI) If a facility designs its own system for mixing concentrates, procedures shall be developed and validated using an independent laboratory to ensure proper mixing.

(x) Acid concentrate mixing tanks shall be designed to allow the inside of the tank to be rinsed when changing concentrate formulas.

(I) Acid mixing systems shall be designed and maintained to prevent rust and corrosion.

(II) Acid concentrate mixing tanks shall be emptied completely and rinsed with product water before mixing another batch of concentrate to prevent cross contamination between different batches.

(III) Acid concentrate mixing equipment shall be disinfected as specified by the equipment manufacturer or in the case where no specifications are given, as defined by facility policy.

(IV) Records of disinfection and rinsing of disinfectants to safe residual levels shall be maintained.

(xi) Bicarbonate concentrate mixing tanks shall have conical or bowl shaped bottoms and shall drain from the lowest point of the base. The tank design shall allow all internal surfaces to be disinfected and rinsed.

(I) Bicarbonate concentrate mixing tanks shall not be prefilled the night before use.

(II) If disinfectant remains in the mixing tank overnight, this solution must be completely drained, the tank rinsed and tested for residual disinfectant prior to preparing the first batch of that day of bicarbonate concentrate.

(III) Unused portions of bicarbonate concentrate shall not be mixed with fresh concentrate.

(IV) At a minimum, bicarbonate distribution systems shall be disinfected weekly. More frequent disinfection shall be done if required by the manufacturer, or if dialysate culture results are above the action level.

(V) If jugs are reused to deliver bicarbonate concentrate to individual hemodialysis machines:

(-a-) jugs shall be emptied of concentrate, rinsed and inverted to drain at the end of each treatment day;

(-b-) at a minimum, jugs shall be disinfected weekly, more frequent disinfection shall be considered by the medical director if dialysate culture results are above the action level; and

(-c-) following disinfection, jugs shall be drained, rinsed free of residual disinfectant, and inverted to dry. Testing for residual disinfectant shall be done and documented.

(xii) All mixing tanks, bulk storage tanks, dispensing tanks and containers for single hemodialysis treatments shall be labeled as to the contents.

(I) Mixing tanks. Prior to batch preparation, a label shall be affixed to the mixing tank that includes the date of preparation and the chemical composition or formulation of the concentrate being prepared. This labeling shall remain on the mixing tank until the tank has been emptied.

(II) Bulk storage/dispensing tanks. These tanks shall be permanently labeled to identify the chemical composition or formulation of their contents.

(III) Single machine containers. At a minimum, single machine containers shall be labeled with sufficient information to differentiate the contents from other concentrate formulations used in the facility and permit positive identification by users of container contents.

(xiii) Permanent records of batches produced shall be maintained to include the concentrate formula produced, the volume of the batch, lot number(s) of powdered concentrate packages, the manufacturer of the powdered concentrate, date and time of mixing, test results, person performing mixing, and expiration date (if applicable).

(xiv) If dialysate concentrates are prepared in the facility, the manufacturers' recommendations shall be followed regarding any preventive maintenance. Records shall be maintained indicating the date, time, person performing the procedure, and the results (if applicable).

(5) [~~(3)~~] Prevention requirements concerning patients.

(A) Hepatitis B vaccination.

(i) With the advice and consent of a patient's attending nephrologist, facility staff shall make the hepatitis B vaccine available to a patient who is susceptible to hepatitis B, provided that the patient has coverage or is willing to pay for vaccination.

(ii) The facility shall make available to patients literature describing the risks and benefits of the hepatitis B vaccination.

(B) Serologic screening of patients.

(i) A patient new to dialysis shall have been screened for hepatitis B surface antigen (HBsAg) within one month before or at the time of admission to the facility or have a known hepatitis B surface antibody (anti-HBs) status of at least 10 milli-international units per milliliter no more than 12 months prior to admission. The facility shall document how this screening requirement is met.

(ii) Repeated serologic screening shall be based on the antigen or antibody status of the patient.

(I) Monthly screening for HBsAg is required for patients whose previous test results are negative for HBsAg.

(II) Screening of HBsAg-positive or anti-HBs-positive patients may be performed on a less frequent basis, provided that the facility's policy on this subject remains congruent with Appendices i and ii of the National Surveillance of Dialysis Associated Disease in the United States, 2000, published by the United States Department of Health and Human Services.

(C) Isolation procedures for the HBsAg-positive patient.

(i) The facility shall treat patients positive for HBsAg in a segregated treatment area which includes a hand washing sink, a work area, patient care supplies and equipment, and sufficient space to prevent cross-contamination to other patients.

(ii) A patient who tests positive for HBsAg shall be dialyzed on equipment reserved and maintained for the HBsAg-positive patient's use only.

(iii) When a caregiver is assigned to both HBsAg-negative and HBsAg-positive patients, the HBsAg-negative patients assigned to this grouping must be Hepatitis B antibody positive. Hepatitis B antibody positive patients are to be seated at the treatment stations nearest the isolation station and be assigned to the same staff member who is caring for the HBsAg-positive patient.

(iv) If an HBsAg-positive patient is discharged, the equipment which had been reserved for that patient shall be given intermediate level disinfection prior to use for a patient testing negative for HBsAg.

(v) In the case of patients new to dialysis, if these patients are admitted for treatment before results of HBsAg or anti-HBs testing are known, these patients shall undergo treatment as if the HBsAg test results were potentially positive, except that they shall not be treated in the HBsAg isolation room, area, or machine.

(I) The facility shall treat potentially HBsAg-positive patients in a location in the treatment area which is outside of traffic patterns until the HBsAg test results are known.

(II) The dialysis machine used by this patient shall be given intermediate level disinfection prior to its use by another patient.

(III) The facility shall obtain HBsAg status results of the patient no later than three days from admission.

(u) - (v) (No change.)

(w) Surgical services. If a hospital provides surgical services, the services shall be well- organized and provided in accordance with acceptable standards of practice. If outpatient surgical services are offered, the services shall be consistent in quality with inpatient care in accordance with the complexity of services offered. A special hospital may not offer surgical services.

(1) Organization and staffing. The organization of the surgical services shall be appropriate for the scope of the services offered.

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

(E) The facility shall adopt, implement, and enforce policies and procedures to comply with Health and Safety Code, Chapter 259 (relating to Surgical Technologists at Health Care Facilities).

(2) (No change.)

(x) - (y) (No change.)

§133.49. Reporting Requirements.

A hospital shall submit reports to the department in accordance with the reporting requirements in Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events).

This 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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Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 458-7111 x6972

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SUBCHAPTER I. PHYSICAL PLANT AND CONSTRUCTION REQUIREMENTS

25 TAC §133.163

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §241.026; concerning rules and minimum standards for the licensing and regulation of general hospitals; Health and Safety Code, Chapter 98, concerning the reporting the of health care-associated infections; Health and Safety Code, Chapter 257, relating to nurse staffing, and Chapter 258, relating to mandatory overtime for nurses prohibited; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 323, which requires hospitals to provide forensic medical examinations for certain sexual assault victims; Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects the Health and Safety Code, Chapters 98, 241, 257, 258, 259, 323, and 1001; and Government Code, Chapter 531.

§133.163. Spatial Requirements for New Construction.

(a) - (aa) (No change.)

(bb) Renal dialysis suite. Outpatient renal dialysis shall not be performed in the hospital's inpatient renal dialysis suite unless authorized under §133.41(t) of this title. When outpatient renal dialysis is provided within a hospital building, the service and facilities shall be separated from the hospital with a two-hour fire rated partition. The owner of the outpatient renal dialysis facility must obtain a separate license under Texas Health and Safety Code, Chapter 251, End Stage Renal Disease Facilities. Mechanical, electrical and plumbing services may be contracted from the hospital and the hospital shall maintain all rights and controls of all systems. When inpatient renal dialysis services are provided, the following rooms or areas shall be included.

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

(cc) - (ff) (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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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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CHAPTER 135. AMBULATORY SURGICAL CENTERS

SUBCHAPTER A. OPERATING REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS

25 TAC §§135.2, 135.15, 135.26

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§135.2, 135.15, and 135.26, concerning the regulation of ambulatory surgical centers.

BACKGROUND AND PURPOSE

The amendments to §135.2 and §135.15 are necessary to comply with House Bill 643, 81st Legislature, Regular Session, 2009, which added Health and Safety Code, Chapter 259, relating to surgical technologists. House Bill 643 requires ambulatory sur-

gical centers to comply with qualification standards for employment of surgical technologists.

The amendment to §135.26 is necessary to comply with Senate Bill (SB) 203, 81st Legislature, Regular Session, 2009, which amended Health and Safety Code, Chapter 98, involving the reporting of health care-associated infections and preventable adverse events in certain health care facilities to the department.

The department regulates ambulatory surgical centers as required by Health and Safety Code, Chapter 243.

SECTION-BY-SECTION SUMMARY

An amendment to §135.2(21) adds the definition of "Surgical technologist" as defined in Health and Safety Code, Chapter 259.

An amendment to §135.15 requires ambulatory surgical centers to adopt, implement, and enforce policies related to the employment of surgical technologists.

An amendment to §135.26 requires ambulatory surgical centers to report to the department incidents of certain healthcare-associated infections and preventable adverse events, in accordance with Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events). The department will promulgate rules to set forth the detailed requirements for reporting. This information will allow the department to make available patient safety information in Texas, including information related to healthcare-associated infections and preventable adverse events in a format that is available on an Internet website.

FISCAL NOTE

Renee Clack, Section Director, Health Care Quality Section, has determined that for each year of the first five-year period that the sections will be in effect, there will not be fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Clack has also determined that there will not be an adverse economic impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

PUBLIC BENEFIT

In addition, Ms. Clack has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The rules protect the health, safety, and welfare of patients receiving services in ambulatory surgical centers, personnel, and the public.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Beth Pickens, Health Care Quality Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 148347, Mail Code 2822, Austin, Texas 78714-9347, (512) 834-6752 or by email to beth.pickens@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §243.009, concerning rules and minimum standards for the licensing and regulation of ambulatory surgical centers; Health and Safety Code, Chapter 259, concerning the surgical technologists at health care facilities; Health and Safety Code, Chapter 98, concerning the reporting the of health care-associated infections; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendments affect the Health and Safety Code, Chapters 98, 243, 259, and 1001; and Government Code, Chapter 531.

§135.2. Definitions.

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

(1) - (20) (No change.)

(21) Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(22) [~~(21)~~] Title XVIII--Title XVIII of the United States Social Security Act, 42 United States Code (USC), §§1395 et seq.

§135.15. Facility Staffing and Training.

(a) Nursing services.

(1) (No change.)

(2) There shall be a written plan of administrative authority for all nursing services with responsibilities and duties of each category

of nursing personnel delineated and a written job description for each category. The scope of nursing service shall include, but is not limited to, nursing care rendered to patients preoperatively, intraoperatively, and postoperatively.

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

(E) The facility shall adopt, implement and enforce policies and procedures to comply with Health and Safety Code, Chapter 259 (relating to Surgical Technologists at Health Care Facilities).

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

(b) (No change.)

§135.26. Reporting Requirements.

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

(e) The ASC shall submit reports to the department in accordance with the reporting requirements in Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events).

(f) [~~(e)~~] Occurrences of fire in the ASC shall be reported as specified under §135.41(a)(2) of this title (relating to Fire Prevention and Protection) and §135.43(b)(6) of this title (relating to Handling and Storage of Gases, Anesthetics, and Flammable Liquids).

This 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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Lisa Hernandez
General Counsel
Department of State Health Services
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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER E. DOG AND CAT STERILIZATION

25 TAC §169.102

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §169.102, concerning the Department of State Health Services Animal Friendly Grants.

BACKGROUND AND PURPOSE

The amendment is necessary to comply with Health and Safety Code, Chapter 828, "Dog and Cat Sterilization," which requires the department to make grants to eligible organizations for the purpose of providing low-cost dog and cat sterilization to the general public.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 169.102 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The amendment to §169.102 replaces the definition of "owner" with "custodian;" deletes the definition of "department" because it is defined in Subchapter A which refers to definitions in the chapter; adds a definition of "sterilization" to make the rule consistent with the statute in subsection (b); adds language in subsection (f) to assure that sterilizations are performed in a manner consistent with the statute; updates the department's mailing address in subsection (g); and clarifies the requirements for animal friendly grants to align more closely with current state law, and revises terminology throughout the rule for consistency.

FISCAL NOTE

Adolfo Valadez, M.D., MPH, Division Director, Prevention and Preparedness Services, has determined that for each year of the first five-year period that the section will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Valadez has also determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment. Therefore, an economic impact statement and regulatory flexibility analysis for small and micro-businesses are not required.

PUBLIC BENEFIT

In addition, Dr. Valadez has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated as a result of enforcing or administering the section will be the distribution of funding to provide low-cost surgical sterilization of dogs and cats, thereby reducing the public health threat due to stray animals.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Tom Sidwa, DVM, Department of State Health Services, Community Preparedness Section, Zoonosis Control Branch, Mail Code 1956, P.O. Box 149347, Austin, Texas 78714-9347, or by email to Tom.Sidwa@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §828.014, which provides the department with the authority to make grants to eligible organizations for the purpose of providing low-cost dog and cat sterilization to the general public, and requires the department to establish guidelines by rule for spending money in the Animal Friendly account; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rule implements Government Code, §2001.039.

The amendment affects Health and Safety Code, Chapters 828 and 1001; and Government Code, Chapter 531.

§169.102. Department of State Health Services Animal Friendly Grants.

(a) (No change.)

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

(1) (No change.)

(2) Custodian--A person or agency which feeds, shelters, harbors, owns, has possession or control of, or has the responsibility to control an animal.

[~~(2) Department--Department of State Health Services.~~]

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

(5) Sterilization--The surgical removal of the reproductive organs of a dog or cat or the use of nonsurgical methods and technologies approved by the United States Food and Drug Administration or the United States Department of Agriculture to permanently render the animal unable to reproduce.

[~~(5) Owner--A person which feeds, shelters, harbors, has possession or control, or has the responsibility to control an animal.~~]

(c) (No change.)

(d) Sources and Allocation of Funds.

(1) Funds for the grants shall be provided in accordance with the Texas Health and Safety Code [~~Health & Safety Code~~], §828.014, relating to the Animal Friendly account.

(2) - (3) (No change.)

(4) The department shall have the authority and discretion to:

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

(C) determine the number, size, and duration of grants; and

(D) (No change.)

(5) (No change.)

(e) (No change.)

(f) Requirements for Grants.

(1) (No change.)

(2) Applicants for grants shall submit as a part of their application a plan of how they intend to provide sterilization services to [~~and~~] their target population, compliant with Texas Health and Safety Code, Chapter 828, and this section.

(3) Grant recipients shall make quarterly [~~semi-annual~~] reports to the department in a form and at a time determined by the department.

(g) Procedures for Grant Announcements.

(1) (No change.)

(2) The department shall maintain a list of persons to be notified of the request [~~requests~~] for proposals. Any person wanting to be placed on the list should contact: Animal Friendly Grants, Zoonosis Control Branch, Mail Code 1956, P. O. Box 149347, Austin, Texas 78714-9347 [~~1100 West 49th Street, Austin, Texas 78756~~].

(3) The department shall develop and publish one or more request [~~requests~~] for proposals, which shall contain details concerning, but not limited to, the following:

(A) - (F) (No change.)

(h) Procedures for Grant Applications.

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

(4) Applicants will be given a minimum of 60 calendar days to file applications after a request for proposals is published. Applications must be received by the department on or before the closing date specified in the request for proposals [~~proposal~~].

(i) (No change.)

(j) Selection Criteria.

(1) (No change.)

(2) A grant application will be given funding preference, in a manner determined by the department and announced in the request for proposals [~~proposal~~], to the extent that it:

(A) includes an outreach program targeting pet custodians [~~targets low-income pets owners, describing how the applicant defines, ascertains, and verifies that the person is financially challenged~~];

(B) documents the intent and ability of the applicant to communicate and collaborate with the local health departments, animal control agencies, animal welfare agencies, veterinary organizations, and human services organizations;

(C) demonstrates a low cost for sterilization on a per animal basis, thereby maximizing the number of animals which can be sterilized; and [~~.~~]

[~~(D) is a new, qualified program that does not duplicate existing low-cost sterilization efforts in a given community; and~~]

(D) [~~(E)~~] contains such other information or criteria that the department may specify and include in the request for proposals.

(k) - (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 June 16, 2010.

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Lisa Hernandez
General Counsel
Department of State Health Services
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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 114. CONTROL OF AIR POLLUTION FROM MOTOR VEHICLES

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§114.2, 114.51, and 114.64; and the repeal of §114.52.

If adopted, the amendments to §114.2 and §114.51 and the repeal of §114.52 would be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP). Section 114.64 is not included in the SIP and the amendments to §114.64 will not be submitted to the EPA.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

A rulemaking adopted by the commission on October 6, 2000, revised an air pollution control strategy involving emissions inspection of vehicles to reduce nitrogen oxides (NO_x) and volatile organic compounds (VOC) necessary for the counties included in the Dallas-Fort Worth (DFW), Houston-Galveston-Brazoria (HGB), and El Paso (ELP) ozone nonattainment areas in order to assist in the ability to demonstrate attainment with the one-hour ozone National Ambient Air Quality Standard (NAAQS). The commission adopted vehicle emissions testing analyzer specifications (TAS) and inspection requirements for acceleration simulation mode (ASM) and on-board diagnostics (OBD) inspections. The revised vehicle emissions inspection program, also known as the Inspection and Maintenance (I/M) program, began on May 1, 2002, in Collin, Dallas, Denton, and Tarrant Counties in the DFW area and Harris County in the HGB area. On May 1, 2003, the I/M program expanded to include Ellis, Johnson, Kaufman, Parker, and Rockwall Counties for the DFW area and Brazoria, Fort Bend, Galveston, and Montgomery Counties in the HGB area. Unlike the two-speed idle (TSI) vehicle emissions inspection that had been in place, the ASM inspection has the ability to detect NO_x emissions, while the OBD inspection has the ability to ensure vehicle emissions control systems are functioning as designed by verification through the vehicle's computer system. Because NO_x is a precursor to ground-level ozone formation, reduced NO_x and VOC emissions result in ground-level ozone reductions. In addition, the inclusion of OBD in the I/M program ensured compliance with a federal mandate requiring all 1996 and newer model-year vehicles to receive an OBD inspection.

On October 24, 2001, the commission adopted rules that implemented portions of House Bill (HB) 2134, 77th Texas Legislature, 2001. The adopted rules defined the term "low-volume emissions inspection station" and required all vehicle emissions inspection stations in the DFW and HGB areas to offer both ASM and OBD inspections to the public with the exception of low-volume emissions inspection stations. The adopted rules also revised the TAS and established the Early Participation Incentive Program (EPIP).

The low-volume emissions inspection station designation was established because the cost of ASM vehicle emissions inspection analyzers, which have the capability to inspect all vehicles required to undergo I/M inspections, is much higher than the cost of OBD-only vehicle inspection analyzers, which only have the capability to inspect 1996 and newer model-year vehicles. To ensure that an adequate number of vehicle emissions inspection stations were available to provide both ASM and OBD inspections at the start of the revised I/M program in the DFW and HGB areas, stations that voluntarily opted to be designated as a low-volume emissions inspection station by the Texas Department of Public Safety (DPS), the agency that implements the I/M program along with the TCEQ, were restricted to a maximum of 1,200 OBD inspections per calendar year.

The EPIP was established as an additional method to ensure that an adequate number of vehicle emissions inspection stations were available to provide both ASM and OBD inspections at the start of the revised I/M program in the DFW and HGB areas. The EPIP encouraged early purchases of ASM analyzers by providing vehicle emissions inspection stations with financial assurance offered by the state if the I/M program was terminated early. The EPIP was available to the first 1,000 eligible vehicle emissions inspection stations that were certified by the DPS to offer ASM and OBD inspections to the public. Vehicle emissions inspection station owners that were accepted into the EPIP and maintained their eligibility could have received a payment of up to $675 per month to cover the cost of the ASM analyzers if the I/M program was terminated within five years of the program start date. As the EPIP expired in all I/M program areas on May 1, 2008, vehicle emissions inspection stations owners are no longer participating in the program.

On October 26, 2005, the commission adopted revisions to §114.51, which required manufacturers of vehicle emissions inspection analyzers used in the I/M program to meet the revised requirements contained in the TCEQ's "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, or in the TCEQ's "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005. Since October 2005, the TAS have been modified four times to improve oversight and enhance effectiveness of the I/M program. The minor modifications did not affect the vehicle emissions inspection procedure or the design and performance criteria for the vehicle emissions inspection analyzer. However, the minor modifications did include updates to accommodate new technology vehicles, enhancements to the method of collecting inspection data that is used to identify the occurrence of possible improper or fraudulent inspections, and updates

to internal reference tables used to determine the applicable vehicle emissions inspection criteria. No modification would be considered a minor non-programmatic modification if it results in additional costs to vehicle inspection station owners. Each time the TAS were modified, staff incorporated the necessary software enhancements into a draft version of the TAS, and these enhancements were implemented on all analyzers by the analyzer manufacturers participating in the I/M program. The modified TAS have not been incorporated by rule.

Rules adopted by the commission on March 27, 2002, implemented the Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP), which was designed to assist low income individuals with repairs, retrofits, or retirement of vehicles that failed emissions inspections as required by HB 2134, 77th Texas Legislature, 2001. Under the LIRAP, monetary assistance is provided for emissions-related repairs directly related to bringing the vehicle into compliance or for replacement assistance for a vehicle that has failed the required emissions inspection. Due to the requirements of Senate Bill (SB) 12, 80th Texas Legislature, 2007, the commission adopted rules on December 5, 2007, that modified the LIRAP, now commonly referred to as the Drive a Clean Machine program, by requiring funds be transferred to a participating dealer not later than five business days after the sale of a replacement vehicle is completed.

The primary reason for this proposed rulemaking is to implement portions of HB 715 and HB 1796 from the 81st Texas Legislature, 2009, relating to requiring the vehicle emissions inspection limit for low-volume emissions inspection stations to be set at no fewer than 150 OBD inspections per month and increasing the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days, respectively. This proposed rulemaking would also define the TAS as "the most recent version" resulting in a more streamlined process for minor non-programmatic modifications to the TAS and allow staff to implement minor non-programmatic modifications including updates to accommodate new technology vehicles, enhancements to the method of collecting inspection data, and updates to internal reference tables. However, modifications to the I/M program design, performance criteria for the vehicle emissions inspection analyzer, or the vehicle emissions inspection procedure would not be implemented unless commission approval is received through the rule and SIP revision process. In addition, the proposed rulemaking would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references to remove redundant requirements and would also repeal the EPIP.

The EPIP was established as an incentive program and is not a control strategy measure of the I/M program. In addition, the EPIP expired on May 1, 2008. Therefore, removal of the EPIP would not change the stringency or effectiveness of the I/M program.

SECTION BY SECTION DISCUSSION

In addition to the proposed amendments associated with the rulemaking for Chapter 114, various stylistic, non-substantive changes are included to update rule language to current Texas Register style and format requirements. Such changes include appropriate and consistent use of acronyms, section references, rule structure, and certain terminology. These changes are non-substantive and generally are not specifically discussed in this preamble. Comments received regarding existing rule language that are not related to incorporating the proposed amendments and the proposed repeal to Chapter 114 or to the specific proposed non-substantive changes discussed in this preamble will not be considered, and no changes will be made based on such comments.

The proposed amendment to §114.2 would modify the definition of a low-volume emissions inspection station. The current definition states that "a low-volume emissions inspection station is a vehicle emissions inspection station that performs only the OBD test and does not exceed 1,200 OBD tests per calendar year." The modified definition would state that "a low-volume inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety." HB 715 prevents the DPS from restricting a vehicle emissions inspection station to fewer than 150 OBD inspections per month. This proposed amendment would ensure that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715.

The proposed amendment to §114.51 would remove the dates associated with the TAS and add language requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS resulting in a more streamlined process for implementing minor non-programmatic modifications to the TAS. The most recent version of the TAS would be the version available at the TCEQ's central office or at *http://www.tceq.state.tx.us/assets/public/implementation/air/ms/IM/txvehanlspecs.pdf.* In addition, the proposed amendment would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references as the specifications for OBD-only vehicle inspection analyzers are also contained in the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program."

The proposed repeal of §114.52 would remove all requirements relating to the EPIP, which has expired, and delete the EPIP requirements that were incorporated into the I/M SIP in the preamble of previous rulemakings adopted on October 24, 2001, October 8, 2003, and September 14, 2004.

The proposed amendment to §114.64 would increase the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

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

The proposed rulemaking would implement two bills: HB 715, which changes requirements for low-volume emissions inspection stations; and HB 1796, which changes a requirement of the LIRAP. In addition, staff is proposing a revision to the rule regarding the TAS and a rule repeal regarding the EPIP.

Low-Volume Emissions Inspection Stations

Currently, low-volume emissions inspection stations may perform up to 1,200 OBD inspections per year. HB 715 increased this limit to a maximum established by the DPS of at least 150 OBD inspections per month effective December 31, 2010. The vehicle emissions inspection limit for stations that only offer emissions inspections on 1996 and newer model-year vehicles has been a component of the I/M program in the DFW and HGB areas since 2002. The rule was adopted in 2001 because the cost of ASM analyzers, which have the capability to inspect all vehicles required to undergo I/M inspections, is much higher than the cost of OBD-only vehicle inspection analyzers, which only have the capability to inspect 1996 and newer model-year vehicles. The rule did not limit the number of inspections conducted using ASM analyzers in order to provide an incentive for automotive shops to purchase the more expensive ASM analyzers so that more inspection stations could accommodate older cars. The rule has been in place for eight years. With the passage of HB 715, the limit for vehicle emissions inspections at low-volume emissions inspection stations has been increased.

In order to comply with HB 715, the proposed rule revision to §114.2 is needed to replace the vehicle emissions inspection limit in the current definition with language indicating that the station must meet the criteria for obtaining a low-volume waiver from the DPS. This change would ensure that the definition of a low-volume emissions inspection station would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules.

The proposed rule revisions would be implemented by the TCEQ through updating the Texas Information Management System database, which is used to enforce this aspect of the I/M program in the DFW and HGB areas. In order to implement the proposed rule revisions, the TCEQ and the DPS would need to make minor administrative and procedural changes. No significant fiscal implications are anticipated for the TCEQ or the DPS as a result of the proposed rule revisions.

LIRAP

Section 12 of HB 1796 revised a requirement of the LIRAP, which increased the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days. The LIRAP is managed by the TCEQ but administered and implemented in the local areas by county program administrators. The TCEQ does not conduct any reimbursement activities to dealerships. Local governments and their contracted local administrators are expected to experience additional processing and review time for payments to dealerships. The proposed rulemaking extending the time period that counties would have to reimburse participating dealerships is not expected to have significant fiscal impacts on the TCEQ or affected local governments.

TAS

On October 26, 2005, the commission adopted revisions to §114.51, which required manufacturers of vehicle emissions inspection analyzers used in the I/M program to meet the requirements contained in the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, or in the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005, which are also referred to as the TAS. Since October 2005, the TAS has been modified four times with minor non-programmatic changes to improve the oversight and effectiveness of the I/M program. The modified TAS has not been incorporated into the rule.

The proposed rule revision would define the TAS as "the most recent version" resulting in a more streamlined process for implementing minor non-programmatic modifications to the TAS. In addition, the rule revision would remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references to remove redundant requirements.

EPIP

On October 24, 2001, the commission adopted rules for the EPIP in §114.52. The EPIP was established to ensure that an adequate number of vehicle emissions inspection stations were available to provide ASM and OBD inspections at the start of the I/M program for the DFW and HGB areas. Vehicle emissions inspection station owners that were accepted into the EPIP and maintained their eligibility could receive a payment of up to $675 per month to cover the cost of the ASM analyzer if the I/M program was terminated within five years of the start date. However, now that the EPIP program has expired in all I/M program areas, the proposed rule revisions would repeal this provision. Because the proposed rule revisions would eliminate an expired program, the TCEQ would not experience any fiscal impacts due to this proposed rule repeal.

PUBLIC BENEFITS AND COSTS

Mr. Horvath has also determined that for each year of the first five years the proposed rule revisions are in effect, the public benefit anticipated from the changes seen in the proposed rule revisions would be compliance with state law and more efficient operation of the state's I/M program.

No significant fiscal implications are anticipated for businesses or for individuals as a result of the implementation or enforcement of the proposed rule revisions.

The proposed changes to the definition of a low-volume emissions inspection station in §114.2 would not impact individuals but may fiscally impact vehicle emissions inspection stations. Low-volume emissions inspection stations may experience an increase in revenue due to the increase in the amount of inspections they are allowed to perform each month, while non low-volume emissions inspection stations, also known as full-service vehicle emissions inspection stations, may experience a corresponding decrease in revenue. Predicting the magnitude of the increase or decrease experienced by each type of station is not possible as the increase or decrease would be determined by the marketplace.

The proposed rule revisions relating to extending the time period that counties would have to reimburse participating dealerships from five to 10 business days is not expected to result in significant fiscal impacts. Participation by dealerships in the LIRAP is voluntary and based on agreements with local program administrators that detail specific program requirements including payment schedules. The proposed rule revisions would provide additional processing and review time that may improve the efficiency of payments to dealerships.

Businesses and motorists would not experience any fiscal impacts due to the proposed rule revisions relating to the TAS. The proposed changes would only affect the way the TCEQ approves minor non-programmatic modifications to the TAS and eliminate redundant requirements.

The proposed changes that would repeal the EPIP would eliminate a requirement for an expired program. Therefore, businesses and motorists would not experience any fiscal impacts as a result of the proposed rule repeal.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

In general, the proposed rule revisions are not expected to adversely affect small or micro-businesses as a result of the implementation or administration of the proposed rule revisions. The proposed rule revisions would affect approximately 531 low-volume emissions inspection stations and approximately 1,011 full-service vehicle emissions inspection stations in the HGB area, and approximately 677 low-volume emissions inspection stations and approximately 1,134 full-service vehicle emissions inspection stations in the DFW area. Low-volume emissions inspection stations may experience an increase in revenue due to the increase in the amount of inspections they are allowed to perform each month. Full-service vehicle emissions inspection stations may experience a corresponding decrease in revenue. Predicting the magnitude of the increase or decrease experienced by each type of station is not possible as the increase or decrease would be determined by the marketplace.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule revisions relating to low-volume emissions inspection stations and the LIRAP are necessary to comply with state law. The rest of the proposed rulemaking is procedural, and all of the proposed rule revisions are consistent with the public health, safety, environmental, and economic welfare of the state.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rule revisions do not meet the definition of a "major environmental rule." Texas Government Code, §2001.0225 states that a "major environmental rule" is, "a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state." Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule, which: "(1) exceeds a standard set by federal law, unless the rule is specifically required by state law; (2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; (3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopts a rule solely under the general powers of the agency instead of under a specific state law."

The proposed rulemaking implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, state SIPs must include "enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter," (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control, otherwise known as the FCAA). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410 and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. Furthermore, while states generally are afforded some flexibility in adopting and implementing a SIP, vehicle I/M programs are required elements of the SIP pursuant to 42 USC, §7511(a).

The specific intent of the proposed rulemaking is to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions. To further this specific intent, this rulemaking incorporates the following proposed amendments to the I/M program. The current definition of a low-volume emissions inspection station in §114.2 states that "a low-volume emissions inspection station is a vehicle emissions inspection station that performs only the OBD test and does not exceed 1,200 OBD tests per calendar year." The proposed amendment to §114.2 would modify the current definition to state that "a low-volume emissions inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety." HB 715 prevents the DPS from restricting a vehicle emissions inspection station to fewer than 150 OBD inspections per month. The proposed amendment would ensure that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715. The proposed amendment to §114.64 would increase the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796. The proposed amendment to §114.51 would remove the dates associated with the TAS and add language requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS and remove the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references. The proposed amendment would improve the efficiency

of the process used by the commission for implementing minor non-programmatic modifications to the TAS and remove redundant requirements. The proposed repeal of §114.52 would repeal all requirements relating to the EPIP, which has expired.

The proposed rulemaking does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3) because: 1) the specific intent of the proposed rule revision is not to protect the environment or reduce risks to human health from environmental exposure, but rather to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions; and 2) as discussed in the FISCAL NOTE, PUBLIC BENEFITS AND COSTS, SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS, and the LOCAL EMPLOYMENT IMPACT STATEMENT sections of this preamble, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the proposed rule revisions adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking actually clarifies, improves upon, and increases consistency within the I/M program and the LIRAP. Because the proposed rulemaking is not a major environmental rule, it is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225.

While the proposed rulemaking does not constitute a major environmental law, even if it did, it would not be subject to a regulatory impact analysis under Texas Government Code, §2001.0225. The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by SB 633 during the 75th Texas Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program; or are adopted solely under the general powers of the TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: "based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application." The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeds a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP and rules was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP and rules would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the SIP and rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code but left this provision substantially unamended. It is presumed that, "when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation." *Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ); *Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of "substantial compliance," Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has substantially complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rule revisions do not exceed a standard set by federal law or exceed an express requirement of state law since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law - the NAAQS. In addition, the adoption and maintenance of the I/M program is directly required by federal law pursuant to 42 USC, §7511(a). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality,* 128 S.W. 3d 728 (Tex. App. - Austin 2004, *no writ).* In addition, portions of this rulemaking are directly required by HB 715 and HB 1796. Furthermore, no contract or delegation agreement covers the topic that is the subject of this rulemaking. Finally, this rulemaking was not developed solely under the general powers of the TCEQ but is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code (TWC), which are cited in the

STATUTORY AUTHORITY section of this preamble, including THSC, §§382.011, 382.012, and 382.017.

This rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b), for the following reasons. The proposed rulemaking is not a major environmental law because: 1) the specific intent of the proposed rulemaking is not to protect the environment or reduce risks to human health from environmental exposure, but rather to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions; and 2) the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would it adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state, because the proposed rulemaking actually clarifies, improves upon, and increases consistency within the I/M program and the LIRAP. Furthermore, even if the proposed rulemaking was a major environmental rule, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this rulemaking; and 4) the proposed rulemaking is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act), and the TWC, which are cited in the STATUTORY AUTHORITY section of this preamble.

The commission invites public comment regarding the draft regulatory impact analysis determination during the public comment period. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rule revisions and performed an analysis of whether the proposed rule revisions constitute a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

The specific purpose of the proposed rulemaking is to clarify, improve upon, and increase consistency within the I/M program and the LIRAP by implementing HB 715 and HB 1796, streamlining the programs, and eliminating certain expired provisions. Therefore, the proposed rulemaking would substantially advance this stated purpose by: modifying the current definition of a low-volume emissions inspection station to state that "a low-volume emissions inspection station is a vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety"; ensuring that the definition for a low-volume emissions inspection station contained in §114.2 would not conflict with the low-volume waiver criteria for inspection stations listed in the DPS rules (37 TAC §23.95) and meet the requirements of HB 715; increasing the maximum time that counties would have to reimburse dealerships participating in the LIRAP from five to 10 business days as mandated by HB 1796; removing the dates associated with the TAS and adding language requiring analyzer manufacturers to meet the requirements contained in the "most recent version" of the TAS and removing the "Specifications for On-Board Diagnostics II Analyzer for Use in the Texas Vehicle Emissions Testing Program" and its corresponding references; streamlining the process used by the commission for implementing minor non-programmatic modifications to the TAS; removing redundant requirements; and deleting all requirements relating to the EPIP, which has expired.

Promulgation and enforcement of the proposed rule revisions would be neither a statutory nor a constitutional taking of private real property. These proposed rule revisions are not burdensome, restrictive, or limiting of rights to private real property because the proposed rule revisions simply clarify, improve upon, and increase consistency within the existing I/M program and the LIRAP. Furthermore, the proposed rule revisions would benefit the public by improving upon the I/M program and the LIRAP, making them more accessible to the public and subsequently improving their effectiveness. The proposed rule revisions do not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, these proposed rule revisions would not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rule revisions in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. The CMP goals applicable to the proposed rulemaking are to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas. No new sources of air contaminants would be authorized and ozone levels would be reduced as a result of the proposed rulemaking. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in the Code of Federal Regulations to protect and enhance air quality in the coastal area (31 TAC §501.32). This rulemaking proposal would not have a detrimental effect on SIP emissions reduction obligations relating to maintenance of the ozone NAAQS by continuing to

implement the existing OBD, ASM, and TSI vehicle inspections as a part of the I/M program. This rulemaking action complies with the Code of Federal Regulations. Therefore, in compliance with 31 TAC §505.22(e), this rulemaking action is consistent with CMP goals and policies. Promulgation and enforcement of these proposed rule revisions would not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule revisions are consistent with these CMP goals and policies and because these propose rule revisions do not create or have a direct or significant adverse effect on any coastal natural resource areas.

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

ANNOUNCEMENT OF HEARINGS

The commission will hold public hearings on this proposal in Fort Worth on July 20, 2010, at 2:00 p.m. at the TCEQ, Region 4 Office, DFW Public Meeting Room, 2309 Gravel Road, Fort Worth, TX 76118; in Austin on July 21, 2010, at 10:00 a.m. at the TCEQ, Building E, Room 201S, 12100 Park 35 Circle, Austin, TX 78753; and in Houston on July 22, 2010, at 3:00 p.m. at the Houston-Galveston Area Council, Conference Room A, 3555 Timmons Lane, Houston, TX 77027. The hearings are structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearings; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearings.

Persons who have special communication or other accommodation needs who are planning to attend the hearings should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2009-027-114-EN. The comment period closes July 26, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Edgar J. Gilmore, Jr., Air Quality Planning Section, (512) 239-2069.

SUBCHAPTER A. DEFINITIONS

30 TAC §114.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendment is also proposed under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401 *et seq.;* and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment is proposed pursuant to Texas Transportation Code, §548.3075, which was amended by House Bill 715 from the 81st Texas Legislature, 2009.

The proposed amendment implements Texas Transportation Code, §548.3075.

§114.2. Inspection and Maintenance Definitions.

Unless specifically defined in Texas Health and Safety Code, Chapter 382, also known as the Texas Clean Air Act (TCAA), or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the TCAA, the following words and terms, when used in Subchapter C of this chapter (relating to Vehicle Inspection and Maintenance; Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program; and Early Action Compact Counties), have the following meanings, unless the context clearly indicates otherwise.

(1) Acceleration simulation mode (ASM-2) test--An emissions test using a dynamometer (a set of rollers on which a test vehicle's tires rest) that applies an increasing load or resistance to the drive train of a vehicle, thereby simulating actual tailpipe emissions of a vehicle as it is moving and accelerating. The ASM-2 vehicle emissions test is comprised of two phases:

(A) the 50/15 mode--in which the vehicle is tested on the dynamometer simulating the use of 50% of the vehicle available horsepower to accelerate at a rate of 3.3 miles per hour (mph) per second at a constant speed of 15 mph; and

(B) the 25/25 mode--in which the vehicle is tested on the dynamometer simulating the use of 25% of the vehicle available horsepower to accelerate at a rate 3.3 mph per second at a constant speed of 25 mph.

(2) Consumer price index--The consumer price index for any calendar year is the average of the consumer price index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of the calendar year.

(3) Controller area network (CAN)--A vehicle manufacturer's communications protocol that connects to the various electronic

modules in a vehicle. CAN provides one protocol that collects information from the vehicle's electronic systems including the on-board diagnostics (OBD) emissions testing system. The United States Environmental Protection Agency requires the CAN protocol to be installed in OBD-compliant vehicles beginning with some model year 2003 vehicles and phasing in to all OBD-compliant vehicles by the 2008 model year.

(4) Low-volume emissions inspection station--A vehicle emissions inspection station that meets all criteria for obtaining a low-volume waiver from the Texas Department of Public Safety. [~~performs on-board diagnostics (OBD) testing only and does not exceed 1,200 OBD tests per calendar year.~~]

(5) Motorist--A person or other entity responsible for the inspection, repair, and maintenance of a motor vehicle, which may include, but is not limited to, owners and lessees.

(6) On-board diagnostic (OBD) system--The computer system installed in a vehicle by the manufacturer that monitors the performance of the vehicle emissions control equipment, fuel metering system, and ignition system for the purpose of detecting malfunction or deterioration in performance that would be expected to cause the vehicle not to meet emissions standards. All references to OBD should be interpreted to mean the second generation of this equipment, sometimes referred to as OBD II.

(7) On-road test--Utilization of remote sensing technology to identify vehicles operating within the inspection and maintenance program areas that have a high probability of being high-emitters.

(8) Out-of-cycle test--Required emissions test not associated with vehicle safety inspection testing cycle.

(9) Primarily operated--Use of a motor vehicle greater than 60 calendar days per testing cycle in an affected county. Motorists shall comply with emissions requirements for such counties. It is presumed that a vehicle is primarily operated in the county in which it is registered.

(10) Program area--County or counties in which the Texas Department of Public Safety, in coordination with the commission, administers the vehicle emissions inspection and maintenance program contained in the Texas Inspection and Maintenance State Implementation Plan. These program areas include:

(A) the Dallas-Fort Worth program area, consisting of the following counties: Collin, Dallas, Denton, [~~Collin,~~] and Tarrant;

(B) the El Paso program area, consisting of El Paso County;

(C) the Houston-Galveston-Brazoria program area, consisting of Brazoria, Fort Bend, Galveston, Harris, and Montgomery Counties; and

(D) the extended Dallas-Fort Worth program area, consisting of Ellis, Johnson, Kaufman, Parker, and Rockwall Counties. These counties became part of the program area as of May 1, 2003.

(11) Retests--Successive vehicle emissions inspections following the failing of an initial test by a vehicle during a single testing cycle.

(12) Testing cycle--Annual cycle commencing with the first safety inspection certificate expiration date for which a motor vehicle is subject to a vehicle emissions inspection.

(13) Two-speed idle (TSI) inspection and maintenance test--A measurement of the tailpipe exhaust emissions of a vehicle while the vehicle idles, first at a lower speed and then again at a higher speed.

(14) Uncommon part--A part that takes more than 30 days for expected delivery and installation, where a motorist can prove that a reasonable attempt made to locate necessary emission control parts by retail or wholesale part suppliers will exceed the remaining time prior to expiration of the vehicle safety inspection certificate or the 30-day period following an out-of-cycle inspection.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER C. VEHICLE INSPECTION AND MAINTENANCE; LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM; AND EARLY ACTION COMPACT COUNTIES

DIVISION 1. VEHICLE INSPECTION AND MAINTENANCE

30 TAC §114.51

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendment is also proposed under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC,

Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.;* and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment to §114.51 is proposed pursuant to THSC, §382.205.

The proposed amendment implements THSC, Subchapter G, §§382.201 - 382.220, Vehicle Emissions.

§114.51. Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.

(a) Any manufacturer or distributor of vehicle testing equipment may apply to the executive director of the commission or his appointee, for approval of an exhaust gas analyzer or analyzer system for use in the Texas Inspection and Maintenance (I/M) program administered by the Texas Department of Public Safety. Each manufacturer shall submit a formal certificate to the commission stating that any analyzer model sold or leased by the manufacturer or its authorized representative and any model currently in use in the I/M program will satisfy all design and performance criteria set forth in the most recent version of the "Specifications for Vehicle Exhaust Gas Analyzer Systems for Use in the Texas Vehicle Emissions Testing Program." [~~," dated May 1, 2005, or in "Specifications for On-Board Diagnostics II for Use in the Texas Vehicle Emissions Testing Program," dated May 1, 2005.~~] Copies of this document [~~these documents~~] are available at the commission's Central Office, located at 12100 Park 35 Circle, Austin, Texas 78753 or at *http://www.tceq.state.tx.us/assets/public/implementation/air/ms/IM/txvehanlspecs.pdf.* The manufacturer shall also provide sufficient documentation to demonstrate conformance with these criteria including a complete description of all hardware components, the results of appropriate performance testing, and a point-by-point response to each specific requirement.

(b) All equipment must [~~shall~~] be tested by an independent test laboratory. The cost of the certification must [~~shall~~] be absorbed by the manufacturer. The conformance demonstration must [~~shall~~] include, but is not limited to:

(1) certification that equipment design and construction conform with the specifications referenced in subsection (a) of this section;

(2) documentation of successful results from appropriate performance testing;

(3) evidence of necessary changes to internal computer programming, display format, and data recording sequence;

(4) a commitment to fulfill all maintenance, repair, training, and other service requirements described in the specifications referenced in subsection (a) of this section. A copy of the minimum warranty agreement to be offered to the purchaser of an approved vehicle exhaust gas analyzer must [~~shall~~] be included in the demonstration of conformance; and

(5) documentation of communication ability using protocol provided by the commission or the commission Texas Information Management System (TIMS) contractor.

(c) If a review of the demonstration of conformance and all related support material indicates compliance with the criteria listed in subsections (a) and (b) of this section, the executive director or his appointee may issue a notice of approval to the analyzer manufacturer that endorses the use of the specified analyzer or analyzer system in the Texas I/M program.

(d) The applicant shall comply with all special provisions and conditions specified by the executive director or his appointee in the notice of approval.

(e) Any manufacturer or distributor that receives a notice of approval from the executive director or the executive director's appointee for vehicle emissions test equipment for use in the Texas I/M program may be subject to appropriate enforcement action and penalties prescribed in the Texas Clean Air Act or the rules and regulations promulgated thereunder if:

(1) any information included in the conformance demonstration as required in subsection (b) of this section is misrepresented resulting in the purchase or operation of equipment in the Texas I/M program that does not meet the specifications referenced in subsection (a) of this section; [~~or~~]

(2) the applicant fails to comply with any requirement or commitment specified in the notice of approval issued by the executive director or implied by the representations submitted by the applicant in the conformance demonstration required by subsection (b) of this section; [~~or~~]

(3) the manufacturer or distributor fails to provide on-site service response by a qualified repair technician within two business days of a request from an inspection station, excluding Sundays, national holidays (New Year's Day, Martin Luther King Jr. Day, President's Day, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, and Christmas Day), and other days when a purchaser's business might be closed;

(4) the manufacturer or distributor fails to fulfill, on a continuing basis, the requirements described in this section or in the specifications referenced in subsection (a) of this section; or

(5) the manufacturer fails to provide analyzer software updates within six months of request and fails to install analyzer updates within 90 days of commission written notice of acceptance.

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

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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30 TAC §114.52

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

STATUTORY AUTHORITY

The repeal is proposed under Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission

to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The repeal is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The repeal is also proposed under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.;* and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The repeal of §114.52 is proposed pursuant to THSC, §382.216.

The proposed repeal implements THSC, Subchapter G, §§382.201 - 382.220, Vehicle Emissions.

§114.52. Early Participation Incentive 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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Robert Martinez
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DIVISION 2. LOW INCOME VEHICLE REPAIR ASSISTANCE, RETROFIT, AND ACCELERATED VEHICLE RETIREMENT PROGRAM

30 TAC §114.64

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, General Powers, TWC, §5.103, Rules, and TWC, §5.105, General Policy, which provide the commission with the general powers to carry out its duties and authorize the commission to propose rules necessary to carry out its powers and duties under the TWC; and TWC, §5.013, General Jurisdiction of Commission, which states the commission's authority over various statutory programs. The amendment is also proposed under Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to propose rules consistent with the policy and purposes of THSC, Chapter 382 (the Texas Clean Air Act), and to propose rules that differentiate among particular conditions, particular sources, and particular areas of the state. The amendment is also proposed under THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC §382.019, Methods Used to Control and Reduce Emissions From Land Vehicles, which provides the commission the authority to propose rules to control and reduce emissions from engines used to propel land vehicles; THSC, Chapter 382, Subchapter G, Vehicle Emissions, which provides the commission the authority by rule to establish, implement, and administer a program requiring emissions-related inspections of motor vehicles to be performed at inspection facilities consistent with the requirements of Federal Clean Air Act, 42 United States Code, §§7401 *et seq.;* and THSC, Chapter 382, Subchapter H, Vehicle Emissions Programs in Certain Counties, which authorize the commission to propose an Inspection and Maintenance program for participating Early Action Compact counties. The amendment is proposed pursuant to THSC, §382.210 which was amended by House Bill 1796 from the 81st Texas Legislature, 2009.

The proposed amendment implements THSC, §382.210.

§114.64. LIRAP Requirements.

(a) Implementation. Upon receiving a written request to implement a Low Income Vehicle Repair Assistance, Retrofit, and Accelerated Vehicle Retirement Program (LIRAP) by a county commissioners court, the executive director shall authorize the implementation of a LIRAP in the requesting county. The executive director and county shall enter into a grant contract for the implementation of the LIRAP.

(1) The grant contract must provide conditions, requirements, and projected funding allowances for the implementation of the LIRAP.

(2) A participating county may contract with an entity approved by the executive director for services necessary to implement the LIRAP. A participating county or its designated entity shall demonstrate to the executive director that, at a minimum, the county or its designated entity has provided for appropriate measures for determining applicant eligibility and repair effectiveness and ensuring against fraud.

(3) The participating county shall remain the contracted entity even if the county contracts with another county or another entity approved by the executive director to administer the LIRAP.

(b) Repair and retrofit assistance. A LIRAP must provide for monetary or other compensatory assistance to eligible vehicle owners for repairs directly related to bringing certain vehicles that have failed a required emissions test into compliance with emissions requirements or for installing retrofit equipment on vehicles that have failed a required emissions test, if practically and economically feasible, in lieu of or in combination with repairs performed to bring a vehicle into compliance with emissions requirements. Vehicles under the LIRAP must be repaired or retrofitted at a recognized emissions repair facility. To de-

termine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(1) the vehicle has failed a vehicle emissions test within 30 days of application submittal;

(2) the vehicle can be driven under its own power to the emissions inspection station or vehicle retirement facility;

(3) the vehicle is currently registered in and has been registered in the program county for the 12 months immediately preceding the application for assistance;

(4) the vehicle has passed the safety portion of the Texas Department of Public Safety (DPS) motor vehicle safety and emissions inspection as recorded in the Vehicle Inspection Report (VIR), or provide assurance that actions will be taken to bring the vehicle into compliance with safety requirements;

(5) the vehicle owner's net family income is at or below 300% [~~300 percent~~] of the federal poverty level; and

(6) any other requirements of the participating county or the executive director are met.

(c) Accelerated vehicle retirement. A LIRAP must provide monetary or other compensatory assistance to eligible vehicle owners to be used toward the purchase of a replacement vehicle.

(1) To determine eligibility, the participating county or its designated entity shall make applications available for LIRAP participants. The application, at a minimum, must require the vehicle owner to demonstrate that:

(A) the vehicle meets the requirements under subsection (b)(1) - (3) and (5) of this section;

(B) the vehicle has passed a DPS motor vehicle safety or safety and emissions inspection within 15 months prior to application submittal; and

(C) any other requirements of the participating county or the executive director are met.

(2) Eligible vehicle owners of pre-1996 model year vehicles that pass the required United States Environmental Protection Agency (EPA) Start-Up Acceleration Simulation Mode (ASM) standards emissions test, but would have failed the EPA Final ASM standards emissions test, or some other criteria determined by the commission, may be eligible for accelerated vehicle retirement and replacement compensation under this section.

(3) Notwithstanding the vehicle requirement provided under subsection (b)(1) of this section, an eligible vehicle owner of a vehicle that is gasoline powered and is at least 10 years old as determined from the current calendar year (i.e., 2010 [~~2007~~] minus 10 years equals 2000 [~~1997~~]) and meets the requirements under subsection (b)(2), (3), and (5) of this section, may be eligible for accelerated vehicle retirement and compensation.

(4) Replacement vehicles must:

(A) be in a class or category of vehicles that has been certified to meet federal Tier 2, Bin 5 or cleaner Bin certification under 40 Code of Federal Regulations §86.1811-04, as published in the February 10, 2000, *Federal Register* (65 FR [~~FedReg~~] 6698);

(B) have a gross vehicle weight rating of less than 10,000 pounds;

(C) be a vehicle, the total cost of which does not exceed $25,000; and

(D) have passed a DPS motor vehicle safety inspection or safety and emissions inspection within the 15-month period before the application is submitted.

(d) Compensation. The participating county shall determine eligibility and approve or deny the application promptly. If the requirements of subsection (b) or (c) of this section are met and based on available funding, the county shall authorize monetary or other compensations to the eligible vehicle owner.

(1) Compensations must be:

(A) no more than $600 and no less than $30 per vehicle to be used for emission-related repairs or retrofits performed at recognized emissions repair facilities, including diagnostics tests performed on the vehicle; or

(B) based on vehicle type and model year of a replacement vehicle for the accelerated retirement of a vehicle meeting the requirements under this subsection. Only one retirement compensation can be used toward one replacement vehicle annually per applicant. The maximum amount toward a replacement vehicle, must not exceed:

(i) $3,000 for a replacement car of the current model year or previous three model years, except as provided by clause (iii) of this subparagraph;

(ii) $3,000 for a replacement truck of the current model year or the previous two model years, except as provided by clause (iii) of this subparagraph;

(iii) $3,500 for a replacement hybrid vehicle of the current model year or the previous model year.

(2) Vehicle owners shall be responsible for paying the first $30 of emission-related repairs or retrofit costs that may include diagnostics tests performed on the vehicle.

(3) For accelerated vehicle retirement, provided that the compensation levels in paragraph (1)(B) of this subsection are met and minimum eligibility requirements under subsection (c) of this section are met, a participating county may set a specific level of compensation or implement a level of compensation schedule that allows flexibility. The following criteria may be used for determining the amount of financial assistance:

(A) model year of the vehicle;

(B) miles registered on the vehicle's odometer;

(C) fair market value of the vehicle;

(D) estimated cost of emission-related repairs necessary to bring the vehicle into compliance with emission standards;

(E) amount of money the vehicle owner has already spent to bring the vehicle into compliance, excluding the cost of the vehicle emissions inspection; and

(F) vehicle owner's income.

(e) Reimbursement for repairs and retrofits. A participating county shall reimburse the appropriate recognized emissions repair facility for approved repairs and retrofits within 30 calendar days of receiving an invoice that meets the requirements of the county or designated entity. Repaired or retrofitted vehicles must pass a DPS safety and emissions inspection before the recognized emissions repair facility is reimbursed. In the event that the vehicle does not pass the emissions retest after diagnosed repairs are performed, the participating county has the discretion, on a case-by-case basis, to make payment for diagnosed emissions repair work performed.

(f) Reimbursements for replacements. A participating county shall ensure that funds are transferred to a participating automobile dealership no later than 10 [~~five~~] business days after the county receives proof of the sale, proof of transfer to a dismantler, and any administrative documents that meet the requirements of the county or designated entity. A list of all administrative documents must be included in the agreements that are entered into by the county or designated entity and the participating automobile dealerships.

(1) A participating county shall provide an electronic means for distributing replacement funds to a participating automobile dealership once all program criteria have been met. The replacement funds may be used as a down payment toward the purchase of a replacement vehicle. Participating automobile dealers shall be located in the State of Texas. Participation in the LIRAP by an automobile dealer is voluntary.

(2) Participating counties shall develop a document for confirming a person's eligibility for purchasing a replacement vehicle and for tracking such purchase.

(A) The document must include at a minimum, the full name of applicant, the vehicle identification number of the retired vehicle, expiration date of the document, the program administrator's contact information, and the amount of money available to the participating vehicle owner.

(B) The document must be presented to a participating dealer by the person seeking to purchase a replacement vehicle before entering into negotiations for a replacement vehicle.

(C) A participating dealer who relies on the document issued by the participating county has no duty to confirm the eligibility of the person purchasing a replacement vehicle in the manner 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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CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§116.13, 116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740, and 116.750; and new §116.765.

The amended sections would be submitted to the United States Environmental Protection Agency (EPA) as revisions to the State Implementation Plan (SIP) with the exception of §§116.711(a)(2)(C)(iii), 116.715(f)(2)(A), 116.730, and 116.740(b).

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

On September 23, 2009, the EPA published notice in the *Federal Register* (74 *FR* 48480) (hereafter "Notice") of its intent to disapprove the TCEQ flexible permit program rules that were submitted to the EPA as a proposed SIP revision in 1994. Although the Federal Clean Air Act (FCAA) requires that proposed revisions to the SIP be reviewed within 18 months after submittal *(See* 42 United States Code (U.S.C.) §7410(k)(1)(B) and (k)(2)), EPA took 15 years to take any formal action and did so only in response to litigation brought by holders of flexible permits *(see BCCA Appeal Group, et al v. United States EPA et al,* No. 3-08CV1491-G (N.D. Texas)). In the Notice, the EPA cited the following assertions as the basis for disapproval of the flexible permit program as a minor New Source Review (NSR) revision: 1) The program is not clearly limited to use in minor NSR and does not clearly prevent circumvention of major NSR requirements; 2) The program does not require that an applicability determination for major NSR be made first for construction or modification that could potentially be subject to major NSR; 3) The program fails to meet the statutory and regulatory requirements for a SIP revision and is not consistent with guidance on SIP revisions; 4) The program lacks replicable, specific, established implementation procedures for establishing the emission cap in a minor NSR flexible permit; 5) The program is not an enforceable minor NSR permitting program; 6) The program allows the issuance of flexible permits that do not incorporate emission limitations and other requirements of the Texas SIP; and 7) The program lacks the necessary more specialized monitoring, recordkeeping, and reporting (MRR) requirements required for this type of minor NSR program, to ensure accountability and provide a means to determine compliance. The EPA also identified a number of related concerns with the Texas flexible permit program in correspondence to the commission dated March 12, 2008.

The Texas flexible permit program rules (Chapter 116, Subchapter G, Flexible Permits) became effective on December 8, 1994. The flexible permit program was developed in response to direction from the commission at the January 21, 1994, policy agenda meeting. The flexible permit rules were developed after considering the positional papers presented by industry, environmental groups, and local programs under the supervision of Task Force 21. The rules created a new type of permit called a flexible permit, which functions as an optional alternative to the traditional preconstruction permits that are authorized in Subchapter B, New Source Review Permits. Flexible permits were designed to exchange flexibility for emission reductions with the final goal being a well-controlled facility. At the time the flexible permit program was developed, the commission lacked the authority to require an air quality permit for grandfathered facilities. The flexible permit program was intended to provide grandfathered facilities with a voluntary authorization mechanism that would reduce emissions. Only one flexible permit can be issued for a particular plant site or active account. However, multiple emission caps, multiple individual emission limits, or any combination thereof can be included in a flexible permit. The applicant for a flexible permit can combine existing facilities and new facilities into the flexible permit. The flexible permit would then become the controlling authorization for all facilities included in the permit, succeeding any existing minor NSR permits that may have been applicable to all or part of the facilities. The flexible permit is not a substitute for or in lieu of major NSR permitting if federal NSR review is triggered. The flexible permitting program is intended to eliminate the need for owners or operators of participating facilities to submit an amendment application each time certain operational or physical changes are made at the permitted facility. The environmental benefits of the flexible per-

mit program have included the permitting of grandfathered units, substantial emission reductions from the installation of controls, and a comprehensive evaluation of emission impacts.

The commission maintains that its flexible permit program rules, as adopted and implemented, are fully approvable as revisions to the SIP. In fact, the Texas flexible permit program is a minor NSR permit program which requires the application of best available control technology (BACT) to minor sources even though not required to do so under the FCAA. The commission's executive director provided detailed comments in response to the Notice addressing each of the EPA assertions discussed earlier and demonstrating that, as written and administered by the commission, the flexible permit program rules are in full conformity with all applicable federal requirements *(see* Letter from M. Vickery, Executive Director, TCEQ to S. Spruiell, Air Permits Section (EPA Region 6), November 23, 2009). Additionally, permits issued under the flexible permit rules are consistent with the FCAA and EPA rules implementing NSR.

As originally developed and subsequently implemented by TCEQ in 1994, the Texas flexible permit program is a minor NSR program. No provision of the Texas flexible permit program rules may be read to circumvent federal requirements. The rules expressly require compliance with all applicable requirements relating to nonattainment and Prevention of Significant Deterioration (PSD) review.

That limitation, adopted in 1994 as §116.711(8) and (9), continues as proposed §116.711(a)(2)(H) and (I); *see also,* e.g., proposed §§116.710(a)(5), 116.711(a)(2)(C)(ii), and 116.718(b) and (c). The program does not supersede or negate federal requirements. The flexible permit program may not be used as a shield for protection or exemption from federal programs. Persons making changes under a flexible permit must maintain sufficient documentation to demonstrate that the project will comply with Subchapter B, Division 5, Nonattainment Review Permits; Division 6, Prevention of Significant Deterioration Review; and Subchapter E, Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63). A major modification, as defined in §116.12, may not occur without first being subject to a Nonattainment and/or PSD review. Likewise, an owner or operator may not use flexible permit rules to avoid maximum achievable control technology (MACT) requirements for the construction or reconstruction of major sources of hazardous air pollutants (HAP) as they are described and addressed in the 40 Code of Federal Regulations (CFR) Part 63, National Emission Standards for Hazardous Air Pollutants (NESHAP) rules. If a proposed project is determined to be a major modification under Nonattainment and/or PSD rules, or meets the definition of construction or reconstruction under 40 CFR Part 63, the owner or operator must obtain a federal NSR permit or major modification under the appropriate federal NSR program, as well as a HAP permit to meet requirements of FCAA §112(g) if case-by-case MACT applies; and a minor NSR permit amendment. Further, the flexible permit program does not impair the commission's authority to control the quality of the state's air and to take action to control a condition of air pollution if the commission finds that such a condition exists.

As the EPA recognizes, under the applicable federal regulations, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards (NAAQS). The development of NSR requirements and procedures tailored for the air quality needs of each state is not only consistent with the FCAA, it is encouraged under the law and EPA's implementing regulations (see 42 U.S.C. §7407(a) and 40 CFR §51.101(e) and (g); see also *Safe Air for Everyone v. United States EPA,* 488 F.3d 1088, 1092 (9th Cir. 2007)). States have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans), and may also provide a rationale for why the rules are at least as stringent as the Part 51 requirements where the revisions are different from Part 51. These amendments are intended to remove any doubt that EPA might have, and to reaffirm the commission's position that the rules for the flexible permit program are at least as stringent as the commission's SIP-approved minor NSR permitting program.

SECTION BY SECTION DISCUSSION

§116.13, Flexible Permit Definitions

The commission is proposing detailed MRR requirements in proposed §116.715(c)(5), (6) and (12) and (d); *see also* §116.711(a)(2)(G). To support the proposed MRR requirements, the commission is proposing definitions of continuous emission monitoring system (CEMS), continuous parameter monitoring system (CPMS), and predictive emissions monitoring system (PEMS). The proposed definitions for these terms are derived from similar definitions established in 40 CFR §52.21, with minor changes to account for their use in the flexible permit program. The proposed changes relating to MRR are intended to address the EPA's comment that the Texas flexible permit program lacks the specialized MRR requirements necessary to enforce flexible permits.

The commission proposes to revise the definition of "emission cap" and the definition of "individual emission limitation" under §116.13 to delete references to the "insignificant emissions factor." The commission also proposes to remove the insignificant emission factor from other sections of Subchapter G as discussed in following sections of this preamble. The EPA identified the insignificant emissions factor as a concern in the March 12, 2008, correspondence to the commission. The proposed changes to eliminate the insignificant emissions factor would improve the accounting of emissions authorized under the flexible permit, and would address the EPA's comments that the Texas flexible permit program lacks replicable, specific, established implementation procedures for establishing the emission cap, and does not sufficiently address major NSR requirements.

§116.710, Applicability

The EPA has commented that the Texas flexible permit program is not clearly limited to minor NSR thereby allowing new major stationary sources to construct without a major NSR permit, and has no regulatory provisions clearly prohibiting the use of the program from circumventing the major NSR SIP requirements thereby allowing sources to use a flexible permit to avoid the requirement to obtain preconstruction permit authorizations for projects that would otherwise require a major NSR preconstruction permit. As previously discussed in the BACKGROUND AND SUMMARY section, the commission does not concur with the EPA's comment that the flexible permit program allows sources to circumvent or avoid major NSR requirements. However, the commission is proposing §116.710(a)(5) to clarify and emphasize that any project that constitutes a new major stationary source or major modification that would trigger major

NSR requirements must comply with Subchapter B, Division 5 or 6, as applicable. Proposed §116.710(a)(5) also contains a statement to emphasize that Subchapter G, cannot be used to circumvent applicable federal major NSR permit requirements. Proposed §116.710 also contains minor editorial changes to correct outdated cross-references and obsolete terminology throughout the section.

§116.711, Flexible Permit Application

The commission proposes to restructure and renumber the contents of this section to provide improved readability and greater consistency with similar requirements in §116.111. The commission also proposes minor changes throughout this section to update terminology and correct cross-references.

The commission proposes §116.711(a)(2)(C)(i) to more clearly describe the application of BACT to new and existing facilities. All new facilities are required to use BACT. Existing facilities may be considered on a grouped basis, such that some facilities within the group may be controlled at a higher level than BACT in order to provide the emission reductions necessary so that other facilities within the group may be controlled to a lesser degree. The existing level of control may not be reduced for any facility.

The commission proposes §116.711(a)(2)(C)(ii), which contains language to clarify that projects which constitute a new major source or major modification that would be subject to federal PSD or nonattainment permitting must comply with applicable requirements of §§116.150, 116.151, or 116.160 to determine the necessary emission controls. This proposed change is intended to ensure that all applicable federal major NSR control requirements are applied. This proposed change addresses EPA's comments that allege that the flexible permit rules could be used to bypass the federal BACT or Lowest Achievable Emission Rate (LAER) control technology determination that is required for major PSD or nonattainment NSR projects.

The commission proposes amended §116.711(a)(2)(G), which would specify that flexible permits shall specify requirements for initial compliance testing and methods of determining ongoing compliance. The EPA expressed a concern that the existing rule language, which contains the term "may" instead of "shall," is not sufficiently specific. Although flexible permits already specify appropriate compliance testing and compliance determination methods within the conditions of the permit, the commission has proposed to revise the rule language for greater clarity. The proposed change, in combination with others in this proposal, addresses the EPA's comments that the flexible permit program is lacking in supporting MRR requirements, and is not sufficiently enforceable.

The commission proposes amended §116.711(a)(2)(H) and (I), which would specify that prior to applying the requirements of Subchapter G, the applicant must first perform an analysis to determine the applicability or nonapplicability of federal nonattainment NSR requirements or PSD requirements. These proposed changes address EPA's comment that the flexible permit program could be used to exempt or shield changes from federal permitting requirements because the program does not require that first an applicability determination be made whether the construction or modification is subject to major NSR.

The commission proposes amended §116.711(a)(2)(J), which would add a requirement that any permit application for a new flexible permit, or permit amendment, shall include an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the NAAQS. This proposed change addresses EPA's comment that the flexible permit program does not sufficiently protect the NAAQS.

The commission proposes to amend §116.711(a)(2)(M)(iv) by adding language to ensure that permit applicants provide a complete description of the emission point numbers (EPNs) and facilities that will be included in an emissions cap. This proposed change addresses the EPA's comment that flexible permits must be structured in such a way that they sufficiently identify which units are subject to emission caps and individual emission limits.

The commission proposes §116.711(a)(2)(M)(vi) to specify that calculations to determine the controlled emission rates from each facility shall be performed in accordance with TCEQ Air Permits Division guidance.

The commission proposes §116.711(a)(2)(M)(vii) to specify that the flexible permit application must identify any terms, conditions, and representations in any Subchapter B permit or permits which will be superseded or incorporated under a flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit. This proposed change is intended to address the EPA's comment that existing SIP permits' major and minor NSR terms, limits and conditions, must be tracked and accounted for.

§116.715, General and Special Conditions

The commission proposes to restructure and renumber portions of §116.715, and proposes other minor changes to improve readability and update terminology and cross references throughout the section.

The commission proposes to amend §116.715(a) by deleting existing language concerning the executive director's ability to limit the use of standard permits or permits by rule in cases where the increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to federal PSD or nonattainment permitting. This requirement has been reorganized and relocated to §116.715(f).

The commission proposes an amendment to §116.715(b) to clarify that a flexible permit may contain more than one emission cap for a specific air contaminant. The commission also proposes to add language to specify that a permit holder shall comply with any emission caps and individual emission limitations in the permit, and that an exceedance of a flexible permit emission cap(s) or individual emission limitations is a violation of the permit. These proposed changes are in response to comments in the EPA's correspondence to the commission dated March 12, 2008.

The commission proposes amendments to §116.715(c)(5). Proposed §116.715(c)(5)(A) would require that each flexible permit specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit. Proposed §116.715(c)(5)(B) would require that each flexible permit specify emission calculation methods for calculating annual and short term emissions for each pollutant when continuous emission monitoring or continuous operating parameter monitoring is not required. These proposed changes address the EPA's concerns that the flexible permit rules are not sufficiently specific concerning the monitoring and enforcement of flexible permit emission caps and individual emission limits.

The commission proposes to amend §116.715(c)(6). The proposed amendment would reorganize the recordkeeping requirements applicable to flexible permits, and add specific new recordkeeping requirements to address certain EPA comments in the Notice and in the March 12, 2008, correspondence from the EPA to the commission. The proposed recordkeeping requirements would require flexible permit applicants to maintain records of any other permit applications associated with the flexible permit; would require specific recordkeeping to document compliance with annual and short term emission caps and individual emission limitations; and would require that flexible permit holders maintain records for five years instead of two years, as suggested by the EPA's March 12, 2008, correspondence.

The commission proposes §116.715(c)(8), concerning compliance with representations in a flexible permit application. This requirement parallels existing requirements relating to representations under §116.116.

In the Notice, the EPA commented that the flexible permit program lacked sufficient MRR to ensure accountability and determine compliance with flexible permits. The commission does not concur with the EPA's comment, as each individual permit establishes appropriate MRR requirements on a case-by-case basis. However, more specific rule language relating to MRR may be appropriate to clearly establish MRR requirements in the rule, especially relating to emission caps. The commission proposes §116.715(c)(12) and (d), which would specify MRR procedures associated with emission caps in a flexible permit. The proposed rules would require semiannual reporting relating to compliance with long and short term emission caps, similar to the semiannual reporting suggested by the EPA's March 12, 2008, correspondence to the commission. The proposed rules include requirements to address absence of monitoring data, require revalidation of site-generated data, and define minimum characteristics of the monitoring system. The proposed rules are intentionally structured in a manner similar to federal regulations for recordkeeping, reporting, and monitoring associated with Plant-wide Applicability Limits, for which the commission has adopted rules in Subchapter C, Plant-wide Applicability Limits, with minor changes as necessary for compatibility with the flexible permit program.

§116.716, Emission Caps and Individual Emission Limitations

The commission is proposing minor changes throughout this section to improve readability and update terminology. Other proposed changes throughout §116.716 are intended to address EPA's comment that the flexible permit program lacks replicable, specific, established implementation procedures for determining an emissions cap, and address several of the EPA's comments in the March 12, 2008, correspondence to the commission.

The commission is proposing §116.716(a)(1), which would specify that only like-kind facilities could be included in an emissions cap. As an alternative to this requirement, a site-wide emission cap could be established to cover all facilities at a site. Like-kind facilities means those facilities which are similar in operational nature and in emissions, such that all the facilities within an emission cap would share certain basic characteristics. Examples of like-kind facilities could include, but are not limited to: engines; turbines; boilers and process heaters; storage vessels; or similar chemical or refining process units. The executive director would reserve the right to exclude a proposed facility from an emissions cap if the executive director determines that the inclusion of the facility in the cap could interfere with the ability to monitor compliance with the permit, or determines that the inclusion of the facility in the cap could interfere with the protection of human health and the environment. The EPA expressed concern in the Notice that under the existing rules, hundreds of unrelated emission sources could be subject to one emission cap and/or individual emission limitations. The proposed change would address this concern by narrowing the scope of the types of sources that could be included together in an emission cap, referred to as a like-kind facilities cap. The commission has also included the option to have a site-wide cap.

The commission is proposing §116.716(a)(2)(B), which would add language to clarify and reinforce the application of federally-required control technology for any project that constitutes a federal major source or major modification. This provision is intended to further address EPA's stated concerns that the flexible permit program could allow a facility to avoid federally-required control technology.

The commission is proposing §116.716(a)(3), which would require that facilities subject to LAER in accordance with Subchapter B, Division 5, must be included in a separate emissions cap or provided with individual emission limitations. This provision is intended to ensure that sources subject to LAER are fully controlled as required by federal NSR regulations and Subchapter B.

The commission is proposing §116.716(a)(5) to specify that a permit applicant may propose an emission cap that is lower than the emission cap determined by subsection (a)(4), if the permit applicant provides technical information to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

The commission is proposing §116.716(c), which would require that each flexible permit clearly identify, by a table or other appropriate means, the facilities that are subject to an emission cap, and the facilities that are subject to individual emission limitations. This proposed change addresses EPA's comment that each flexible permit must be structured in such a manner that it will be clear which facilities are included under the permit and emission cap, and which facilities are subject to individual emission limitations.

The commission proposes to delete existing §116.716(d), which currently allows an emission cap or individual limitation to include an insignificant emissions factor of up to 9%.

The commission proposes §116.716(d) which would clarify how an emission cap is to be adjusted or determined for several situations. Proposed §116.716(d)(1) would require that an emission cap be adjusted downward to account for the shutdown of a facility for a period longer than six months. The current rule does not require the emission cap to be adjusted until a facility is shut down for longer than 12 months. The time period has been proposed to be reduced from 12 months to ensure that the emissions cap corresponds to the actual operation of the facilities under the cap and to ensure that appropriate emission control is maintained even when some sources within the cap are not operating. Proposed §116.716(d)(1) also includes language to clarify how the emission cap is to be adjusted when a previously shut down facility is restored to operation. The commission proposes §116.716(d)(2) to clarify that a permit amendment is required to add a facility to a flexible permit emission cap. Proposed §116.716(d)(3) further explains how the emission cap shall be determined when the permit is amended.

Proposed §116.716(e) would require that each emission cap or individual emission limitation have an annual emission limit, based on a 12-month rolling period. The proposed rule would also require that each emission cap or individual emission limitation include an appropriate short term (such as hourly) emission limit.

§116.717, Implementation Schedule for Additional Controls

The commission proposes an amendment to §116.717 to clarify that any control implementation schedule contained in a flexible permit is a requirement of the permit, such that if the schedule cannot be met, the permit holder must obtain a permit amendment or alteration to revise the control schedule in order to maintain compliance with the permit. The permit amendment or alteration would have to be approved by the executive director before the control schedule deadline specified in the permit passes. In addition, the commission has added language to this section to acknowledge and emphasize that certain federally-required controls, such as BACT or LAER required by PSD or nonattainment NSR, must be in place and operational before the permitted facility can begin operation. The proposed amendment addresses the EPA's comments relating to implementation schedules in the March 12, 2008, correspondence from the EPA to the commission, and would further ensure that the flexible permit program cannot be used to forestall or avoid major NSR control requirements.

§116.718, Significant Emission Increase

The commission proposes §116.718(b) to clarify that this section may not be used to authorize an emission increase under a flexible permit for any project that constitutes a federal major modification. Proposed §116.718(b) further requires that the permit holder must document that any increases under this section are not major modifications. The proposed changes further address the EPA's comments that the flexible permit program could be used to avoid applicable major NSR requirements.

The commission proposes §116.718(c) which would require a permit holder to perform an air quality analysis to demonstrate that any increases under this section would not interfere with attainment and maintenance of the NAAQS. This proposed change addresses the EPA's comment in the Notice that the flexible permit program does not contain sufficient assurances that the NAAQS will not be violated.

§116.720, Limitation on Physical and Operational Changes

The commission proposes minor editorial changes to §116.720 to improve readability.

§116.721, Amendments and Alterations

The commission proposes amendments to §116.721 to clarify under what circumstances a flexible permit amendment is required. The proposed rule under §116.721(a) includes new language to state that any action that would relax emission controls, add a new facility or facilities, or would constitute a major modification would require the permit holder to obtain a permit amendment. Similar language is proposed to be added to §116.721(c) for the same purpose. The proposed change is intended to prevent "backsliding" of emission controls, and ensure that projects that constitute a major modification are subject to an appropriate review for applicable federal requirements. The commission also proposes minor editorial changes to this section to update terminology and improve readability.

The Notice stated that the proposed disapproval was based, in part, on the EPA's understanding that the flexible permit program allows holders of a flexible permit to make de facto amendments of existing SIP permits, including changes in the terms and conditions (such as throughput, fuel type, hours of operation) of minor and major NSR permits, without a preconstruction review. The Notice further stated that while the EPA has recognized that under certain circumstances changes to PSD permits may be appropriate, such changes are generally not allowed without a review of the new circumstances by the permitting authority. The EPA stated that any time a change to a permit limit founded in BACT is being considered, a corresponding reevaluation (or reopening) of the original BACT determination may be necessary, and cited a memo from 1987.

The EPA's understanding of the Texas flexible permit rule is incorrect, and the case cited by EPA does not match the point EPA is attempting to support. Authorizing facilities in a flexible permit emission cap (regardless of their previous status) is a modification and requires a complete preconstruction review. Once established in a flexible permit, changes in the terms and conditions (such as any restrictions on throughput, fuel type, or hours of operation) of minor and major NSR permits without a preconstruction review are not allowed. Section 116.721(b)(2) provides that any change to permit conditions requires executive director approval. In general, flexible permits will not have conditions that restrict throughput or hours of operation unless they are necessary for BACT or to ensure acceptable off-site impacts. Changing any condition related to BACT requires a permit amendment, pursuant to §116.721(a). Any change in permit conditions that could result in a major modification as well as any fuel switch must undergo a preconstruction review, §116.721(a).

§116.730, Compliance History

The commission proposes minor editorial changes to §116.730 to improve readability and update terminology.

§116.740, Public Notice and Comment

The commission proposes minor editorial changes to §116.740 to improve readability and correct outdated cross-references. In a concurrent rulemaking, the commission has proposed new and amended rules regarding public participation in Chapter 39, Public Notice, Subchapters H and K, and in Chapter 55, Requests for Reconsideration and Contested Case Hearings; Public Comment, Subchapter E. Some of these changes apply to flexible permit applications.

§116.750, Flexible Permit Fee

The commission proposes an amendment to §116.750 that would revise how fees for flexible permits are determined. Since the inception of the flexible permit program in 1994, fees for flexible permits have been determined based on the quantity of emissions authorized, at a rate of $32 per ton (with a minimum fee of $900, and a maximum fee of $75,000). The proposed changes would require that flexible permit fees be based on a percentage of project capital cost, rather than based on emission rate. The proposed changes would make flexible permits subject to the existing fee system used for Subchapter B air permits, as specified in §116.141. The minimum fee of $900 and the maximum fee of $75,000 would be retained. The commission is proposing this change because the relatively small volume of flexible permit actions in relation to the number of Subchapter B permit actions does not justify maintaining a separate fee system.

§116.765, Delayed Effective Date

The commission proposes new §116.765 to specify that the rule changes proposed in this action would not become effective until the earlier of 60 days after the EPA publishes final approval of these sections as revisions to the Texas SIP, or December 1, 2012. Until such time, the existing Subchapter G rules concerning flexible permitting would remain in effect.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules. The proposed rules will base the calculation of the flexible permit fee on the capital cost of a project instead of annual emissions. The impact on agency revenue will vary depending on the complexity of each project, but the overall impact to agency revenue is not expected to be significant. Most local governments are not expected to experience fiscal impacts as a result of the proposed rules, but some governmental entities that have flexible permits could experience fiscal impacts if they choose to apply for a new flexible permit or modify facilities in a way that would require them to request an amendment to a flexible permit.

The EPA has proposed to disapprove existing rules in Subchapter G that relate to the flexible air permits program. The existing flexible permits program allows different sources to be grouped together under an emissions cap instead of having an individual emission limit for every emission point in a permit. The proposed rules are intended to address the EPA's concerns so that it will approve the flexible permits program.

For the most part, the proposed rules are clarifications of already existing agency practices and policies concerning the review and issuance of flexible permits. The proposed rules provide more detail, reorganize existing requirements, clarify and reference applicable federal requirements if a project triggers federal NSR permitting, clearly state that the flexible permits program cannot be used to circumvent federal NSR permitting, clearly state that exceedance of flexible permit caps or individual emission limitations is subject to enforcement action, and detail other requirements that are not expected to have a fiscal impact on regulated entities.

The proposed rules also incorporate provisions that are expected to have fiscal impacts, although these impacts are not expected to be significant. The proposed rules will only have fiscal impacts on regulated entities if they apply for a new flexible permit or are required to amend an existing flexible permit. Provisions of the proposed rules that may have a fiscal impact on regulated entities include changes to require that new permit or amendment applications include an air quality analysis to demonstrate that proposed actions will not interfere with attainment and maintenance of NAAQS, and specify a five-year record retention period.

The proposed rules may have a fiscal impact on agency revenue, but the impact is not expected to be significant. The basis for calculating the flexible permit fee will change from being based on tons of emissions per year to a percentage of project capital cost, which is the same basis used to assess a fee for a construction permit. Based on historical data, the average fee for an initial flexible permit has been $19,000, but a new flexible permit could range from $900 to $75,000. The number of initial flexible permits has been five to seven per year, and the number of flexible and construction amendments have averaged 30 per year. The average fee for a flexible permit amendment has been about $5,700. The average fee for an initial construction permit has been $11,000 and the fee for an amendment has been $5,700. If an average of six initial flexible permits and 30 flexible amendments are issued in a year, the estimated decrease in agency revenue could be as much as $48,000 per year in Account 151 - Clean Air Account. However, since projects requiring flexible permits are often complex, the effect on agency revenue due to the change in the basis for assessment could vary considerably. If a large number of complex projects are submitted, fees assessed could actually increase agency revenue.

Agency records indicate that there may be as many as one local government, one state agency, and one federal installation that could experience fiscal implications as a result of the proposed rules if they need a new flexible permit or are required to amend an existing flexible permit. Fiscal implications will vary depending on the complexity of each project. Permit fees will vary depending on the complexity of the project, but based on the difference in average fees charged for flexible and construction permits under current rules, the fee for an initial flexible permit could decrease by $8,000 per permit. New or amended flexible permits will require a local government or other governmental entity to conduct an air quality analysis. An air quality analysis would be a one-time cost that could range from $5,000 to $20,000 per analysis. A governmental entity would also be required to keep records for five years instead of two, which could increase record storage costs. The increase in storage costs is expected to be minimal and will depend on storage costs in different locations around the state.

The proposed rules modify the types of emission units allowed in a group to determine emission caps. Instead of allowing any kind of unit in an emission cap, the proposed rules allow that an emission cap have similar units. As an alternative to this requirement, permit applicants would also have the option to establish a site-wide emission cap that would cover all facilities at the site. Local governments with flexible permits could experience cost increases if facilities are placed in different emission caps. However, as permit applicants can elect to use a site-wide cap, instead of a like-kind cap for similar units, no fiscal impacts are expected as a result of the proposed rules for those situations.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be consistency with federal requirements and additional clarity regarding the flexible permit program.

Individuals are not expected to experience fiscal impacts as a result of the proposed rules. Individuals do not typically operate facilities that would elect to use the flexible permit program for operational flexibility.

Large businesses will be affected by the proposed rules if they elect to apply for a new flexible permit or elect to modify facilities in a way that requires an amendment of a flexible permit. Trends suggest that there may be as many as 37 plants per year that could be affected by the proposed rules, and examples of businesses that might be affected include chemical plants, refineries, pipeline companies, oil and gas companies, power plants, and others. Fiscal implications will vary depending on the complexity of each project. Permit fees paid will vary depending on the com-

plexity of the project, but based on the difference in average fees charged for flexible and construction permits under current rules, the fee for an initial flexible permit could decrease by $8,000 per permit. If the project is more complex, a flexible permit fee could increase. New or amended flexible permits will require a local government or other governmental entity to conduct an air quality analysis. An air quality analysis would be a one-time cost that could range from $5,000 to $20,000 per analysis. A large business would also be required to keep records for five years instead of two, which could increase record storage costs. The increase in storage costs is expected to be minimal and will depend on storage costs in different locations around the state. Businesses could also experience higher costs for monitoring or control devices if they choose to place facilities in different emission cap groupings. However, as permit applicants can elect to use a site-wide cap, instead of a like-kind cap for similar units, no fiscal impacts are expected as a result of the proposed rules for those situations.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that operate facilities under flexible permits unless they apply for a new flexible permit or modify facilities in a way that would require them to amend their flexible permits. Agency records indicate that most flexible permits are held by large businesses, but there may be as many as ten small businesses that have flexible permits. If these small businesses elect to apply for a new flexible permit or modify facilities in a way that requires an amendment of a flexible permit, they will experience the same fiscal impacts as those experienced by a large business.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed amendments to the rules are required for approval as part of the Texas SIP. The approval will be based on whether the commission's flexible permit program rules meet federal requirements. For purposes of the fiscal analysis, the requirements of the flexible permit program apply to both large and small businesses alike.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

A major environmental rule means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the proposed rules is to amend various sections of Subchapter G to address concerns expressed by the EPA regarding the agency's flexible permit program submitted by the commission as a revision to the SIP. The proposed changes to established rules for the flexible permit program are necessary to ensure that the rules can be a federally approved part of the Texas SIP. Specifically, these amendments: 1) include detailed MRR requirements; 2) propose replicable, specific, established implementation procedures for establishing the emission cap; 3) clearly limit the rules to minor NSR; 4) include regulatory provisions clearly prohibiting the use of the program from circumventing the major NSR permitting; 5) ensure that the rules cannot be used to bypass the federal BACT or LAER control technology determination that is required for major PSD or Nonattainment NSR projects; 6) specify requirements for initial compliance testing and methods of determining ongoing compliance; 7) ensure that the NAAQS are sufficiently protected; 8) include requirements for clarity of which facilities are included under the permit and any emission cap, and that there are sufficient monitoring and enforcement requirements for the emission caps and individual emission limits; and 9) provide for a delayed effective date.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action does not meet any of these four applicability requirements of a "major environmental rule." Specifically, the proposed amendments were developed to correct EPA-identified deficiencies in the commission's flexible permit program to ensure SIP approval by the EPA and thus meet a requirement of federal law. This rulemaking action does not exceed an express requirement of state law or a requirement of a delegation agreement, and was not developed solely under the general powers of the agency, but was specifically developed to meet the requirements of the Texas SIP, and the requirements of the FCAA and its associated regulations, and is authorized by specific sections of Texas Health and Safety Code, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the STATUTORY AUTHORITY section of this preamble.

Therefore, this proposed rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b). Comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS portion of this preamble.

TAKINGS IMPACT ASSESSMENT

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is

the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the proposed rulemaking action under the Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to amend the rules related to flexible permits in order to obtain federal approval of the rules into the Texas SIP. The proposed rules will not create any additional burden on private real property. The proposed rules will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in Chapter 281, Applications Processing, Subchapter B. As required by §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this proposed rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(l)). The proposed amendments will benefit the environment by ensuring that the flexible permit program meets applicable federal requirements, and is adequately enforceable so that air quality is protected. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 CFR, to protect and enhance air quality in the coastal areas (31 TAC §501.32). Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of the proposed rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement under Chapter 122, Federal Operating Permits Program. If the proposed rules are adopted, owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, upon the effective date of the adopted rulemaking, revise their operating permit to include the new Chapter 116 requirements.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on July 29, 2010, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-007-116-PR. The comment period closes August 2, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html.* For further information, please contact Mr. Michael Wilhoit, Air Permits Division, at (512) 239-1222.

SUBCHAPTER A. DEFINITIONS

30 TAC §116.13

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendment is also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 382.0513, and 382.0514.

§116.13. Flexible Permit Definitions.

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

(1) Continuous emission monitoring system (CEMS)--All of the equipment that may be required to meet the data acquisition and availability requirements of Subchapter G of this chapter, to sample, condition (if applicable), analyze, and provide a record of emissions on a continuous basis.

(2) Continuous parameter monitoring system (CPMS)--All of the equipment necessary to meet the data acquisition and availability requirements of Subchapter G of this chapter, to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, O_2 or CO_2 concentrations), and to record average operational parameter value(s) on a continuous basis.

(3) [~~(1)~~] Emission cap--Emission limit for a specific air contaminant based on total emissions of that pollutant [~~adjusted by an insignificant emissions factor~~] from all facilities [~~sources~~] that are included in a flexible permit.

(4) [~~(2)~~] Expected maximum capacity--The maximum capacity of a facility according to its physical and operational design and planned operation.

(5) [~~(3)~~] Individual emission limitation--Emission limit for a specific air contaminant [~~not covered by an emission cap~~] for an individual facility [~~adjusted by an insignificant emissions factor~~].

(6) Predictive emissions monitoring system (PEMS)--All of the equipment necessary to monitor process and control device operational parameters (for example, control device secondary voltages and electric currents) and other information (for example, gas flow rate, O_2 or CO_2 concentrations), and calculate and record the mass emissions rate (for example, pounds per hour) on a continuous basis.

This 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 June 18, 2010.

TRD-201003435
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 239-2548

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SUBCHAPTER G. FLEXIBLE PERMITS

30 TAC §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740, 116.750, 116.765

STATUTORY AUTHORITY

The amendments and new rule are proposed under Texas Water Code, §5.102, concerning General Powers, that provides the commission with the general powers to carry out its duties under the Texas Water Code; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the Texas Water Code; and under Texas Health and Safety Code (THSC), §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The amendments are also proposed under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §381.0511, concerning Permit Consolidation and Amendment; §382.0512, concerning Modification of Existing Facility, which restricts what the commission may consider in determining a facility modification; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; §382.0514, concerning Sampling, Monitoring, and Certification; §382.0515, concerning Application for Permit, §382.0517, concerning Determination of Administrative Completion of Application, §382.0518, concerning Preconstruction Permit, which authorizes the commission to require a permit before a facility is constructed or modified; §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing; and §382.062, concerning Application, Permit, and Inspection Fees.

This rulemaking implements THSC, §§382.002, 382.003, 382.011, 382.012, 382.051, 381.0511, 382.0512; 382.0513, 382.0514, 382.0515, 382.0517, 382.0518, 382.056 and 382.062.

§116.710. Applicability.

(a) Flexible permit. A person may obtain a flexible permit which allows for physical or operational changes as provided by this subchapter as an alternative to obtaining a new source review permit under §116.110 of this title (relating to Applicability), or in lieu of amending an existing permit under §116.116 of this title (relating to Amendments and Alterations). A person may obtain a flexible permit under §116.711 of this title (relating to Flexible Permit Application) for a facility, group of facilities, or account before any actual work is begun, provided however:

(1) only one flexible permit may be issued for [~~at~~] an account [~~site~~];

(2) modifications to existing facilities included in [~~covered by~~] a flexible permit may be authorized by [~~handled through~~] the amendment of an existing flexible permit;

(3) [~~permitting of~~] a new facility may be authorized by [~~handled through~~] the amendment of a flexible permit; [~~and~~]

(4) a flexible permit may not cover facilities [~~sources~~] at more than one account; and [~~site.~~]

(5) a flexible permit application, review, and issued permit used to authorize any facility, group of facilities, account, or any change to existing facilities that constitutes a new major stationary source or major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), shall be completed in accordance with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively), as applicable. No person shall use this subchapter to circumvent applicable requirements of Subchapter B, Division 5 or 6 of this chapter.

(b) Change in ownership. The new owner of a facility, group of facilities, or account shall comply with §116.110(e) [~~§116.110(d)~~] of

this title, provided however, that all facilities authorized [~~covered~~] by a flexible permit must change ownership at the same time and to the same person, or both the new owner and existing permit holder must obtain a permit alteration allocating the emission caps or individual emission limitation prior to the transfer of the permit by the commission. After the sale of a facility, or facilities, but prior to the transfer of a permit requiring a permit alteration, the original permit holder remains responsible for ensuring compliance with the existing flexible permit and all rules and regulations of the commission.

(c) Submittal under seal of Texas licensed professional engineer. All applications for a flexible permit or flexible permit amendment shall comply with §116.110(f) [~~§116.110(e)~~] of this title.

(d) Responsibility for flexible permit application. The owner of the facility, group of facilities, or account or the operator of the facility, group of facilities, or account who is authorized to act for the owner is responsible for complying with this section, except as provided by subsection (b) of this section.

§116.711. Flexible Permit Application.

[~~Any application for a new flexible permit or flexible permit amendment must include a completed Form PI-1 General Application. The Form PI-1 must be signed by an authorized representative of the applicant. The Form PI-1 specifies additional support information which must be provided before the application is deemed complete.~~] In order to be granted a flexible permit or flexible permit amendment, the owner or operator of the proposed facility shall submit a permit application which must include: [~~information to the commission which demonstrates that all of the following are met.~~]

(1) a completed Form PI-1 General Application signed by an authorized representative of the applicant. All additional support information specified on the form must be provided before the application is complete;

(2) information which demonstrates that emissions from the facility, including any associated dockside vessel emissions, meet all of the following:

(A) [~~(1)~~] Protection of public health and welfare.

(i) The emissions from the proposed facility, group of facilities, or account as determined under §116.716 of this title (relating to Emission Caps and Individual Emission Limitations), will comply with all applicable rules [~~and regulations~~] of the commission and with the intent of the TCAA, including protection of the health and physical property of the people.

(ii) In considering the issuance of a flexible permit for construction or modification of any facility, group of facilities, or account within 3,000 feet or less of an elementary, junior high/middle, or senior high school, the commission shall consider any possible adverse short-term or long-term side effects that an air contaminant or nuisance odor from the facility, group of facilities, or account may have on the individuals attending these school facilities.

(B) [~~(2)~~] Measurement of emissions. The proposed facility, group of facilities, or account will have provisions for measuring the emission of air contaminants as determined by the executive director. This may include the installation of sampling ports on exhaust stacks and construction of sampling platforms in accordance with guidelines in the "Texas Natural Resource Conservation Commission Sampling Procedures Manual."

(C) [~~(3)~~] Best available control technology (BACT).

(i) All new facilities must [~~The proposed facility, group of facilities, or account will~~] utilize BACT[~~, with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility, group of facilities, or account basis~~]. Existing facilities shall utilize BACT with consideration given to the technical practicability and economic reasonableness of reducing or eliminating the emissions from the facility on a proposed facility or group of existing facilities basis. Control technology beyond BACT may be used on certain existing facilities to provide the emission reductions necessary to comply with this requirement on a group of existing facilities [~~or account~~] basis, provided however, that the existing level of control may not be lessened for any facility. [~~For new facilities and proposed affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the use of BACT shall be demonstrated for the individual facility or affected source.~~]

(ii) For pollutants from new or modified facilities that constitute a new major stationary source or major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), control technology shall be demonstrated as required by §§116.150, 116.151, or 116.160 of this title (relating to New Major Source or Major Modification in Ozone Nonattainment Areas; New Major Source or Major Modification in Nonattainment Area Other Than Ozone; and Prevention of Significant Deterioration Requirements, respectively), as applicable, for each new or modified facility.

(iii) For new facilities and proposed affected sources (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the use of BACT shall be demonstrated for the individual facility or affected source.

(D) [~~(4)~~] New Source Performance Standards (NSPS). The emissions from each affected facility as defined in 40 Code of Federal Regulations (CFR), Part 60 will meet at least the requirements of any applicable NSPS as listed under Title 40 CFR Part 60, promulgated by the EPA under authority granted under the FCAA, §111, as amended.

(E) [~~(5)~~] National Emission Standards for Hazardous Air Pollutants (NESHAPS). The emissions from each facility as defined in 40 CFR Part 61 will meet at least the requirements of any applicable NESHAPS, as listed under 40 CFR Part 61, promulgated by EPA under authority granted under the FCAA, §112, as amended.

(F) [~~(6)~~] NESHAPS for source categories. The emissions from each affected facility shall meet at least the requirements of any applicable maximum achievable control technology (MACT) standard as listed under 40 CFR Part 63, promulgated by the EPA under FCAA, §112 or as listed under Chapter 113, Subchapter C of this title (relating to National Emissions Standards for Hazardous Air Pollutants for Source Categories (FCAA, §112, 40 CFR 63)).

(G) [~~(7)~~] Performance demonstration. The proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit application. The applicant may be required to submit additional engineering data after a flexible permit has been issued in order to demonstrate further that the proposed facility, group of facilities, or account will achieve the performance specified in the flexible permit. In addition, initial compliance testing with ongoing compliance determined through engineering calculations based on measured process variables, parametric or predictive monitoring, stack monitoring, or stack testing shall [~~may~~] be required as specified in each flexible permit.

(H) [~~(8)~~] Nonattainment review. If the proposed facility, group of facilities, or account is located in a nonattainment area, each facility shall comply with all applicable requirements concerning nonattainment review in this chapter. Prior to the application of this subchapter to a proposed facility, group of facilities, or account; or any change at an existing facility, group of facilities, or account; a separate analysis shall be made for the project to determine the applicability or nonapplicability of federal Nonattainment New Source Review requirements.

(I) [~~(9)~~] Prevention of Significant Deterioration (PSD) review. If the proposed facility, group of facilities, or account is located in an attainment area, each facility shall comply with all applicable requirements in this chapter concerning PSD review. Prior to the application of this subchapter to a proposed facility, group of facilities, or account; or any change at an existing facility, group of facilities, or account; a separate analysis shall be made for the project to determine the applicability or nonapplicability of federal PSD review.

(J) [~~(10)~~] Air dispersion modeling or ambient monitoring. Any permit application for a new flexible permit, or permit amendment to increase a flexible permit emission cap or individual emission limitation, shall include an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the National Ambient Air Quality Standards. Computerized air dispersion modeling and/or ambient monitoring may be required by the commission's Air [~~New Source Review~~] Permits Division to determine the air quality impacts from the facility, group of facilities, or account. In conducting a review of a permit application for a shipbuilding or ship repair operation, the commission will not require and may not consider air dispersion modeling results predicting ambient concentrations of non-criteria air contaminants over coastal waters of the state. The commission shall determine compliance with non-criteria ambient air contaminant standards and guidelines at land-based off-property locations.

(K) [~~(11)~~] Federal standards of review for constructed or reconstructed major sources of hazardous air pollutants. If the proposed source is an affected source (as defined in §116.15(1) of this title), it shall comply with all applicable requirements under Subchapter E [~~C~~] of this chapter.

(L) [~~(12)~~] Mass cap and trade allocations. If subject to Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program) the proposed facility, group of facilities, or account must obtain allocations to operate.

(M) [~~(13)~~] Application content. In addition to [~~any~~] other requirements of this chapter, the applicant shall:

(i) [~~(A)~~] identify each air contaminant for which an emission cap is desired;

(ii) [~~(B)~~] identify each facility to be included in the flexible permit;

(iii) [~~(C)~~] identify each source of emissions to be included in the flexible permit and for each source of emissions identify the Emission Point Number (EPN) and the air contaminants emitted;

(iv) [~~(D)~~] for each emission cap, identify all associated EPNs and facilities (including description, common name, and facility identification number) and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;

(v) [~~(E)~~] for each individual emission limitation, identify the EPN and provide emission rate calculations based on the expected maximum capacity and the proposed control technology;[~~.~~]

(vi) include calculations used to determine the controlled emission rates from each facility performed in accordance with TCEQ Air Permits Division guidance; and

(vii) if the flexible permit application includes facilities currently authorized by a permit issued under Subchapter B of this chapter (relating to New Source Review Permits), the applicant shall identify any terms, conditions, and representations in the Subchapter B permit or permits which will be superseded by or incorporated into the flexible permit. The applicant shall include an analysis of how the conditions and control requirements of Subchapter B permits will be carried forward in the proposed flexible permit.

(N) [~~(14)~~] Proposed control technology and compliance demonstration. The applicant shall specify the control technology proposed for each unit [~~to meet the emission cap~~] and demonstrate compliance with all emission caps at expected maximum production capacity.

§116.715. General and Special Conditions.

(a) Flexible permits may contain general and special conditions. The holders of flexible permits shall comply with any and all such conditions. [~~Upon a specific finding by the executive director that an increase of a particular air contaminant could result in a significant impact on the air environment, or could cause the facility, group of facilities, or account to become subject to review under §116.150 and §116.151 and §§116.160 - 116.163 of this title (relating to Nonattainment Review or Prevention of Significant Deterioration Review) or Subchapter C of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)), the permit may include a special condition which requires the permittee to obtain written approval from the executive director before constructing a facility under a standard permit or a permit by rule under Chapter 106 of this title (relating to Permits by Rule).~~]

(b) A pollutant specific emission cap or [~~multiple emission caps and/or~~] individual emission limitations shall be established for each air contaminant for all facilities authorized by the flexible permit. A flexible permit may contain more than one emission cap for a specific air contaminant. The holder of a flexible permit shall comply with all flexible permit emission cap(s) and individual emission limitations. An exceedance of the flexible permit emission cap(s) or individual emission limitations is a violation of the permit.

(c) The following general conditions shall be applicable to every flexible permit.

(1) Applicability. This section does not apply to physical or operational changes allowed without an amendment under §116.721 of this title (relating to Amendments and Alterations).

(2) Construction progress. The permit holder shall report the start of construction, construction interruptions exceeding 45 days, and completion of construction [~~shall be reported~~] to the appropriate regional office of the commission not later than 15 working days after occurrence of the event.

(3) Start-up notification.

(A) The permit holder shall notify the appropriate regional office of the commission and any local program having jurisdiction [~~shall be notified~~] prior to the commencement of operations of the facilities authorized by the permit in such a manner that a representative of the commission may be present.

(B) The permit holder shall provide a separate notification for the commencement of operations for each unit of phased construction, which may involve a series of facilities commencing op-

erations at different times. [~~Phased construction, which may involve a series of facilities commencing operations at different times, shall provide separate notification for the commencement of operations for each facility.~~]

(C) Prior to beginning operations of the facilities authorized by the permit, the permit holder shall identify to the Air Permits Division [~~Office of Permitting, Remediation, and Registration~~] the source or sources of allowances to be utilized for compliance with Chapter 101, Subchapter H, Division 3 of this title (relating to Mass Emissions Cap and Trade Program).

(4) Sampling requirements.

(A) If sampling [~~of stacks or process vents~~] is required, the flexible permit holder shall contact the commission's Office of Compliance and Enforcement prior to sampling to obtain the proper data forms and procedures.

(B) All sampling and testing procedures must be approved by the executive director and coordinated with the appropriate regional office of the commission.

(C) The flexible permit holder is also responsible for providing sampling facilities and conducting the sampling operations or contracting with an independent sampling consultant.

(5) Monitoring, Calculations, and Equivalency of Methods.

(A) Each flexible permit shall specify requirements for monitoring or demonstrating compliance with emission caps and individual emission limits in the flexible permit.

(B) Each flexible permit shall specify methods for calculating annual and short term emissions for each pollutant for a given type of facility when continuous emission monitoring or continuous operating parameter monitoring is not required to be used to monitor emissions for that type of facility.

(C) [~~It shall be the responsibility of the~~] The flexible permit holder must [~~to~~] demonstrate or otherwise justify the equivalency of emission control methods, sampling or other emission testing methods, and monitoring or calculation methods proposed as alternatives to methods indicated in the conditions of the flexible permit. Requests for alternative [~~Alternative~~] emission control, sampling, monitoring, or calculation methods [~~shall be applied for~~] must be submitted in writing for review and approval [~~and must be reviewed and approved~~] by the executive director prior to their use in fulfilling any requirements of the permit.

(6) Recordkeeping. The permit holder shall:

(A) maintain a [~~A~~] copy of the flexible permit (and any permit applications associated with the flexible permit) along with information and data sufficient to demonstrate continuous compliance with the emission caps and individual emission limitations contained in the flexible permit [~~shall be maintained in a file at the plant site and made available at the request of personnel from the commission or any air pollution control program having jurisdiction. For facilities that normally operate unattended, this information shall be maintained at the nearest staffed location within Texas specified by the permit holder in the permit application. This information may include, but is not limited to, emission cap and individual emission limitation calculations based on a 12-month rolling basis and production records and operating hours. Additional recordkeeping requirements may be specified in special conditions attached to the flexible permit. Information in the file shall be retained for at least two years following the date that the information or data is obtained~~]. This information and data shall include, but is not limited to:

(i) emission cap and individual emission limitation calculations based on a 12-month rolling basis;

(ii) emission cap and individual emission limitation calculations corresponding to any short term emission limitation; and

(iii) Production records and operating hours.

(B) keep all required records in a file at the plant site. If, however, the facility site normally operates unattended, records must be maintained at an office within Texas having day-to-day operational control of the facility site;

(C) make the records available at the request of personnel from the commission or any local air pollution control agency having jurisdiction over the site, which, upon request, the commission shall make any such records of compliance available to the public in a timely manner;

(D) comply with any additional recordkeeping requirements specified in special conditions in the permit; and

(E) retain information in the file for at least five years following the date the information or data is obtained.

(7) Maximum allowable emission rates. A flexible permit covers only those sources of emissions and those air contaminants listed in the table entitled "Emission Sources, Emissions Caps and Individual Emission Limitations" in [~~attached to~~] the flexible permit. Flexible permitted facilities [~~sources~~] are limited to the emission limits and other conditions specified in the table in [~~attached to~~] the flexible permit.

(8) Representations and conditions. The following are the conditions upon which a flexible permit or a flexible permit amendment is issued:

(A) representations with regard to construction plans and operation procedures in an application for a permit or permit amendment; and

(B) any general and special conditions included in the permit.

(9) [~~(8)~~] Emission cap readjustment. If a schedule to install additional controls is included in the flexible permit and a facility subject to such a schedule is taken out of service, the emission cap contained in the flexible permit will be readjusted for the period the unit is out of service to a level as if no schedule had been established. Unless a special condition [~~provision~~] specifies the method of readjustment of the emission cap, a permit alteration shall be obtained.

(10) [~~(9)~~] Maintenance of emission control. The facilities authorized [~~covered~~] by the flexible permit shall not be operated unless all air pollution emission capture and abatement equipment is maintained in good working order and operating properly during normal facility operations. Notification for emissions events and scheduled maintenance shall be made in accordance with §101.201 and §101.211 of this title (relating to Emissions Event Reporting and Recordkeeping Requirements; and Scheduled Maintenance, Startup, and Shutdown Reporting and Recordkeeping Requirements).

(11) [~~(10)~~] Compliance with rules. Acceptance of a flexible permit by a permit applicant constitutes an acknowledgment and agreement that the holder will comply with all applicable Rules[~~, Regulations,~~] and Orders of the commission issued in conformity with the Texas Clean Air Act [~~TCAA~~] and the conditions precedent to the granting of the permit. If more than one state or federal rule or regulation or flexible permit condition are applicable, then the most stringent limit or condition shall govern and be the standard by which compliance shall be demonstrated. Acceptance of the permit includes consent to

the entrance of commission employees and agents into the permitted premises at reasonable times to investigate conditions relating to the emission or concentration of air contaminants, including compliance with the flexible permit.

(12) Emissions Caps. The following requirements apply to facilities with emissions subject to emission caps.

(A) Recordkeeping and reporting.

(i) A semiannual report shall be submitted to the executive director within 30 days of the end of each reporting period that contains:

(I) the identification of the owner and operator and the permit number;

(II) total annual emissions (in tons per year) based on a 12-month rolling total for each month in the reporting period;

(III) the identification of any exceedances of a short-term emission cap during the reporting period;

(IV) all data relied upon, including, but not limited to, any quality assurance or quality control data, in calculating the monthly and annual emission cap pollutant emissions, and short-term emission cap pollutant emissions;

(V) a list of any facility modified as defined in §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) during the preceding six-month period and the documentation required by §116.718(b) of this title (relating to Significant Emission Increase);

(VI) the number, duration, and cause of any deviations or monitoring malfunctions (other than the time associated with zero and span calibration checks), and any corrective action taken. For facilities that are subject to the federal operating permits program in Chapter 122 of this title (relating to Federal Operating Permits Program) this may be satisfied by referencing the flexible permit number in the semiannual report for the site submitted under §122.145 of this title (relating to Reporting Terms and Conditions);

(VII) a notification of a shutdown of any monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, whether the facility monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the emissions determined by method included in the permit;

(VIII) the readjusted emission cap for each pollutant if a facility subject to an emission cap is shut down for a period longer than one week as required by §116.716(e)(1) of this title (relating to Emission Caps and Individual Emission Limitations); and

(IX) a signed statement by the owner or operator certifying the truth, accuracy, and completeness of the information provided in the report.

(ii) The reporting period for the semiannual report required under this section shall begin on the earliest date any facilities in an emission cap commence operation under the cap.

(iii) The owner or operator shall submit the results of any revalidation test or method to the executive director within three months after completion of such test or method.

(B) Absence of monitoring data. A facility owner or operator shall record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for a facility during any period of time that there is no monitoring data, unless another method for determining emissions during such periods is specified in the flexible permit special conditions.

(C) Revalidation. Any site generated test data used to determine the emission rates for facilities under the cap must be revalidated through performance testing or other scientifically valid means approved by the executive director. Such testing must occur at least once every five years after the facility has been added to an emission cap.

(d) Each permit with emission caps must include special conditions that satisfy the following requirements for facilities subject to those caps. These requirements do not apply to facilities that are not subject to an emission cap.

(1) The monitoring system must accurately determine all emissions of the pollutants in terms of mass per unit of time. Any monitoring system authorized for use in the permit must be based on sound science and meet generally acceptable scientific procedures for data quality and manipulation.

(2) The monitoring system must employ one or more of the general monitoring approaches meeting the minimum requirements as described in subparagraphs (A) - (D) of this paragraph.

(A) An owner or operator using mass balance calculations to monitor pollutant emissions from activities using coating or solvents shall meet the following requirements:

(i) provide a demonstrated means of validating the published content of the pollutant that is contained in, or created by, all materials used in or at the facility;

(ii) assume that the facility emits all of the pollutant that is contained in, or created by, any raw material or fuel used in or at the facility, if it cannot otherwise be accounted for in the process; and

(iii) where the vendor of a material or fuel that is used in or at the facility publishes a range of pollutant content from such material, the owner or operator shall use the highest value of the range to calculate the pollutant emissions unless the executive director determines that there is site-specific data or a site-specific monitoring program to support another content within the range.

(B) An owner or operator using a continuous emission monitoring system (CEMS) to monitor pollutant emissions shall meet the following requirements.

(i) The CEMS must comply with applicable performance specifications found in 40 Code of Federal Regulations Part 60, Appendix B.

(ii) The CEMS must sample, analyze, and record data at least every 15 minutes while the emissions unit is operating.

(C) An owner or operator using a continuous parameter monitoring system (CPMS) or a predictive emission monitoring system (PEMS) to monitor pollutant emissions shall meet the following requirements:

(i) The CPMS or the PEMS must be based on current site-specific data demonstrating a correlation between the monitored parameter(s) and the pollutant emissions across the range of operation of the facility; and

(ii) Each CPMS or PEMS must sample, analyze, and record data at least every 15 minutes or at another less frequent interval approved by the executive director, while the facility is operating.

(D) An owner or operator using emission factors to monitor pollutant emissions shall meet the following requirements:

(i) All emission factors must be adjusted as specified by the permit, if appropriate, to account for the degree of uncertainty or limitations in the factors' development;

(ii) The facility must operate within the designated range of use for the emission factor, if applicable; and

(iii) The owner or operator of a significant facility as defined in §116.12 of this title that relies on an emission factor to calculate pollutant emissions shall conduct validation testing to determine a site-specific emission factor within six months of permit issuance or start of operation of the facility, whichever is later, unless the executive director determines that testing is not required.

(E) An alternative monitoring system must meet the requirements in paragraph (1) of this subsection and be approved by the executive director.

(3) Where an owner or operator of a facility cannot demonstrate a correlation between monitored parameter(s) and the pollutant emissions rate at all operating points of the facility, the executive director shall:

(A) establish default value(s) for determining compliance with the emission cap based on the highest potential emissions reasonably estimated at such operating point(s); or

(B) determine that operation of the facility during operating conditions when there is no correlation between monitored parameter(s) and the pollutant emissions is a violation of the emission cap.

(e) [~~(d)~~] There may be additional special conditions included in [~~attached to~~] a flexible permit upon issuance or amendment of the permit. Such conditions in a flexible permit may be more restrictive than the requirements of this title.

(f) The executive director may require as a special condition that the permit holder obtain written approval before constructing a source under a standard permit under Subchapter F of this chapter (relating to Standard Permits) or a permit by rule under Chapter 106 of this title. Such written approval may be required if the executive director specifically finds that an increase of a particular pollutant could either:

(1) result in a significant impact on the air environment, or

(2) cause the facility, group of facilities, or account to become subject to review under:

(A) Subchapter E of this chapter (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)); or

(B) the provisions in Subchapter B, Divisions 5 and 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively).

§116.716. Emission Caps and Individual Emission Limitations.

(a) Emission caps. Each emission cap for a specific pollutant will be established as follows:

(1) either as a site-wide cap or a like-kind facilities cap. The executive director reserves the right to reject or exclude any facility from an emissions cap if necessary to ensure compliance with the permit or to ensure the protection of human health and the environment.

(2) [~~(1)~~] emissions will be calculated for each facility within an emission cap as follows: [~~based on application of current Best Available Control Technology at expected maximum capacity;~~]

(A) based on application of best available control technology at expected maximum capacity; or

(B) if the permit is used to authorize any facility, group of facilities, or account, or any change to existing facilities, that constitutes a new major stationary source or major modification for the pollutant as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions), emissions shall be based on control technology determined in accordance with Subchapter B, Division 5 or 6 of this chapter (relating to Nonattainment Review Permits; and Prevention of Significant Deterioration Review, respectively) as applicable, at expected maximum capacity.

(3) pollutants emitted from facilities subject to lowest achievable emission rate review in accordance with Subchapter B, Division 5 of this chapter must be included in a separate emissions cap or listed as individual emission limitations.

(4) [~~(2)~~] the calculated emissions for all facilities within an emission cap will be summed.

(5) a lower emission cap than that determined by paragraph (4) of this subsection may be proposed by the permit applicant if technical information is provided to demonstrate that it is feasible to operate in compliance with the proposed emission cap.

(b) Individual emission limitations. An individual emission limitation will be established in the same permit for each pollutant not included in [~~covered by~~] an emission cap for facilities authorized[~~covered~~] by the flexible permit. In addition, an individual emission limitation may be established for a pollutant included in [~~covered by~~] an emission cap when the expected capacity of a facility is less than the expected maximum capacity to prevent a facility from exceeding emission levels appropriate for the proposed controls.

(c) The permit shall clearly identify, by a table or other appropriate means, the facilities that are subject to an emission cap, and the facilities that are subject to individual emission limitations. A facility may be subject to both an emission cap and an individual emission limitation.

(d) [~~(c)~~] Adjustment [~~Readjustment~~] of emission cap.

(1) If a facility subject to an emission cap is shut down for a period longer than six [~~12~~] months, the emission cap shall be adjusted [~~readjusted~~] by lowering the emission cap by an amount that the shut down facility contributed to the original calculation of the emission cap. If a shut down facility is returned to operation, the emission cap shall be adjusted by increasing the emission cap by the amount that the facility contributed to the original calculation of the emission cap; however, the emission cap cannot be increased beyond the original emission cap amount.

(2) If a [~~new~~] facility is to be added to [~~brought into~~] the flexible permit, a permit amendment is required to establish a revised emission cap[~~, an emission cap shall be adjusted by modifying the emissions cap accordingly~~].

(3) If an existing emission cap is to be increased through a permit amendment as a result of adding a new facility or the modification of a facility within the emission cap, the emission cap shall be increased by the sum of the emissions from each of the new or modified facilities determined in accordance with subsection (a) of this section and decreased by the sum of the previous emission cap contributions from the facilities to be modified. For the purpose of determining whether an increase in the emission cap constitutes a major modification for the pollutant as defined by §116.12 of this title, all facilities under that cap shall be considered modified unless there has been

no physical modification of that facility and a separate permit limit or physical constraint limits its potential to emit.

[~~(d) Insignificant emission factor. The emission caps and individual emissions limitation calculated pursuant to this section may include an Insignificant Emissions Factor which does not exceed 9.0% of the total emission cap or individual emission limitation.~~]

(4) [~~(e)~~] An emission cap will be adjusted [~~readjusted~~] downward for any facility authorized [~~covered~~] by a flexible permit if that facility becomes subject to any new state or federal rule or regulation which would lower emissions or require an emission reduction. The adjustment will be made [~~at~~] the next time the flexible permit is amended or altered. If an amendment to a flexible permit is not required to meet the new requirement [~~regulation~~], then within 60 days of making the change, the permittee must submit a request to alter the permit and include information describing how compliance with the new requirement will be demonstrated.

(e) Each emission cap or individual emission limitation shall specify an annual emission limitation in tons per year, based on a rolling 12-month period. Each emission cap or individual emission limitation shall also specify a practically enforceable short term emission limitation.

§116.717. Implementation Schedule for Additional Controls.

If a facility requires the installation of additional control or controls to meet an emission cap for a pollutant, the flexible permit shall specify an implementation schedule for such additional controls. The permit may also specify how the emission cap will be adjusted if such a facility is taken out of service [~~or fails to install the additional control equipment as provided by the implementation schedule~~]. In the event that the controls and implementation schedule specified by a flexible permit cannot be met, a permit amendment or alteration to modify the controls and implementation schedule must be approved by the executive director before the applicable control schedule deadline. Control technology that is required by federal major new source review requirements must be operational at start of operation and is not eligible for an implementation schedule under this section.

§116.718. Significant Emission Increase.

(a) An increase in emissions from operational or physical changes at an existing facility authorized [~~covered~~] by a flexible permit is insignificant, for the purposes of minor [~~state~~] new source review under this subchapter, if the increase does not exceed either the emission cap or individual emission limitation. This section does not apply to an increase in emissions from a new facility nor to the emission of an air contaminant not previously emitted by an existing facility.

(b) This section does not apply to any change or series of related changes that would constitute a major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions). Unless a plant-wide applicability limit has been established for the pollutant under Subchapter C of this chapter (relating to Plant-wide Applicability Limits), the permit holder shall document that the change is not a major modification as defined in §116.12 of this title, and maintain the documentation required by §116.121 of this title (Actual to Projected Actual and Emissions Exclusion Test for Emissions Increases). When determining whether a change is a major modification as defined in §116.12 of this title, the project emissions increase and the project net shall be determined as specified as defined in §116.12 of this title, regardless of how the existing facilities are authorized. For new facilities or modified facilities under an emission cap for the pollutant where the permit holder elects to use potential to emit rather than projected actual emissions from the facility to determine the project emissions increase, the potential to emit shall be considered as the proposed emissions cap unless a separate permit limit or physical constraint limits the facility's potential to emit. If the project emission increase is such that a *de minimis* threshold test (netting) is required for a pollutant, the analysis shall be submitted to the commission for review and approval prior to making the change. If netting is not required, the information shall be submitted with the next permit amendment or renewal application.

(c) The permit holder shall complete an air quality analysis to demonstrate that the proposed action will not interfere with attainment and maintenance of the National Ambient Air Quality Standards if there may be an increase in emissions from operational or physical changes at an existing facility authorized by a flexible permit and the area is not designated as nonattainment for the pollutant. If the emission increase may result in off-site ambient concentrations greater than *de minimis* for that pollutant, the air quality analysis shall be submitted to the commission for review and approval prior to making the change.

§116.720. Limitation on Physical and Operational Changes.

Operational or [~~Neither operational nor~~] physical changes authorized under this subchapter may not result in an increase in actual emissions at facilities not authorized [~~covered~~] by the flexible permit unless those affected facilities are authorized pursuant to §116.110 of this title (relating to Applicability).

§116.721. Amendments and Alterations.

(a) Flexible permit amendments. All representations with regard to construction plans and operation procedures in an application for a flexible permit or flexible permit amendment, as well as any general and special conditions [~~provisions attached~~], become conditions upon which the subsequent flexible permit is issued. It shall be unlawful for any person to vary from such representation or flexible permit provision if the change will cause a change in the method of control of emissions or[~~,~~] the character of the emissions, will relax emission controls, will add a new facility or facilities, [~~or~~] will result in a significant increase in emissions, or will constitute a major modification as defined by §116.12 of this title (relating to Nonattainment and Prevention of Significant Deterioration Review Definitions) unless application is made to the executive director to amend the flexible permit in that regard and such amendment is approved by the executive director or commission. Applications to amend a flexible permit shall be submitted with a completed Form PI-1 and are subject to the requirements of §116.711 of this title (relating to Flexible Permit Application).

(b) Flexible permit alterations.

(1) A flexible permit alteration is for any variation from a representation in a flexible permit application or a general or special provision of a flexible permit that does not require a flexible permit amendment.

(2) All flexible permit alterations which may involve a change in a general or special condition contained in the flexible permit, or affect control equipment performance must receive prior approval by the executive director. The executive director shall be notified in writing of all other flexible permit alterations within ten days of implementing the change, unless the permit provides for a different method of notification. Any flexible permit alteration request or notification shall include information sufficient to demonstrate that the change does not interfere with the owner or operator's previous demonstrations of compliance with the requirements of §116.711 of this title, including the protection of public health and welfare. The appropriate commission regional office and any local air pollution program having jurisdiction shall be provided copies of all flexible permit alteration documents.

(3) Flexible permit alterations shall not be subject to the requirements of Best Available Control Technology identified in §116.711(3) of this title.

(c) Changes not requiring an amendment or alteration. The following changes do not require an amendment or alteration, except that an amendment is required if the change will cause a change in the method of control of emissions or[~~,~~] the character of the emissions, will relax emission controls, will add a new facility, [~~or~~] will result in a significant increase in emissions as determined under §116.718 of this title (relating to Significant Emission Increase), constitutes a major modification as defined by §116.12 of this title, or conflicts with an existing permit condition:

(1) a change in throughput; or

(2) a change in feedstock.

(d) Permit by rule under Chapter 106 of this title (relating to Permits by Rule) in lieu of permit amendment or alteration.

(1) Notwithstanding subsections (a) or (b) of this section, no permit amendment or alteration is required if the changes to the permitted facility qualify for a permit by rule under Chapter 106 of this title unless prohibited by permit provision as provided in §116.715 of this title (relating to General and Special Conditions). All such changes permitted by rule to a permitted facility shall be incorporated into that facility's permit at such time as the permit is amended or renewed.

(2) Emission increases authorized by Chapter 106 of this title at an existing facility authorized [~~covered~~] by a flexible permit shall not cause an exceedance of the emissions cap or individual emission limitation.

§116.730. Compliance History.

As part of a flexible permit review, or the review of an amendment of a flexible permit, or renewal of an existing flexible permit, the requirements of [~~provisions found in~~] Chapter 60 of this title (relating to Compliance History) shall be applicable to the facility, group of facilities, or account being permitted, amended, or renewed.

§116.740. Public Notice and Comment.

(a) Any person who applies for a flexible permit or an amendment to a flexible permit shall comply with the requirements [~~provisions~~] in Chapter 39 of this title (relating to Public Notice).

(b) Any person who applies for an amendment to a flexible permit regarding an affected source (as defined in §116.15(1) of this title (relating to Section 112(g) Definitions)) subject to Subchapter E [~~C~~] of this title (relating to Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources (FCAA, §112(g), 40 CFR Part 63)) shall comply with the requirements [~~provisions~~] in Chapter 39 of this title [~~(relating to Public Notice)~~].

§116.750. Flexible Permit Fee.

(a) Fees required. Any person who applies for a flexible permit or for an amendment to an existing flexible permit shall remit, at the time of application for such permit, a fee as set forth in subsection (b) of this section. Fees will not be charged for flexible permit alterations, changes of ownership, or changes of location of permitted facilities.

(b) Fee amounts. The fee to be remitted with a flexible permit application shall be determined as set forth in §116.141 of this title (relating to Determination of Fees) [~~based on the total annual allowable emissions from the permitted facility, group of facilities, or account for which the flexible permit is being sought. The fee shall be $32 per ton with the minimum fee being $900 and the maximum fee $75,000. For flexible permit amendments, the fee shall be calculated based on $32 per ton for the incremental emission increase with the minimum fee being $900 and the maximum fee being $75,000~~].

(c) Payment of fees. All permit fees for a flexible permit shall be remitted in the form of a check, certified check, electronic funds transfer, or money order made payable to the Texas Commission on Environmental Quality and delivered with the application for flexible permit or flexible permit amendment to the commission's Air [~~New Source Review~~] Permits Division. Required fees must be received before the agency will begin examination of the application.

(d) Return of fees. Fees must be paid at the time an application for a flexible permit or flexible permit amendment is submitted. If the applicant withdraws the application prior to issuance of the flexible permit or flexible permit amendment, one-half of the fee will be refunded, except that the entire fee will be refunded for any such application for which a permit by rule under Chapter 106 of this title (relating to Permits by Rule) is allowed. No fees will be refunded after a deficient application has been voided, denied, or after a flexible permit or flexible permit amendment has been issued by the agency.

§116.765. Delayed Effective Date.

The amendments to §§116.710, 116.711, 116.715 - 116.718, 116.720, 116.721, 116.730, 116.740 and 116.750 of this title (relating to Applicability, Flexible Permit Application, General and Special Conditions, Emission Caps and Individual Emission Limitations, Implementation Schedule for Additional Controls, Significant Emission Increase, Limitation on Physical and Operational Changes, Amendments and Alterations, Compliance History, Public Notice and Comment, and Flexible Permit Fee; respectively) adopted by the commission on December 1, 2010, shall be effective on the earlier of 60 days after publication in the *Federal Register* of the final approval by the United States Environmental Protection Agency of these sections as revisions to the Texas State Implementation Plan, or December 1, 2012. Until such time, these sections, as they existed prior to the adoption of these amendments, remain in effect.

This 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 June 18, 2010.

TRD-201003436
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 239-2548

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CHAPTER 305. CONSOLIDATED PERMITS
SUBCHAPTER P. EFFLUENT GUIDELINES AND STANDARDS FOR TEXAS POLLUTANT DISCHARGE ELIMINATION SYSTEM (TPDES) PERMITS

30 TAC §305.541

The Texas Commission on Environmental Quality (commission or TCEQ) proposes an amendment to §305.541.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULE

The rulemaking is necessary to adopt by reference the new United States Environmental Protection Agency (EPA) construction storm water rules, which were adopted in 40 Code of

Federal Regulations (CFR) Part 450 and became effective on February 1, 2010. The rule applies to construction activities that are already required to be authorized under the Texas Pollutant Discharge Elimination System (TPDES) program, meaning that it applies to sites that are one or more acres in size, as well as smaller sites that are part of a larger common plan of development or sale that will disturb one or more acre. This rule requires all regulated construction activities to meet a series of non-numeric effluent limitations established to provide minimum national requirements. Besides the non-numeric effluent limits that all regulated sites are required to meet, construction sites that disturb ten or more acres will also be required to collect and analyze storm water discharges from the site and comply with a numeric effluent limitation for turbidity.

Non-numeric effluent limits are narrative requirements for best management practices to address erosion, sediment control, soil stabilization, and pollution prevention that prevent or minimize the amount of construction site pollutants, such as sediment, in storm water runoff. The requirements in the rule are similar to the existing requirements in the TPDES Construction General Permit (CGP), TXR15000 reissued on March 5, 2008.

The federal numeric effluent limitation is for turbidity and is set at 280 nephelometric turbidity units. This new requirement is achievable at a well-managed construction site without specialized treatment through the use of routine best management practices. Turbidity does not require laboratory analysis to determine the level present in the discharge. Analysis can be performed at the construction site with a hand-held turbidity meter.

The CGP is due for renewal in 2013. The non-numeric effluent limitations and turbidity effluent limitation will be incorporated into the renewal of the CGP. Construction site operators will not be required to comply with the new requirements until the CGP is reissued.

Currently, §305.541 adopts by reference certain parts of 40 CFR that were in effect at the time Texas was awarded delegation of the National Pollutant Discharge Elimination System program, and specific parts that were adopted after delegation. This rulemaking will add 40 CFR Part 450 to the list of parts adopted after delegation.

SECTION DISCUSSION

Proposed amended §305.541 adds the adoption by reference of 40 CFR Part 450 as amended, which contains regulations related to controlling storm water from regulated construction sites.

COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, fiscal implications, although not significant, are anticipated for the agency. The agency will be required to purchase new equipment, increase public outreach, modify forms, update educational materials, modify inspection protocols, and modify the requirements of the CGP when it is renewed in 2013. The agency will use currently available resources to implement the proposed rule. Units of state or local governments that engage in regulated construction activities or that operate regulated Municipal Separate Storm Sewer Systems (MS4s) will also experience fiscal implications as a result of implementation or enforcement of the proposed rule. However, any fiscal implications are not expected to be significant.

Many types of construction activities are affected by the proposed rule. Some examples are: residential construction, highway construction, commercial building construction, public building construction, and power line construction. The federal rules require all regulated construction activities to comply with non numeric effluent limitations, which are essentially required best management practices. For large sites (ten acres or more), construction activities must also monitor (i.e., sample and analyze) discharges from construction sites and comply with a numeric effluent limitation for turbidity. The CGP will incorporate the non-numeric limitations and numeric limitations upon its renewal in 2013. No costs will be incurred by any regulated entity until the CGP is reissued in 2013, the third year after the proposed adoption of this rulemaking.

Small construction sites (at least one but less than ten acres or part of a larger plan of development) will be required to utilize best management practices that address erosion and sediment control, soil stabilization, and pollution prevention methods that are similar to the requirements in the requirements of the existing CGP. These prescribed methods (berms, barriers, etc.) are already used at many construction sites to comply with non-numeric effluent limitations, and any cost increase under the proposed rule is expected to be negligible. The proposed rule is not expected to have a significant fiscal impact on small construction sites that disturb less than ten acres.

Large construction sites, which for the purpose of this rule are those disturbing ten or more acres, including smaller sites that are part of a larger common plan of development that will disturb ten or more acres, will be required to comply with the non-numeric effluent limitations described above, monitor discharges from the site, and comply with a numeric effluent limitation for turbidity. The proposed rule is not expected to have a significant fiscal impact on entities that engage in construction activities. Prescribed methods to comply with non-numeric effluent limitations are already used at many construction sites, and any cost increase to use prescribed methods is not expected to be significant. In order to monitor discharges and comply with the numeric effluent limit, operators of large construction sites will need to have a turbidity meter and trained staff available to sample and analyze storm water when there is a rainfall event sufficient to cause a discharge. The cost to purchase a turbidity meter and associated equipment could range from $900 to $1,325. This purchase is expected to be a one-time purchase of equipment that can be used at multiple construction sites. The annual purchase of verification standards used to calibrate the meter is estimated to cost $15 per year. Training and sampling costs are not expected to be significant since the meters come with instructions and current construction site staff can be trained while on the job to sample and monitor storm water. In addition, sampling and monitoring will only be required when there is a rainfall event sufficient to cause a discharge. The TCEQ will determine the frequency of sampling in the renewal of the CGP in 2013.

State agencies and local governments that engage in regulated construction activities will be affected by the proposed rule, but any cost increases are not expected to be significant. MS4 operators (e.g., cities or counties) that regulate construction storm water may need to adjust their oversight programs and investigation protocols to include the new requirements. They may need to purchase turbidity meters to verify permittees' sample results. One-time costs for turbidity meters and associated equipment could range from $900 to $1,325. The annual purchase of verification standards used to calibrate the meter is estimated to cost $15 per year. MS4 operators could increase permit fees to cover these costs, if they choose to do so.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rule will be greater control over storm water discharges from regulated construction sites resulting in less sediment, turbidity, and other pollutants in construction storm water discharges from reaching waters in the state.

The proposed rule is not expected to result in significant fiscal implications for individuals or businesses.

Businesses that engage in regulated construction activities will be affected by the proposed rule, but not until the construction general permit is renewed in 2013. Costs to comply with the proposed non-numeric effluent limitations for small construction sites are not expected to be significant since many of the prescribed methods are used in current construction activities. Businesses may incur one-time equipment costs for a turbidity meter and related equipment, which is estimated to range from $900 to $1,325, if they have large construction sites. The annual purchase of verification standards used to calibrate the meter is estimated to cost $15 per year. Training on equipment use is expected to occur on the job and is not expected to be significant since the meters come with instructions. Sampling and monitoring will occur only when there is a rainfall event that causes storm water runoff.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses that engage in regulated construction activities. A small business is expected to incur the same costs as a large business to comply with the non-numeric effluent limitations and numeric effluent limitations of the proposed rule. For small construction sites, a small business will be required to use the prescribed methods, many of which are currently used, to comply with non-numeric effluent limitations. For large construction sites, a small business will be required to monitor runoff when there is a significant rainfall event and comply with the numeric effluent limitations. A small company may incur one-time costs for a turbidity meter and associated equipment, which is estimated to range between $900 and $1,325. The annual purchase of verification standards used to calibrate the meter is estimated to cost $15 per year. Training, sampling, and monitoring costs are not expected to be significant since they can be done using current personnel and with on the job training.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule is required to comply with federal regulations, and any cost increases are not expected to affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

LOCAL EMPLOYMENT IMPACT STATEMENT

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

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rule change is not subject to §2001.0225, because it does not meet the criteria for a "major environmental rule" as defined in the statute.

A "major environmental rule" is defined in Texas Government Code, §2001.0225(a) as applying to rules adopted by a state agency that: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

The specific intent of the proposed rule change is to modify TCEQ's rules to implement new federal storm water regulations affecting construction activities that disturb one or more acres, and smaller sites that are part of larger common plans of development that will disturb one or more acres. Title 40 CFR Part 450 has new requirements that took effect on February 1, 2010. These rules would be adopted by reference in §305.531. Since these rules are being adopted by reference to conform to both federal rules and the NPDES delegation agreement; and this rule does not exceed any express requirement of state law or adopted solely under the general powers of TCEQ, the commission concludes that this rule does not meet the definition of "major environmental rule."

The commission invites public comment on the draft regulatory impact analysis determination.

DRAFT TAKINGS IMPACT ASSESSMENT

The commission evaluated this rule and performed an assessment of whether the proposed rule change constitutes a taking under Texas Government Code, Chapter 2007. The specific purpose of the proposed rule change is to incorporate new federal storm water regulations into state rules.

Promulgation and enforcement of this rule would be neither a statutory nor a constitutional taking of private real property because it involves only additional control of storm water runoff during construction activities on sites disturbing ten acres or more.

There are additional storm water control requirements imposed on private real property during construction activities that disturb one or more acres, but the benefits to society are increased by reducing discharges of pollutants from construction sites disturbing these particular construction sites. The rule change does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond what would otherwise exist in the absence of the regulation. Therefore, this rule change, if adopted, does not constitute a taking under the Texas Government Code, Chapter 2007.

The commission invites public comment on the draft takings impact assessment.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rule in accordance with Coastal

Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies. This rulemaking fulfills the CMP goal to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone.

Written comments on the consistency of this rulemaking with the CMP goals may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on July 29, 2010, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Charlotte Horn, Office of Legal Services at (512) 239-0779. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Patricia Duron, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2010-015-305-OW. The comment period closes August 2, 2010. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Sherry Smith at (512) 239-0571.

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.102, which grants the commission the authority to carry out its powers under the TWC; §5.103, which provides the commission the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which requires the commission to establish and approve all general policy of the commission by rule; and §5.120, which requires the commission to administer the law for the maximum conservation and protection of the environment and natural resources of the state.

The proposed amendment implements 40 Code of Federal Regulations Part 450.

§305.541. Effluent Guidelines and Standards for Texas Pollutant Discharge Elimination System Permits.

Except to the extent that they are less stringent than the Texas Water Code or the rules of the commission, 40 Code of Federal Regulations (CFR), Subchapter N, Parts 400 - 471, except 40 CFR Part 403, which are in effect as of the date of the Texas Pollutant Discharge Elimination System program authorization, as amended, and Parts 437 (Federal Register, Volume 65, December 22, 2000), 442 (Federal Register, Volume 65, August 14, 2000), 444 (Federal Register, Volume 65, January 27, 2000), [~~and~~] 445 (Federal Register, Volume 65, January 19, 2000), and 450 (Federal Register, Volume 74, December 1, 2009), as amended, are adopted by reference.

This 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 June 18, 2010.

TRD-201003424
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 239-6087

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board (Board) proposes the repeal of Chapter 375, §§375.1 - 375.4, 375.11 - 375.21, 375.31 - 375.42, 375.51 - 375.53, 375.61, 375.62, 375.71 - 375.73, 375.81 - 375.87, 375.101 - 375.105, 375.201, 375.211 - 375.214, 375.221, 375.222, 375.301, 375.302, 375.325 - 375.329, 375.350 - 375.363, and 375.400 - 375.408. The Board proposes the repeal of current Chapter 375, relating to the Clean Water State Revolving Fund (CWSRF), because the Board is proposing a new Chapter 375. This proposal to repeal and the Board's proposal to adopt the new Chapter 375 are published simultaneously to allow the Board's repeal of current Chapter 375 to occur when the Board adopts proposed new Chapter 375.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT.

Ms. Melanie Callahan, Chief Financial Officer of the Board states that for the first five years this repeal will be in effect, the following statements are correct and accurate to the best of the Board's ability to project future economic trends.

Ms. Callahan does not expect any additional estimated costs to the state and to local governments as the result of administering this repeal. These rules apply only to those entities that voluntarily apply for financial assistance from the CWSRF and therefore do not have any general effect on costs to the state or to local governments. The loan origination fees have not been altered; the interest rates are tied to market conditions.

Ms. Callahan does not expect any cost reductions to either state or local government because the Board's loan processing costs and the costs of administering the program are not expected to change.

Ms. Callahan does not expect this proposed repeal to have any impact on state or local revenues. The rules apply only to those

eligible governmental entities that apply for a loan and there are no foreseeable implications relating to costs or revenues.

PUBLIC BENEFIT AND COSTS.

For the first five years this proposed repeal will be in effect, the public benefits expected include more precise funds management. Certain timelines in the proposed new rules are expected to provide more capacity for the CWSRF to provide financial assistance to more entities. There will be no anticipated economic effect on small businesses or individuals.

LOCAL EMPLOYMENT IMPACT STATEMENT.

Pursuant to Government Code §2001.022, this proposed repeal has been examined and there will not be any direct effect on local employment.

REGULATORY ANALYSIS.

Pursuant to Government Code §2001.0225, requiring a regulatory analysis of a major environmental rule, it has been determined that this proposed repeal is not a major environmental rule under §2001.0225 and therefore the analysis required under that section is not applicable.

TAKINGS IMPACT ANALYSIS.

The Board has determined that the proposed repeal will constitute neither a statutory nor a constitutional taking of private real property. The proposed repeal does not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed repeal does not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed repeal does not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

SUBMITTAL OF COMMENTS.

Comments on the proposed repeal and the new Chapter 375, proposed elsewhere in this issue of the *Texas Register,* will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 475-2053. Additionally, the Board will hold a public hearing on Tuesday, July 27, 2010, at 8:00 a.m. to solicit public comments on the proposal. Comments received in any of these formats indicated will be considered and addressed.

SUBCHAPTER A. GENERAL PROVISIONS

DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §§375.1 - 375.4

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

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.1. Scope of Rules.

§375.2. Definitions of Terms.

§375.3. Policy Declarations.

§375.4. Date of Applicability of 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.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003509

Kenneth L. Petersen

General Counsel

Texas Water Development Board

Earliest possible date of adoption: August 1, 2010

For further information, please call: (512) 463-8061

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DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §§375.11 - 375.21

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

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.11. Public Hearings.

§375.12. Types of Assistance.

§375.13. Activities Funded.

§375.14. Project Priority List.

§375.15. Criteria and Methods for Distribution of Funds.

§375.16. Rating Process.

§375.17. Intended Use Plan.

§375.18. Administrative Cost Recovery.

§375.19. Financial assistance for projects benefiting disadvantaged communities.

§375.20. Criteria and Methods for Distribution of Funds for Disadvantaged Communities for fiscal year 2004 intended use plan.

§375.21. Criteria and Methods for Distribution of Funds for Disadvantaged Communities beginning with fiscal year 2005 intended use plan.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003510

Kenneth L. Petersen

General Counsel

Texas Water Development Board

Earliest possible date of adoption: August 1, 2010

For further information, please call: (512) 463-8061

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DIVISION 3. APPLICATIONS FOR ASSISTANCE

31 TAC §§375.31 - 375.42

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.31. Preapplication Conferences.

§375.32. Required General Information.

§375.33. Required Legal Information.

§375.34. Required Fiscal Information.

§375.35. Required Environmental Review and Determination.

§375.36. Engineering Feasibility Data.

§375.37. Required Water Conservation Plan.

§375.38. Review of Applications by the Executive Administrator.

§375.39. Pre-Design Funding Option.

§375.40. Applicant Resolution and Financing Agreement.

§375.41. Rural Hardship Grants.

§375.42. Capital Improvements Plan Option.

This 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 June 21, 2010.

TRD-201003511
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 4. BOARD ACTION ON APPLICATIONS

31 TAC §§375.51 - 375.53

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.51. Formal Action by the Board.

§375.52. Lending Rates.

§375.53. Financial Guarantees for Political Subdivision Bonds and Required Reserves.

This 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 June 21, 2010.

TRD-201003512
Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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DIVISION 5. ENGINEERING REQUIREMENTS

31 TAC §375.61, §375.62

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.61. Contract Documents.

§375.62. Approval of Contract 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 June 21, 2010.

TRD-201003513
Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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DIVISION 6. PREREQUISITES TO RELEASE OF FUNDS

31 TAC §§375.71 - 375.73

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

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating

to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.71. Loan Closing.

§375.72. Release of Funds.

§375.73. Movement of Funds Between Approved Projects.

This 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 June 21, 2010.

TRD-201003514
Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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DIVISION 7. BUILDING PHASE

31 TAC §§375.81 - 375.87

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.81. Awarding Construction Contracts.

§375.82. Inspection During Construction.

§375.83. Alterations in Approved Contract Documents.

§375.84. Contractor Bankruptcy.

§375.85. Building Phase Submittals.

§375.86. Retainage.

§375.87. Disbursements and Outlay Reports.

This 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 June 21, 2010.

TRD-201003515
Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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DIVISION 8. POST BUILDING PHASE

31 TAC §§375.101 - 375.105

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.101. Responsibilities of Applicant.

§375.102. Final Accounting.

§375.103. Audits.

§375.104. Certificate of Approval.

§375.105. Final Release of Retainage.

This 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 June 21, 2010.

TRD-201003516
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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SUBCHAPTER B. PROVISIONS RELATING TO USE OF CAPITALIZATION GRANT FUNDS

DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §375.201

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.201. Scope of Subchapter.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003517
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 2. PROGRAM REQUIREMENTS

31 TAC §§375.211 - 375.214

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.211. Capitalization Grant Application.

§375.212. Capitalization Grant Requirements.

§375.213. Distribution of Funds.

§375.214. Required Environmental Review and Determination.

This 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 June 21, 2010.

TRD-201003518
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 3. PREREQUISITES TO RELEASE OF FUNDS

31 TAC §375.221, §375.222

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.221. Pre-Design Funding Option.

§375.222. Lending Rates.

This 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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Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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SUBCHAPTER C. NONPOINT SOURCE POLLUTION CONTROL PROJECT AND ESTUARY MANAGEMENT FINANCIAL ASSISTANCE PROGRAMS

DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §375.301, §375.302

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.301. Scope of Subchapter.

§375.302. Definitions of Terms.

This 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 June 21, 2010.

TRD-201003520
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 2. NONPOINT SOURCE POLLUTION LOAN AND ESTUARY MANAGEMENT PROGRAM

31 TAC §§375.325 - 375.329

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.325. Purpose.

§375.326. Eligible Projects.

§375.327. Application for Assistance.

§375.328. Promissory Notes and Loan Agreements.

§375.329. Lending Rates.

This 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 June 21, 2010.

TRD-201003521
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 3. NONPOINT SOURCE POLLUTION LINK DEPOSIT PROGRAM

31 TAC §§375.350 - 375.363

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.350. Purpose.

§375.351. Authorization to Execute Agreements.

§375.352. Conditions Prior to Execution.

§375.353. Project Certifications.

§375.354. Board Obligations in Linked Deposit Agreements.

§375.355. Lending Institution Obligations in Linked Deposit Agreements.

§375.356. Requirements after Execution.

§375.357. State Liability.

§375.358. Collateral for Linked Deposits.

§375.359. Records of Depository.

§375.360. Deposit of Pledged Securities with Custodian.

§375.361. Custodian's Deposit of Pledged Security with Another Institution.

§375.362. Records of Custodian.

§375.363. Audits and Examinations.

This 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 June 21, 2010.

TRD-201003522
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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SUBCHAPTER D. PROVISIONS RELATING TO APPLICATIONS FOR FINANCIAL ASSISTANCE FILED IN RESPONSE TO SPECIAL CAPITALIZATION GRANTS; EXPEDITED REVIEW, PROCESSING AND LOAN CLOSING REQUIREMENTS

31 TAC §§375.400 - 375.408

(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 Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

This repeal is proposed pursuant to the Board's rulemaking authority in Texas Water Code §15.6041(a), relating to the manner in which financial assistance shall be provided; §15.605, relating to rules necessary to carry out Subchapter J of Chapter 15; and §15.609, relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.400. Purpose.

§375.401. Definitions.

§375.402. Eligibility Requirements.

§375.403. Intended Use Plan.

§375.404. Applicable Rules.

§375.405. Review of Applications by the Executive Administrator.

§375.406. Formal Action by the Board.

§375.407. Lending Rates.

§375.408. Waiver of 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.

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003523
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CHAPTER 375. CLEAN WATER STATE REVOLVING FUND

The Texas Water Development Board (Board) proposes for adoption a new Chapter 375, §§375.1, 375.2, 375.10 - 375.19, 375.30 - 375.33, 375.40 - 375.44, 375.50 - 375.56, 375.60 - 375.70, 375.80 - 375.83, 375.90 - 375.93, 375.100 - 375.110, and 375.200 - 375.214 relating to the Clean Water State Revolving Fund. In this issue of the *Texas Register,* the Board is proposing the repeal of current Chapter 375.

BACKGROUND AND INTRODUCTION.

The Clean Water State Revolving Fund (CWSRF) is authorized pursuant to the Federal Water Pollution Control Act, 33 USCA §§1251 et seq. (1972), as amended, and Texas Water Code, Chapter 15, Subchapter J. Each federal fiscal year an appropriation to the Environmental Protection Agency (EPA) is dedicated to capitalization grants for state revolving fund programs. The State of Texas, through the Board, provides a 20% match for the federal capitalization grant. The capitalization grant constitutes the federal funds portion of the CWSRF and is used to provide loans and loan guarantees to eligible wastewater systems for expenditures to facilitate full compliance. The CWSRF is designed to remain available in perpetuity. In addition to the federal capitalization grant, the CWSRF consists of the following: direct appropriations; investment earnings on amounts credited to the CWSRF; all payments of principal and interest and all proceeds from the sale; and refunding or prepayment of bonds.

During the applicable year, the Board solicits project information forms from potentially eligible applicants; the forms describe a proposed project and provide information about the wastewater problems or issues that will be addressed and remedied by the proposed project. After receipt of the project information forms, Board staff rates the projects. Board staff prioritizes projects based on the rating and other identified criteria. These projects are part of the Board's intended use plan (IUP). The IUP provides information for public review and comment about the planned expenditures of the capitalization grant funds.

New Chapter 375 relating to the CWSRF is proposed to clarify and streamline the rules applicable to loan recipients and to improve the efficiency and administration of the CWSRF. First, the Board's recent experience in administering the American Recovery and Reinvestment Act of 2009 and the latest EPA procedures for capitalization grants demonstrate the need for the Board to increase flexibility in developing the list of fundable projects. These proposed new rules provide that the criteria and methods of distribution of funds will primarily be contained in the IUP instead of in the rules. Thus, the Board can quickly adapt to changing federal capitalization grant requirements.

Second, the EPA prefers that capitalization grant funds be disbursed as efficiently as possible. These rules address that preference by proposing shortened time frames for loan closings. Additionally, these proposed rules provide a loan for planning, acquisition and design only and for construction only. These proposed new loans will become the Board's preferred method of financial assistance. Although the current pre-design funding option remains in the rules, it is not the preferred type of loan and is expected to be phased out over time. The purpose of this change is to provide more efficient use of funds instead of committing funds to a construction project whose scope is undetermined at the time of pre-design funding. The new proposed types of loans will enable the applicant to specify more precise loan amounts and therefore will result in more projects being funded when they are ready to proceed to construction instead of years before the costs are accurately known. The loans for construction will follow this same logic and will be available only when the eligible project is ready to proceed. These changes enable the Board to spend federal capitalization grant funds as efficiently as possible.

Third, the EPA's procedures for implementing the FY 2010 capitalization grant includes a minimum of 30% of a portion of the capitalization grant be allotted in subsidy for entities not otherwise able to afford a CWSRF loan. This is the first time, outside of the American Recovery and Reinvestment Act, that subsidy has been authorized for CWSRF. This is another reason that the Board prefers to place criteria in the annual IUP instead of in the rules. The EPA recommends that program requirements refer to guidance documents where possible and the Board has responded to that recommendation by removing many details of the numerous federal requirements for expenditures of federal funds by reference to the Board's comprehensive engineering guidance documents. Another new requirement for capitalization grants is that 20% of the grant must be expended on green projects. Although these proposed rules provide notice about the existence of the green project reserves, the detailed requirements will be in the IUP and in Board and EPA guidance documents.

Fourth, current Board rules include rules relating to the Board's internal processes and procedures. These sections include portions of current §§375.14 - 375.17 and portions of other rules contained in Chapter 375. Pursuant to the Texas Supreme Court decision in *El Paso Hospital District v. Texas Health and Human Services Commission,* 247 S.W.3d 709, 714 (2008), the Board has removed those rules and portions of rule that address only "internal management or organization of a state agency and not affecting private rights or proceedings."

Fifth, these proposed rules combine previously redundant sections relating to rating, methods and criteria for distribution of funds, and the pre-design funding option into single sections instead of the current separate sections. The only sections that contain different requirements due to the funding source, state or federal, are Lending Rates at proposed §375.15 and Environmental Reviews and Determinations at proposed §§375.50 - 375.56 for state funded loans and proposed §§375.60 - 375.70. Proposed Subchapters B, C, D, F, G, and H apply to both state and federally funded loans.

Finally, the proposed rules delete Subchapter D relating to Application for Financial Assistance filed in response to Special Capitalization Grants; Expedited Review, Processing and Loan Closing requirements. This subchapter was adopted to expedite the review of applications submitted pursuant to the American Recovery and Reinvestment Act of 2009 and is no longer needed.

BRIEF EXPLANATION OF THE PROPOSED RULES.

Proposed new Chapter 375 generally is a reorganization and rewrite of existing Chapter 375. All subchapters except Subchapter I (relating to Nonpoint Source Pollution Linked Deposits Program) have been rewritten for clarity and consistency and have been reorganized for ease of use. Subchapter I in these proposed rules is identical to current Subchapter C, Division 2. Improved organization is manifested by, for example, locating information relating to application requirements in one subchapter, proposed Subchapter D, in contrast to the current rule where the requirements were located in several different locations. The environmental review section is reorganized to follow the sequence of the environmental review process and contains Division 1, applicable to state-funded loans, and Division 2, applicable to

federally-funded loans. This preamble discusses proposed substantive changes from current rules.

Subchapter A. General Program Requirements.

There are changes to the definitions in Subchapter A; however, because the eligibility of entities, projects, costs, and activities are constrained by federal law, many of these sections remain substantively the same as current rules. Not only have certain definitions in §375.1 been revised for clarification purposes, several definitions have been eliminated. A number of new terms have been added to the definitions in Subchapter A including Davis-Bacon Act, federally funded loans, force majeure, green project, green project reserve, investment pool, private placement memorandum, project information form, ready to proceed, state depository institution, state-funded loans, trust and agency certificate, trust institution and trustee in order to reflect new EPA priorities and to clarify existing rules.

Three new sections have been added to Subchapter A. Proposed §375.2 specifies the entities and the activities that are eligible for CWSRF financial assistance; these entities include political subdivisions seeking to construct, alter and improve wastewater treatment facilities as well as persons seeking to implement a nonpoint source pollution project or a national estuary program, reflecting the EPA and the Board's increased interest in funding these types of projects. Subsection (b) defines certain terms of importance to the nonpoint source pollution program and subsection (c) provides that CWSRF funding is also available for national estuary program projects.

Subchapter B. Financial Assistance.

Major changes to the current rules are in proposed new Subchapter B, §§375.10 - 375.20. A significant change is proposed in §375.10 to clarify that the executive administrator and not the Applicant determines the type of loan or grant that will be recommended to the Board for commitment. The executive administrator takes into account the availability of funds and program priorities.

Proposed new §375.11 relating to refinancing consolidates the various provisions relating to refinancing that appear throughout the current Chapter. Subsection (a) allows the executive administrator to accept applications for refinancing provided that sufficient funds are available, a project information form is submitted timely after receipt of a Board invitation to apply for funding and a complete application is filed. Application requirements are detailed in subsection (b). The consolidation of these provisions does not substantively change the conditions under which refinancing may be considered by the Board.

Significant changes are also proposed relating to the types and conditions of financial assistance. Proposed §§375.12, 375.13 and 375.14 authorize the Board to award financial assistance for planning, acquisition and design activities only or for construction activities only, thereby segregating project financing into two phases for purposes of funding: the planning, acquisition and design phase or "PAD" and the construction phase of the project. Although the pre-design funding option, which allows the financing of a complete project from preliminary planning through construction, is maintained in proposed §375.14, the intent is to phase this option out in order to enable the Board to more efficiently manage CWSRF funds and to expedite the completion of projects.

Proposed new §375.15, relating to Lending Rates, has been reorganized; it now contains the lending rates for both state-funded and federally-funded loans. Currently, the lending rates are in §375.52 and §375.222. Proposed §375.15 contains several changes. The major change allows the Board to adopt lending rates in an IUP as noted in proposed subsection (b); this provides flexibility and better funds management in a changing economy. The procedures for determining lending rates for state-funded loans and for federally-funded loans are generally similar; however the percentage of reduction from the market rates are changed for state funded loans. The change in lending rates is designed to address changing programmatic needs and to increase Board flexibility. Section 375.16 relating to fees is not different from the current fee requirement. Proposed new §375.17 relating to the term of the loan is significantly different in that it allows up to ten years for a planning, acquisition and design loan. Finally, a new §375.18 is being proposed that relates to certain subsidies that may be applied to the award of financial assistance based on affordability criteria and other factors that will be detailed in the applicable IUP. Proposed §375.19 relating to financial guarantees for political subdivision bonds has not been changed.

Subchapter C. Intended Use Plan.

A major change relating to the IUP is evident in proposed §375.31 and §375.33 relating to rating process and distribution of funds; these sections are substantially shorter because details on rating and distributing funds will be detailed in the IUP instead of in these rules. Additionally current §§375.15, 375.16, and 375.213 contained internal procedures that do not appear in the proposed rules. One example of this proposed new approach is §375.31 containing the federal project rating criteria; it is not as comprehensive as current §375.16 relating to the rating process. Another major change is contained in proposed §375.30 and relates to the submission of project information forms. Secondary projects will no longer be permitted, resulting in a more focused project management approach as well as a more efficient use of surplus funds, as described in proposed §375.93.

Another major change is the consolidation of current §§375.15, 375.20, 375.21 and 375.213 all relating to criteria and methods for distribution of funds, into proposed new §375.33. One significant change is the use of a bypass process whereby projects for which no application is received or for which the application is incomplete shall be bypassed and other projects may be bypassed if necessary to fund the minimum number of projects required by certain categories; the change allows the Board to expedite the distribution of funds. These changes are proposed to consolidate similar rules into one section for ease of use and to emphasize the use of the IUP to describe distinctive methods and criteria for distribution of federal capitalization grant funds. Current rules delineated all of the requirements usually contained in capitalization grants but the most recent capitalization grant contains new and different requirements, including subsidies and green project reserve requirements. Moving the specific requirements from the rules and into the IUP allows the Board to be fully responsive to federal requirements without needing to undergo future rule changes. Additionally, moving distribution of funds criteria to the IUP allows for the more specific targeting of projects as well as more flexibility in use of loan subsidies to assist communities that cannot otherwise afford a CWSRF loan.

Subchapter D. Application for Assistance.

This proposed subchapter contains new requirements relating to the timeliness of an application and additional requested information or data; these proposed changes are contained in

§375.41. Additionally, new requirements relating to the time for loan closing are contained in proposed §375.44 relating to Board approval of funding. Loan commitments will either automatically expire or will expire on the date in the loan commitment resolution. A single extension of time for loan closing is allowed. The other proposed sections in this subchapter are not substantively different from current rules although they have been reorganized and rewritten.

Subchapter E. Environmental Reviews and Determinations.

This proposed subchapter contains two divisions. The first containing §§375.50 - 375.56 applies to state funded loans and the second containing §§375.60 - 375.70 applies to federally funded loans. A significant change to the state-funded loans environmental review is that, if detailed in the IUP, the Board may decide to require a full National Environmental Policy Act (NEPA) environmental review on state funded projects. The purpose of proposing that option is to increase the speed of drawing down federal funds for the program. Proposed Subchapter E is a complete rewrite and reorganization of current §375.35 and §375.214 relating to the environmental review and determinations that apply to state-funded and federally-funded projects. This proposed subchapter follows the EPA rules for NEPA review. The substantive legal requirements are the same as those in the current rules.

Subchapter F. Engineering Review and Approval.

Proposed Subchapter F relating to engineering review and approval does not contain any major substantive changes. However language has been added to proposed §375.82 and §375.83 to clarify that review and approval of construction contract documents may include documents created for alternative methods of project delivery such as design-build. This proposed subchapter describes the information required and directs applicants to use the Board's engineering guidance documents and forms.

Subchapter G. Loan Closings and Availability of Funds.

A major change is proposed under §375.92 which requires outlays on a periodic basis until all loan funds are disbursed. Projects must proceed in accordance with approved project schedules and outlays are submitted in accordance with this section. Another change is contained in proposed §375.93 relating to surplus funds and limiting the use of such funds to those listed and clarifying that the executive administrator, and not the Applicant, who determines the use of all surplus funds.

Subchapter H. Construction and Post-Construction Requirements.

Proposed Subchapter H is reorganized to more closely follow the normal course of events during the construction of a project. There are no major changes, but some minor changes. Proposed §375.101 relating to inspections during construction adds the project schedule as an element of inspection. Proposed §375.102 clarifies that it is for changes initiated by both a change order and also for changes proposed prior to construction. These proposed rules provide the Board with information necessary to ensure the funds are expended only on projects and their components that are consistent with remedying the problems identified.

Subchapter I. Nonpoint Source Pollution Linked Deposits Program.

This subchapter remains the same as current Subchapter C, Division 3.

SECTION BY SECTION DISCUSSION OF THE PROPOSED RULES.

Subchapter A.

Subchapter A relating to General Program Requirements provides definitions and information about which entities, projects and activities are eligible for funding. The sections in Subchapter A are not substantively different from current sections on the same topics; the new sections are proposed to consolidate similar information and to rewrite certain section to improve clarity and ease of use. The types of entities and projects eligible for funding are generally proscribed by the Federal Water Pollution Control Act, as amended, and the federal rules set forth at 40 CFR Part 35, Subpart J, relating to Clean Water State Revolving Funds.

Section 375.1 relating to Definitions provides definitions for the words used in the subchapter. New words and phrases defined include: applicant, Davis-Bacon Act, disadvantaged community, federally funded loans, force majeure, green project, green project reserve, private placement memorandum, project information form, ready to proceed, state depository institution, state-funded loans, trust and agency certificate, trust institution and trustee.

The word "Applicant" has been redefined to include not only entities that apply for financial assistance but also loan recipients and owners of funded projects. This allows for consistent use throughout the chapter.

The term "Davis-Bacon Act" is defined because compliance with that statute is required for any project that utilizes federal funds.

There is a substantive change in the definition of "Disadvantaged community;" the change substitutes the word "or" for "and" between subparagraphs (B) and (C). This change is proposed to provide greater flexibility in providing subsidies to disadvantaged communities. The EPA advises that CWSRF loans should be provided to those entities who cannot otherwise afford an SRF loan. This proposed change allows the Board to provide the funding to entities that may, for example, have a median household income several points above 75% of the state median and who also have a high household cost factor. These communities are unlikely to be otherwise able to afford a loan and this proposed change will allow the Board to subsidize more communities that are otherwise unable to afford a loan.

A new definition of "disaster" is included because EPA has recently advised the Board that, in certain specified instances, the CWSRF may be used in spill response or other emergency situations. This definition is the same as the definition in §418.004(a)(1) of the Texas Government Code, Chapter 481 relating to Emergency Management.

A new definition of "environmental affirmation" is proposed to refer to the Board's acceptance of the environmental determination made prior to the release of design funds for federally-funded projects utilizing the pre-design funding option.

A new definition of "federally funded loans" is inserted to refer to loans that are funded directly out of the federal capitalization grant; these loans have been referred to as "Tier III" loans or equivalency loans meaning that the terms and conditions of these loans must comply with all federal requirements. The use

of this proposed new term provides clarity about the source of the funding.

A definition of "force majeure" is added because proposed §375.41 and §375.91 provide strict timelines to submit applications and information and to close a loan. If force majeure applies, then the executive administrator has greater latitude to grant extensions to an applicant.

The terms "green project" and "green project reserve" have been added in recognition of certain EPA initiatives that are now mandated in capitalization grant agreements and refer to projects that, once implemented, will result in increased energy efficiency, water efficiency, green infrastructure or environmental innovation. The green project reserve refers to the EPA directive requiring that a portion of loan proceeds be used for green projects.

A definition of the term "investment pool" has been added to this section to refer to an entity created under the Public Funds Investment Act that invests loan and grant proceeds in authorized investments.

The term "private placement memorandum" has been added to the Definitions section which refers to a document required by the Depository Trust Company at each closing. This term is used in proposed §375.91 relating to loan closings.

The term "project information form" has been added to refer to the form that must be submitted by an applicant by a date certain after a solicitation for CWSRF funding has been received from the Board. This term is used in proposed §375.30 relating to submission of project information forms.

Ready to proceed is a new term used in §375.17 and it refers to a project that is ready to commence construction of a project.

The term "state depository institution" has been added to refer to those entities who may be approved to manage CWSRF loan proceeds as escrow agents until such time as the funds are released to the construction account for project implementation. This term is used in proposed §375.91 relating to loans secured by bonds or other authorized securities.

The term "state funded loans" is proposed to refer to loans that are funded solely from repayments and interest payments; these loans have been referred to as "Tier II" loans or non-equivalency loans meaning that the terms and conditions of these loans need not comply with all federal requirements, unless determined otherwise in an IUP as noted in proposed §375.15.

The term "trust and agency certification" refers to the instrument that may be executed between the executive administrator and a home-rule municipality with a population of more than 1,000,000 whose charter provides for an elected comptroller, auditor or treasurer to govern the management of CWSRF proceeds. This term is used in proposed §375.91 relating to loans secured by bonds or other authorized securities. The terms "trust institution" and "trustee" have also been added to clarify that an applicant may use either an approved escrow agent or a properly-chartered trust institution to manage CWSRF loan and grant proceeds until such time as they are ready to be released to the applicant for project implementation.

Numerous definitions were deleted because they either were not used or were used infrequently in the current rules.

In order to identify those entities that are eligible to participate in CWSRF financing, a new §375.2 is proposed that provides that any municipality, interstate or state agency is eligible for CWSRF financing if the project involves the construction of or improvements to a publicly-owned treatment works. Any person seeking to implement a nonpoint source pollution or national estuary project may be eligible for funding.

Proposed §375.2(b) defines several terms of importance in the nonpoint source pollution and national estuary programs including BMP, national estuary program, nonpoint source loan program and nonpoint source management report. Provisions relating to nonpoint source pollution and national estuary programs have been consolidated in Subchapter A and Subchapter I. In order to be eligible for financial assistance, nonpoint source pollution and national estuary projects must be consistent with certain agency activities and programs. These practices and programs are identified in proposed §375.2.

Section 375.2 also allows applicants to apply for financing for nonpoint source pollution and national estuary project funding and provides that the Board may either purchase bonds issued by an applicant or may enter into a loan agreement and execute a promissory note with an applicant unless the applicant is a governmental entity authorized to issue bonds, in which case the Board would only accept the bonds as security for CWSRF financing.

Subchapter B.

Subchapter B relating to Financial Assistance describes the types of loans available to eligible entities; it also includes information about lending rates, subsidies and financial guarantees.

Section 375.10(a) relating to Types and Conditions of Financial Assistance states that the type of financial assistance offered to an applicant is the executive administrator's decision and will be based on the information submitted with the project information forms, as described in proposed §375.30, applications and the availability of funds. Current rules do not clearly state that the executive administrator decides on the type of financial assistance that will be awarded to a particular applicant; this change enables the Board to better manage its loan portfolio. Subsections (b) and (c) of proposed §375.10 are substantially equivalent to §375.12(a), (c) and (d) of the existing rules.

A proposed new §375.11 relating to refinancing is being proposed in order to consolidate the various provisions relating to financing. Subsection (a) allows the executive administrator to accept applications for refinancing provided that sufficient funds are available, a project information form is submitted in a timely fashion after receipt of a Board solicitation and a complete application is filed. Application requirements are detailed in subsection (b). The consolidation of these provisions is not intended to substantively revise the conditions under which refinancing may be considered by the Board.

Proposed §375.12 relating to Planning, Acquisition and Design Funding provides for a loan for planning, acquisition and design to allow entities to perform the necessary pre-construction activities without taking on debt for construction. This is a new method of providing financial assistance that is not present in the current rules. Subsection (a) describes the project phases that will be funded under this section. Subsection (b) is entirely new and provides for a priority for construction funding if the planning, acquisition and design phases of the project are completed within three years. Section 375.13 relating to construction funding allows the Board to finance projects which are ready to proceed to construction.

Section 375.14 relating to Pre-Design Funding Option provides for financial assistance for all phases of a project from planning

through construction. This type of financial assistance is available only in the circumstances described in subsection (a). Subsection (b) allows for funding projects using alternative delivery methods, such as design-build and allows the modification of release of funds and other rules to accommodate this type of project delivery.

Section 375.15 relating to Lending Rates for state-funded projects provides notice to loan applicants about how interest rates are set for CWSRF loans. Pursuant to Texas Water Code §15.604(a)(1)(A), the Board makes CWSRF loans at or below market interest rates. This rule is significantly changed from current §375.52. The proposed addition to subsection (b) allows the Board to use a procedure to set interest rates in an IUP instead of using the procedure in this proposed section. Proposed subsection (c)(2) amends the basis point reduction from market rate so that the reduction in interest rates will not exceed 130 basis points below that market rate based on a level debt service schedule for state funded loans. The proposed reduction of basis points from market interest rate remains at an amount not to exceed 195 for federally funded loans pursuant to subsection (d). A significant change is the addition of "not to exceed" language in each subsection describing the reduction from market rates; these changes provide the Board with the flexibility needed to maintain the CWSRF on a sound financial footing in changing economic times. Under proposed new §375.15, fixed lending rates will be determined based on proposed subsections (b), (c) and (d).

Proposed subsection (f) relating to private and taxable borrowers provides that the interest rate for loan agreements for those certain private and taxable issuers will be 140% of the rate assessed pursuant to subsections (b), (c) and (g) of this section. Finally proposed subsection (g) provides notice that the interest rate may change depending upon the borrower's credit rating.

Section 375.16 relating to Fees of Financial Assistance describes the loan origination fee and emphasizes that the fee is not calculated on the subsidy portion of a loan; this is substantively the same as current §375.18(c) relating to loan origination charge.

Section 375.17 relating to Term of Loan describes the different terms available to eligible applicants including subsection (a) which provides that a loan for planning, acquisition and design shall be for up to a ten year term; this is a new provision. A construction loan is available for a term of up to 30 years; however, subsection (b) states no loan term may exceed the design life of the project.

Section 375.18 relating to Loan Subsidies describes the types of loan subsidies available and provides for further loan subsidies as described in the annual IUP. This section replaces current §375.21 relating to disadvantaged communities. The calculation and the level of subsidy available to disadvantaged communities will be detailed in the IUP except that there is a definition of disadvantaged that contains new language in proposed §375.1 relating to definitions.

Section 375.19 relating to Financial Guarantees for Political Subdivision Bonds describes the types of financial guarantees and the Board's conditions for accepting such guarantees. This proposed section is the same as current §375.53.

Subchapter C.

Subchapter C relating to Intended Use Plan describes eligibility, rating factors, subsidies and other requirements of the annual federal capitalization grant. This subchapter has significant changes and new language. The primary purpose of the changes is to provide increased flexibility in the CWSRF program to meet the changing requirements in federal capitalization grants.

Section 375.30 relating to Submission of Project Information Forms describes the initial process for an eligible entity interested in receiving a CWSRF loan. Subsection (a) details the minimum specific information required on a project information form. The major change to this section is the removal of the principal and secondary projects category. The Board will fund only the rated and ranked projects instead of allowing any surplus funds to be used on other projects.

Section 375.31 relating to the Rating Process describes the federally required criteria for rating specific projects and is substantially different from current §371.16 which lists all criteria. The Board's policy in proposed §375.31 is that the rating process should be performed with the goals of achieving water quality management consistent with public health and water quality standards. Instead of ranking projects based on population categories, projects will be rated on the substantive criteria set forth in subsection (b); in the event of a tie, funding will be made first to projects in which a sewage treatment plant is at the greatest percentage of its rated capacity and then to the applicant with the lowest per capita income. The change allows the Board to adapt each year's IUP to changed federal requirements and to provide financial assistance focused on particular clean water issues. Nonpoint source pollution projects will be rated in the manner described in the IUP. Finally, the Board now has explicit authority to issue an emergency IUP to provide financial assistance for projects which require immediate attention in order to protect public health under §375.31(f).

Section 375.32 relating to Public Notice provides a short statement about the requirement to provide an opportunity for public comment about a proposed IUP.

Section 375.33 relating to Criteria and Methods for Distribution of Funds describes the process for distributing funds and consolidates current §§375.14, 375.15, 375.16 and 375.17 into this one section. The current sections are repetitive varying only with respect to the type of entity or the type of project; this proposed change makes the rules clearer and easier to use. Subsection (a) and (b) state that available funds and subsidies will be determined annually. Subsection (c) provides a specific amount of available funds be provided to small systems and states that at least 15% of available funds will be awarded to small communities. Subsection (d) describes the methods used to rank the priority list of projects and allows for bypass in subsection (d)(3). Bypass is a new process and allows the executive administrator to bypass higher rated projects in favor of lower rated projects to ensure that subsidy percentages in statute and in a capitalization grant are met. For example, EPA is requiring that 20% of funded projects meet the green project criteria and that percentage may require bypassing otherwise higher ranked projects. Subsection (e) describes the funding line and the invitation to apply for a loan. Subsection (f) describes the application of additional funds and the redrawing of the funding line. Subsection (g) describes re-ranking when not all invited applicants apply for a loan. The project is iterative and subsection (h) provides for re-invitations for loans to ensure all categories of funds are fully expended. Subsections (i) and (j) respectively discuss the process for situation where there are extra funds or a shortage of funds.

Subchapter D.

Subchapter D relating to Application for Assistance details the information required to complete an application for financial assistance. It also describes the Board's review and approval of an application. Finally it provides notice that the Board must approve all applications at an open meeting.

Section 375.40 relating to Pre-application Conferences provides the opportunity for potential applicants to meet with Board staff to increase the likelihood of receipt of a complete application and to provide preliminary information to the applicant about eligibility requirements.

Section 375.41 relates to Timeliness of Application and Required Application Information. Subsection (a) lists new deadlines for submitting the application and for supplying additional information or data as requested. These proposed new timelines will result in more rapid disbursement of loan funds creating greater efficiencies in the use of federal funds. Proposed subsection (a)(4) allows for limited extensions of time to submit the application and requires applicants to show good cause or the occurrence of a force majeure event to receive an extension of time. This change provides for better management of each federal grant and allows the Board to provide loans to those applicants who are prepared to close the loan in a more limited time period frame. Subsection (b) includes the information that is required in applications for financial assistance and combines current §§375.32, 375.33 and 375.34 so that application information is contained in one section.

Section 375.42 relating to Review of Applications for Financial Assistance provides notice to applicants about the executive administrator's review process, including possible requests for additional information. Subsection (b) explains that the failure to timely submit requested information will result in the project being bypassed.

Section 375.43 relating to Required Water Conservation Plan references the current rule at §363.15. This is the same as the current rule.

Section 375.44 relating to Board Approval of Funding contains subsections (a) - (c) which are substantively the same as current §375.51. However, subsection (d) provides new limits on the length of the Board's loan commitment and limits extensions of time to only those situations where there is good cause or a force majeure event.

Subchapter E.

Subchapter E relating to Environmental Reviews and Determinations contains the procedures for review of potential environmental impacts of projects funded by the CWRSF.

Division 1, State-Funded Projects. For state-funded financial assistance, a state may apply the procedures at 40 CFR Part 6 to its own environmental review rules; Subdivision 1 of this subchapter applies to state-funded projects. This proposed subchapter is substantively similar in content to current §375.35 but is reorganized and rewritten to provide greater ease of use, including ordering the sections to follow the required environmental review process.

Section 375.50 contains a statement of applicability and defines terms that apply to the environmental review process including affected community, avoidance, minimization and mitigation. Additionally, proposed §375.50(a) constitutes a major change in these rules by limiting the use of Division 1, if so stated in an IUP. The purpose of this proposed change is to increase the rate at which the State draws down federal funds. State dollars provide approximately two-thirds of the amount lent under the CWSRF program. Where state-funded loans comply with NEPA, the Board may use those loan outlays to draw on the capitalization grant, thereby increasing the rate of flow of federal dollars to the State. Therefore, the Board may, from time to time, require that state-funded loans comply with NEPA and proposed Division 2 of this subchapter.

Proposed §375.51 relating to Environmental Review Process provides an overview of the environmental review process required for state-funded projects. Section 375.52 relating to Types of Environmental Determinations: Categorical Exclusions describes when categorical exclusions are appropriate and lists those projects that may be eligible for a categorical exclusion in subsection (a). Section 375.5 relating to Types of Environmental Determinations: Full Review outlines when and how a full review must be performed and specifies the type of documentation needed in order to document its completion. Proposed §375.54 describes the requirements that an applicant must meet in order to develop an approvable environmental assessment when a project cannot be categorically excluded. Proposed §375.55 addresses proposed project alterations and the approval procedure that is used to review the environmental review and determinations and whether they require amendment based on such project alterations and §375.56 addresses the use of environmental review activities and determinations prepared by other governmental entities.

Division 2, Federally-funded Projects. The Board reviews the potential environmental impact of the decision to federally fund projects under a structure required by the NEPA, 42 U.S.C. 4321 *et seq.* The proposed rules set forth in Subdivision 2 of Subchapter E are based on the EPA rules set forth at 40 CFR Part 35 and at 40 CFR Part 6 relating to Procedures for Implementing the National Environmental Policy Act and Assessing the Environmental Effects Abroad of EPA Actions. The proposed rules in Division 2 are substantively similar to the existing rule set forth at §375.214 but have been reorganized and rewritten to provide greater ease of use.

Section 375.60 defines certain terms that are applicable to federal environmental review requirements including affected community, avoidance, NEPA, Indian tribes, minimization, and mitigation. Proposed §375.61 relating to Environmental Review Process provides an overview of the environmental review process required for federally-funded projects. Subsection (a) specifically notes that these rules follow EPA procedures and also requires the completion of the environmental review prior to the release of federal funds. Subsection (b) lists the type of environmental determinations that may issue after the review. Subsection (c) provides a general description of the inter-disciplinary, inter-agency and public review process and describes when a previous environmental determination may be used by the Board.

Section 375.62 relating to Types of Environmental Determinations: Categorical Exclusions describes when categorical exclusions are appropriate and lists those projects that may be eligible for a categorical exclusion in subsection (a). Subsection (b) lists the types of projects that are not eligible for a categorical exclusion. Subsection (c) lists the extraordinary circumstances that may preclude the use of a categorical exclusion and subsection (d) states that a categorical exclusion may be rescinded upon the discovery of extraordinary circumstances. Subsection (e) lists the documents that applicant must provide to be eligible for a categorical exclusion. Subsections (f) and (g) discuss the

review of the applicants' information and the required public notice respectively.

Section 375.63 relating to Types of Environmental Determinations: Finding of No Significant Impact describes the purpose and applicability of a FNSI in subsection (a). Subsection (b) requires the preparation of an environmental assessment when the executive administrator preliminarily determines that any adverse impacts will not be significant and those impacts may be adequately addressed by ordinary mitigation measures. Subsection (c) provides detail about the contents of an environmental assessment and subsection (d) provides detail about the contents of the FNSI. Subsection (d) provides notice that the executive administrator may issue a statement of findings about the outcome of required mitigation measures. Subsection (e) describes the required public notice period.

Section 375.64 relating to Environmental Information Document: Applicant Requirements contains subsection (a) which requires the applicant to prepare an environmental information document then the executive administrator determines that neither a categorical exclusion nor a FNSI is appropriate for the proposed project or preliminarily determines that an environmental impact statement may be required. The specific contents of the environmental information document will be communicated to the applicant and will vary depending upon the issues specific to the proposed project. Subsection (b) provides notice to the applicant about the interagency coordination that is required in developing the environmental information document. Subsection (c) requires notice to the executive administrator about changes to the proposed project. Subsection (d) describes the required contents of an environmental information document.

Section 375.65 relating to Decision to Prepare an Environmental Impact Statement: Notice of Intent, subsection (a), explains that a recommendation to issue an environmental impact statement must be published for public notice and contain the information required by subsection (b).

Section 375.66 relating to Types of Environmental Determinations: Record of Decision provides a general description of a record of decision in subsection (a). Subsection (b) provides notice of the required contents of a record of decision and subsection (c) explains that the issuance of the record of decision allows the project to proceed and subjects the project to avoidance, minimization and mitigation measures. Subsection (d) provides notice that the executive administrator shall ensure monitoring of required mitigation measures and requires inclusion of those measures in all relevant project construction documents.

Section 375.67 relating to Environmental Impact Statements describes the purpose of an environmental impact statement in subsection (a). Subsection (b) lists events which require the preparation of an environmental impact statement.

Section 375.68 relating to Environmental Impact Statements: Applicant Requirements requires an applicant, in conjunction and coordination with the executive administrator, to hire a third party contractor to prepare the environmental impact statement. Subsection (b) requires the executive administrator's approval of the contractor. Subsection (c) prohibits the contractor from having any financial interest in the proposed project and requires a disclosure statement. Subsection (d) discusses the contract with the third party and requires a contract clause indemnifying the Board and the EPA. Subsection (e) describes the working relationship between the contractor and the Board.

Section 375.69 relating to Proposed Project Alterations requires an applicant to notify the executive administrator when alterations are proposed for a project that has already received an environmental determination pursuant to proposed subsection (a). Subsection (b) describes the executive administrator's review and the potential results of the review. Subsection (c) provides notice that proposed changes to the project which do not result in potential adverse impacts that were not previously reviewed will generally not require additional environmental review.

Section 375.70 relating to Use of Environmental Determinations Prepared by Other Entities provides, in subsection (a), for the adoption of a determination issued by the EPA or other federal agency; such previous determination shall be reviewed to determine whether further information is required. Subsection (b) provides notice that previous requirements for mitigation measures shall be incorporated into the Board's documents. Subsection (c) describes the executive administrator's review of a previous determination and his issuance of a statement of findings.

Subchapter F.

Subchapter F relating to Engineering Review and Approval describes the Board's engineering review of proposed projects. It requires applicants for financial assistance to provide information to the Board and describes the review of the information. This subchapter also details requirements for construction contracts and the Board's approval process for construction contract documents.

Section 375.81 relating to Engineering Feasibility Report describes the requirements and process for the Board's review and approval of the engineering report. Subsection (a) requires the applicant's submission of a report and describes the required elements of the report, including a new requirement for a detailed project schedule with milestones. This new requirement will enhance the Board's ability to ensure that loan funds are drawn down in a timely manner because the details in the project schedule will also serve as a guide to the required outlays described in proposed §375.92. Subsection (b) describes the information required for the executive administrator's approval of the report. Subsection (c) provides notice to applicants that a significant change in the proposed project may require additional engineering review and amendments to the report.

Section 375.82 relating to Contract Documents: Review and Approval requires the submission of contract documents prior to advertising for bids for the project and describes the purpose of the review. Proposed subsection (a) defines contract documents to include traditional construction contract and other contracts containing construction phase work. This change recognizes that traditional distinctions between design and construction are not as clearly delineated in project delivery methods like design-build. Proposed subsection (b) reminds the applicant to coordinate approval of the contract documents from other relevant agencies.

Section 375.83 relating to Advertising and Awarding Construction Contract requires the applicant to comply with relevant procurement laws and rules pursuant to subsection (a). Applicants who receive grants will be required to comply with federal regulations at 40 CFR Part 31 pursuant to subsection (b). Proposed subsection (b) requires executive administrator's approval of advertisement of bids for construction work prior to advertising. Subsection (c) prohibits the applicant from making any substantive changes to the approved contract documents after the Board's approval. Proposed subsection (d) requires

the awarded construction contract or any contract containing alternative project delivery methods such as design-build to conform to the previously approved documents regarding same. Subsection (e) requires the applicant to conduct a pre-construction conference on significant projects and to advise the executive administrator prior to same. Subsection (f) provides that upon approval of the documents, the executive administrator will advise the applicant that a notice to proceed may issue. Subsection (g) reiterates the legal principle that the Board is not liable for any event arising out of or relating to the construction or the construction contracts.

Subchapter G.

Subchapter G relating to Loan Closings and Availability of Funds provides details about the types of documentation needed to close a loan when the Board purchases local entities' bonds. The subchapter also describes the methods for disbursing loan proceeds and the restrictions that apply to the use of surplus funds.

Section 375.91 relates to Loans Secured by Bonds or other Authorized Securities. Subsection (a) requires a disbursement of loan funds at closing and subsection (b) describes the documents required for loan closing.

Proposed §357.91(b)(2)(A) relating to the establishment of an escrow or trust account has been revised to clarify the types of institutions that can manage loan proceeds and the requirements that apply to the management of loan proceeds. Specifically, loan proceeds must be released into a separate escrow or trust account at either an approved official state depository institution designated by the Office of the Comptroller or a properly-chartered trust institution at loan closing unless the loan recipient is a home-rule municipality with a population in excess of 1,000,000 in which case the loan recipient may execute a trust and agency certificate relating to the management of loan proceeds.

Proceeds cannot be released unless approved by the executive administrator and the executive administrator has issued written authorization for the release of funds into a separate construction account. Escrow and trust account statements must be submitted to the Board on a monthly basis. Any investments of proceeds must comply with the Public Funds Investment Act and the accounts must be properly collateralized in accordance with the Public Funds Collateral Act.

Proposed §375.91(b)(7) requires delivery of a private placement memorandum or official statement with the closing documents; this change conforms to new requirements by the Depository Trust Company. Subsection (c) requires submission of the transcript of the proceedings relating to the debt purchased by the Board within 60 days of closing. Subsection (d) allows for phased loan closings in particular circumstances.

Section 375.92 relating to Disbursement of Funds provides that reimbursements and corresponding releases from the escrow or trust account must be consistent with the approved project schedule. Subsection (b) describes the sequence of allowable disbursement; this section allows disbursements only for the phase of the project in progress. Proposed subsection (c) requires the regular submission of outlays. This is a new requirement designed to ensure timely expenditures of capitalization grant funds. Subsection (d) relates to the Board's affirmation of the environmental mitigation measures applicable to the project. A new subsection (e) notes that the executive administrator may release funds to an escrow or trust account at the time of loan closing. Finally, a new subsection (f) charges the executive administrator with ensuring that projects proceed in accordance with approved project schedules, that outlays are submitted as required in subsection (c) and that schedules are adhered to as closely as possible.

Section 375.93 relating to Surplus Funds defines, in subsection (a), surplus funds. Subsection (b) limits the uses of surplus funds and requires the executive administrator's approval for any use of surplus funds.

Subchapter H.

Subchapter H relating to Construction and Post-Construction Requirements provides notice to loan recipients about the Board's inspection powers and processes, including approval of completion of project work under prime contracts and the final project contract approval. The subchapter also describes the Board's process and conditions for approving change orders and the use of force account labor. Finally, the subchapter describes administrative requirements for final accounting, as build plans, records retention and release of retainage.

Section 375.101 relating to Inspection during Construction contains subsection (a) requiring the use of a registered professional engineer or a person under the supervision of same to inspect the project during construction. Subsection (b) describes the Board's authority to inspect the project during construction, including a new statement that the inspection will consider the approved project schedule. Proposed subsection (c) describes the scope of the Board's inspections. Subsection (d) allows Board inspectors to document issues that may result in recommendations to the owner to undertake corrective measures to ensure compliance with applicable laws and rules. Subsection (e) requires applicants to provide a response to any issues relating to compliance with contract documents; this is a new statement but not a change in Board practices.

Section 375.102 relating to Alterations During Construction requires the owner of the project to notify the executive administrator pursuant to subsection (a) when a change to the project is recommended after approval of the engineering report. Subsection (b) describes the process for change orders issued during construction.

Section 375.103 relating to Force Account states the Board's policy regarding that the use of force account labor which requires the prior approval of the executive administrator and it also states that force account labor is only allowed in limited circumstances.

Section 375.104 relating to As-Built Plans requires the Applicant to notify the executive administrator when he received a complete set of As-Built drawings.

Section 375.105 relating to Certificate of Approval and Project Completion describes the issuance of a certificate of approval at the completion of each prime construction contract in subsection (a). Subsection (b) describes the final certificate of approval issued at the completion of the last prime construction contract. The final certificate of approval is accompanied by a statement from the Board that the inspection process is complete.

Section 375.106 relating to Final Accounting requires the Applicant to provide a final accounting within 60 days of the receipt of a certificate of approval for the final prime construction contract.

Section 375.107 relating to Records Retention requires the Applicant to retain all documents and records for three full years from the receipt of the certificate of approval for the final construction contract.

Section 375.108 relating to Release of Retainage requires the executive administrator's approval of the release of retainage after the owner's engineer and governing body approve the release of all retainage in subsection (b). Subsection (a) requires withholding a minimum of five percent of each payment and subsection (c) allows for the partial release of retainage when the project is substantially complete.

Section 375.109 relating to Responsibilities of Applicant emphasizes the applicant's ongoing responsibility to comply with all covenants in the loan documents and provides notice of the executive administrator's authority to monitor the project through the final loan payment.

Section 375.110 relates to Authority of Executive Administrator. Subsection (a) states that the executive administrator shall periodically monitor the project after completion of construction. Subsection (b) lists specific post-construction inspection authority of the executive administrator.

Subchapter I.

Subchapter I relating to Nonpoint Source Pollution Linked Deposits Program has not been modified from the existing rules in Subchapter C, Division 3 of Chapter 375.

FISCAL NOTE.

Ms. Melanie Callahan, Chief Financial Officer, has approved the fiscal note and has determined that for each of the first five years these rules will be in effect, the following statements are correct and accurate to the best of the agency's ability to project future economic trends.

There is no expected additional cost to state or local governments expected as the result of administering these rules. The loan origination fee amounts have not been increased. The interest rates are tied to market conditions and the Board is not increasing interest rates or financial terms of loans as detailed in the unchanged method for calculating interest rates.

These rules are not expected to result in reductions in costs to either state or local governments because the loan processing costs for the Board is not significantly affected and there is no change for local entities that apply for loans because there is no change in the loan fees.

These rules are not expected to have any impact on state or local revenues. The rules do not require any increase in expenditures for state or local governments as a result of administering these rules. Additionally, there are no foreseeable implications relating to state or local governments' costs or revenue resulting from these rules.

The Board has also determined that there will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this rulemaking.

PUBLIC BENEFIT AND COSTS.

For the first five years these rules will be in effect, the public benefits expected are enhanced funds management that will result in more funds available for loans and other financial assistance for communities to maintain and enhance the quality of public drinking water. Ms. Callahan has determined that there will be no economic cost to persons required to comply with these rules because the requirements of these rules apply only to those persons who voluntarily seek assistance from the State Revolving Fund and because there is no proposed increase to program fees.

LOCAL EMPLOYMENT IMPACT STATEMENT.

Pursuant to §2001.022 of the Texas Government Code, these proposed rules have been examined and there will not be any direct effect on local employment. These rules are applicable to projects funded by the CWSRF in any geographic area of the State. A local governmental entity may decide to apply for financial assistance from the CWSRF to construct a project and that voluntary decision would create additional jobs for the duration of the construction. However, the adoption of these rules alone has no impact on local employment in any geographic region of the State.

REGULATORY ANALYSIS FOR MAJOR ENVIRONMENTAL RULE.

Pursuant to §2001.0225 of the Government Code, requiring a regulatory analysis of a major environmental rule, it has been determined that these rules are not major environmental rules under §2001.0225 and therefore the analysis under that section is not required.

TAKINGS IMPACT ANALYSIS.

The Board has determined that the proposed rules will constitute neither a statutory nor a constitutional taking of private real property. The proposed rules do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because the proposed rules do not burden or restrict or limit the owner's right to or use of property. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007 or the Texas Constitution.

REQUEST FOR COMMENTS.

Comments on the proposed new Chapter 375 and the repeal proposed elsewhere in this issue of the *Texas Register* will be accepted for 30 days following publication in the *Texas Register* and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, *rulescomments@twdb.state.tx.us,* or by fax at (512) 475-2053. Additionally, the Board will hold a public hearing on Tuesday, July 27, 2010, at 8:00 a.m. in Room 1-170 of the Stephen F. Austin Building, 1700 North Congress Avenue, Austin, Texas, to solicit public comments on the proposal. Comments received in any of these formats indicated will be considered and addressed.

SUBCHAPTER A. GENERAL PROGRAM REQUIREMENTS

31 TAC §375.1, §375.2

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.1. Definitions.

The following words and terms, when used in this Chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Chapter 15 of the Texas Water Code, and not defined here shall have the meanings provided by the chapter or subchapter as appropriate.

(1) Act--The Federal Water Pollution Control Act, as amended, 33 U.S.C.A. 1251 et. seq., as amended

(2) Applicant--The entity applying for financial assistance, the entity receiving financial assistance, and the entity owning the project funded under this chapter or an entity authorized to act on behalf of another eligible Applicant.

(3) Application--The forms provided by the executive administrator that must be completed for consideration for financial assistance.

(4) Authorized representative--The person authorized by the Applicant and directed by the Applicant's governing body to file the application and to sign documents relating to the project, on behalf of the Applicant.

(5) Board--The Texas Water Development Board.

(6) Bonds--All bonds, notes, certificates of obligation, book-entry obligations, and debt obligations authorized to be issued by any political subdivision.

(7) Capitalization grant--The federal grant awarded annually by the EPA to the State to fund the CWSRF.

(8) Clean Water State Revolving Fund (CWSRF)--The financial assistance program authorized by Texas Water Code, Chapter 15, Subchapter J.

(9) Closing--The exchange of the Applicant's approved debt instruments or loan agreement in return for CWSRF financial assistance.

(10) Commission--The Texas Commission on Environmental Quality or TCEQ.

(11) Commitment--An action of the Board, evidenced by a resolution, approving a request for financial assistance pursuant to this chapter.

(12) Construction--The erection, acquisition, alteration, remodel, rehabilitation, improvement or extension of wastewater facilities.

(13) Construction fund--A dedicated source of funds, created and maintained by the Applicant at a designated state depository institution, used solely for a Board approved project.

(14) Construction contract documents--The engineering drawings, maps, technical specifications, design reports, instructions and other contract terms, conditions and forms developed in sufficient detail to allow contractors to bid on the work.

(15) Davis Bacon Act--The federal statute at 40 U.S.C.A. §3141 et seq., as amended and in conformance with the U.S. Department of Labor regulations at 29 CFR Part 5 (Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction) and 29 CFR Part 3 (Contractors and Subcontractors on Public Work Financed in Whole or in Part by Loans or Grants from the United States).

(16) Debt--All bonds or other documents issued by any political subdivision to be used to pledge repayment of the Board's financial assistance.

(17) Design phase--The project phase during which the Applicant prepares the project design documents including surveys, plans, working drawings, specifications and any procedures and protocols to be used during the design of the project.

(18) Disadvantaged community--The service area of a political subdivision, or the service area of a community that is located outside the political subdivision, that has an adjusted median household income that is no more than 75% of the state median household income for the most recent year for which statistics are available; and

(A) if the service area is not charged for sewer services, has a household cost factor for water rates that is greater than or equal to one percent; or

(B) if the service area is charged for water and sewer services, has a combined household cost factor for water and sewer rates that is greater than or equal to two percent; or

(C) that qualifies as a disadvantaged community based on factors as determined by the Board.

(19) Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, other public calamity requiring emergency action, or energy emergency as defined in Texas Government Code §418.004.

(20) Eligible applicant--A waste treatment management agency including any interstate agencies, or any city, commission, county, district, river authority, or other public body created by or pursuant to state law that has authority to dispose of sewage, industrial wastes, or other waste; or an authorized Indian tribal organization; or any person applying for financial assistance to build a nonpoint source pollution control project pursuant to the Act, §319; or any person applying for financial assistance for an estuary management project pursuant to the Act, §320.

(21) Engineering feasibility report--Those necessary plans and studies that directly relate to the project and that are needed in order to assure compliance with the enforceable requirements of the Act and state statutes. The engineering feasibility data should consist of a systematic evaluation of alternatives that are feasible in light of the unique demographic, topographic, hydrologic, and institutional characteristics of the area that is also demonstrated to be cost-effective.

(22) Environmental affirmation--The Board's acceptance of the environmental determination made prior to the release of design or construction funds for federally funded pre-design financial assistance.

(23) EPA--The United States Environmental Protection Agency.

(24) Escrow--The transfer of funds to an eligible state depository institution until such funds are eligible for release.

(25) Escrow agent--The state depository institution appointed to hold the funds that are not eligible for release to the Applicant.

(26) Estuary management plan--A plan for the conservation and management of an estuary of national significance as described in the Act, §320.

(27) Estuary management project--A project to develop or implement an estuary management plan.

(28) Executive administrator--The executive administrator of the Board or a designated representative.

(29) Financial assistance--Loans, including principal forgiveness and negative interest loans as well as grants to eligible Applicants.

(30) Federally funded loans--Financial Assistance funded in whole or in part from the federal funds portion of the CWSRF; also known as equivalency or Tier III loans.

(31) Force majeure--Acts of god, strikes, lockouts or other industrial disturbances, acts of the public enemy, war, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, droughts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, breakage or damage to machinery, pipelines or canals, and any other inabilities of either party, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, which by the exercise of due diligence and care such party could not have avoided.

(32) Fund--The CWSRF created pursuant to the Texas Water Code, Subchapter J, Chapter 15.

(33) Green project--A project or project components that, when implemented, will result in energy efficiency, water efficiency, green infrastructure or environmental innovation and that are characterized as green projects either categorically or by utilizing a business case approved by the executive administrator.

(34) Green project reserve--A federal directive requiring a specified portion of the capitalization grant to be used for green projects.

(35) Intended use plan--A document prepared annually by the Board, subject to public review and comment that identifies the intended uses of all CWSRF program funds and describes how those uses support the goals of the CWSRF.

(36) Investment pool--An entity created under the Public Funds Investment Act, Chapter 2256, Government Code, as amended, to invest public funds jointly on behalf of the entities that participate in the pool and whose investment objectives in order of priority are:

(A) preservation and safety of principal;

(B) liquidity; and

(C) yield.

(37) Lending rate--The rate of interest applicable to a particular CWSRF loan.

(38) Market interest rate--Interest rates comparable to those attained for municipal securities in an open market offering.

(39) Municipality--A city, town, county, district, association or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, municipal and industrial wastes, or other wastes or an approved management agency under the Act

(40) Nonpoint source pollution plan--A plan for managing nonpoint source pollution as described in the Act, §319. Nonpoint source pollution is any source of water pollution that does not enter water from a point source and includes pollution generally resulting from land runoff, precipitation, atmospheric deposition, drainage, seepage or hydrologic modification.

(41) Nonpoint source pollution project--A project implemented pursuant to a nonpoint source pollution plan.

(42) Permit--Any permit, license, registration and other legal document required from any local, regional, state or federal government for construction of the project.

(43) Person--An individual, corporation, partnership, association, State, municipality, commission or political subdivision of the State, or any interstate body.

(44) Point source--Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(45) Priority list--The section of the IUP that lists projects ranked according to priority order based on criteria described within the applicable IUP.

(46) Private Placement Memorandum--A document functionally similar to an official statement used in connection with an offering of municipal securities in a private placement.

(47) Project--The planning, acquisition of land and permits, environmental review, design, construction and other activities designed to improve, extend, rehabilitate and construct wastewater treatment facilities and nonpoint source or national estuary program projects.

(48) Project engineer--The engineer retained by the Applicant to provide professional engineering services during any phase of a project.

(49) Project information form--The Board form that must be submitted by Applicants invited to apply for funding from the CWRSF.

(50) Ready to proceed--A project that has obtained all permits, legally required authorizations, and all land, and has complied with all engineering and environmental planning review requirements and other Board requirements and design is complete.

(51) Release--The time at which financial assistance funds are made available to the loan recipient.

(52) State--The State of Texas.

(53) State depository institution--A state or national bank designated by the comptroller in accordance with the Local Government Code, Chapter 404, Subchapter C, as amended.

(54) State funded loans--Financial assistance funded solely from the state funds portion of the CWSRF; also known as non-equivalency or Tier II loans.

(55) Subsidy--Any special financial terms and conditions available including loan forgiveness, negative interest rates, grants or other financial incentives as detailed in an IUP.

(56) Treatment works--Any devices, facilities and systems that are used in the storage, treatment, recycling, and reclamation of waste or that are necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of, or used in connection with, the treatment process (including land used for the storage of treated water in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment; or facilities to provide for the collection, control, and disposal of waste. The term also means any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste, including storm water runoff; and waste combined in storm water and

sanitary sewer systems, the type of projects that often arise in response to emergency events.

(57) Trustee--The person holding the property in trust including an original, additional or successor trustee, whether or not the person is appointed or confirmed by a court.

(58) Trust and agency certificate--The instrument executed between the executive administrator and a home-rule municipality with a population of more than 1,000,000 whose charter provides for an elected comptroller, auditor or treasurer governing the management of CWSRF loan and grant proceeds;

(59) Trust institution--A bank, credit union, foreign bank, savings association, savings bank or trust company that is authorized by its charter to conduct trust business.

(60) Water conservation plan--A report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area.

(61) Water conservation program--A comprehensive water conservation program with a schedule and description of the methods and means to be used to implement and enforce a water conservation plan.

(62) Water quality management plan--A plan prepared and updated annually by the state and approved by the Environmental Protection Agency that determines the nature, extent, and causes of water quality problems in various areas of the state and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

§375.2. Entities and Activities Eligible for Assistance.

(a) Financial assistance from the CWSRF is available to the following entities:

(1) any municipality, interstate or state agency for the construction of or improvements to publicly-owned treatment works;

(2) any person for the implementation of a non-point source project under §319 of the Act; and

(3) any person for the development and implementation of a conservation and management plan for bays and estuaries under §320 of the Act.

(b) Financial assistance from the CWSRF is available for nonpoint source pollution projects consistent with the following definitions:

(1) BMP--Best management practices are those practices determined to be the most efficient, practical, and cost-effective measures identified to guide a particular activity or address a particular problem.

(2) National Estuary Program--A program created by the Water Quality Act of 1987 and administered according to §320 of the Act.

(3) NPS Loan Program--Nonpoint Source Pollution Loan Program established to provide low interest loans to persons for the implementation of approved nonpoint source pollution control and abatement projects and estuary management projects.

(4) NPS Management Report--The most recent Texas Nonpoint Source Pollution Assessment Report and Management Program adopted by the commission.

(c) Financial assistance from the CWSRF is available for nonpoint source pollution projects consistent with the following eligibilities:

(1) The executive administrator may provide financial assistance to persons for nonpoint source pollution control projects or for national estuary program projects.

(2) An Applicant for financial assistance for a nonpoint source or estuary program project shall submit an application in the form and number prescribed by the executive administrator. The executive administrator shall determine the type of financial assistance available to an Applicant for a nonpoint source pollution project or a national estuary program project.

(3) The Board may provide financial assistance to applicants by either purchasing bonds issued by such applicant or by receiving a promissory note and entering into a loan agreement with such Applicant. If, however, an Applicant is a governmental entity that is fully authorized to issue bonds, the Applicant may not enter into a loan agreement as provided in this section.

(d) Financial assistance from the CWSRF is available for nonpoint source pollution projects consistent with the following conditions:

(1) an identified practice within a Water Quality Management Plan;

(2) a nonpoint source management activity that has been identified in the Texas Comprehensive Groundwater Protection Program; or

(3) a BMP listed in the NPS Management Report and the EPA approved Nonpoint Source Management Plan and or the National Estuary Program efforts for the State of Texas.

(e) Financial Assistance from the CWSRF is available for national estuary program projects consistent with the EPA approved National Estuary Program efforts for the State of Texas.

This 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 June 21, 2010.

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-8061

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SUBCHAPTER B. FINANCIAL ASSISTANCE

31 TAC §§375.10 - 375.19

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.10. Types of Financial Assistance.

The executive administrator shall determine the type of financial assistance available to the Applicant based on the evaluation of the project information forms, the application and the availability of funds.

§375.11. Refinancing.

(a) The executive administrator may accept applications to refinance existing debt for eligible projects when sufficient funds are available. If refinancing funds are available in an IUP, then the eligible Applicant shall describe the water quality need for construction of the eligible project and provide other specific information detailed in the project information form.

(b) An application for refinancing of existing debt shall be the same as an application for financial assistance under this chapter. The executive administrator may consider an application for refinancing when:

(1) the project meet all of the requirements for a federally funded project under this chapter, including information evidencing that the environmental review and engineering criteria considered by the original lender shall meets the criteria required under current this chapter and law for the same or similar projects; and

(2) the federal tax regulations allow such refinancing if Board bond proceeds will be used to refinance.

§375.12. Planning, Acquisition, and Design Funding.

(a) This type of financial assistance is available for the planning, acquisition of land, and the design for a proposed project.

(b) Applicants who have completed the planning, acquisition, and design for a proposed project within three years of the loan closing date will receive priority for construction funding when the project is ready to proceed.

§375.13. Construction Funding.

This type of financial assistance is available for the construction of an eligible project that is ready to proceed.

§375.14. Pre-Design Funding.

(a) Description. This type of financial assistance is available for the planning, design, acquisition and construction of a project. The funds for the construction phase of a project will be released only when construction contracts have been executed and the project is ready to proceed. This option is available only when the executive administrator recommends it to the Board based on a preliminary determination that there are no significant permitting, social, contractual, environmental, engineering or financial issues that would make a Finding unavailable.

(b) Alternative methods of project delivery. Design-Build, Construction Manager at Risk, and other alternative methods of project delivery are eligible for the pre-design funding option and loan commitments may include construction funding. The executive administrator may break a project into phases for purposes and may modify the requirement of this chapter for alternative project delivery methods.

§375.15. Lending Rates.

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

(1) Average life--The number determined by dividing the sum of the payment periods of all maturities of a loan by the total number of maturities.

(2) Borrower--Each eligible Applicant receiving a loan from the Board.

(3) Delphis--Delphis Hanover Corporation Range of Yield Curve Scales.

(4) Loan interest rate--The individual interest rate for each maturity of a loan as identified by the executive administrator under this chapter.

(5) Market rate--The individual interest rate for each maturity of a loan payment that is the borrower's market cost of funds based on the Delphis index's scale for the borrower as identified under subsection (c)(1) of this section.

(6) Payment period--The number determined by multiplying the total principal amount due for an individual maturity as set forth in the loan by the standard period for the loan.

(7) Standard period--The number identified by determining the number of days between the date of delivery of the funds to a borrower and the date of the maturity of a bond or loan payment pursuant to which the funds were provided calculated on the basis of a 360-day year composed of twelve 30-day periods and dividing that number by 360.

(b) Procedure for setting fixed interest rates. The interest rates will be determined by this section or as described in an IUP.

(1) The executive administrator will set fixed rates for loans on a date that is:

(A) five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the execution of a loan agreement; and

(B) not more than 45 days before the anticipated closing of the loan from the Board.

(2) After 45 days from the assignment of the interest rate on the loan, rates may be extended only with the executive administrator's approval.

(c) Fixed Rates for State Funded Loans. The fixed interest rates for CWSRF loans under this chapter will be determined as provided in this subsection or as detailed in an IUP. The executive administrator will identify the market rate for the borrower, determine the amount of adjustment from the market interest rate appropriate for the borrower, apply the identified interest rate adjustment to the market rate for the borrower to determine the loan interest rate, and apply the loan interest rate to the proposed principal schedule, as more fully set forth in this subsection.

(1) To identify the market rate:

(A) for borrowers that have a rating by a recognized bond rating entity and will not have bond insurance, the executive administrator will rely on the higher of the Delphis scale for the current bond rating of the borrower or the Delphis 90 index;

(B) for borrowers with no rating by a recognized bond rating entity or for borrowers with a rating that is less than investment grade as determined by the executive administrator, the executive administrator will rely on the Delphis 90 index; or

(C) for borrowers that are rated by a recognized rating entity with bond insurance or for borrowers with no rating by a recognized bond rating entity with insurance, the executive administrator will rely on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.

(2) The program is designed to provide borrowers with a reduction not to exceed 130 basis points below the market rate based on a level debt service schedule. Notwithstanding the foregoing, in no event shall the loan interest rate as determined under this section be less than zero.

(3) To determine the loan interest rate, the following procedures will apply:

(A) Unless otherwise requested by the borrower under subparagraph (B) of this paragraph, the loan interest rate will be deter-

mined based on a debt service schedule that provides interest only to be paid in the first year of the debt service schedule and in which the remaining annual debt service payments are level, as determined by the executive administrator. The executive administrator will identify the appropriate Delphis scale for the borrower and identify the market rate for the maturity due in the year preceding the year in which the average life is reached. The executive administrator will reduce that market rate by the number of basis points applicable according to paragraph (2) of this subsection and thereby identify a proposed loan interest rate. The proposed loan interest rate will be applied to the proposed principal repayment schedule. If the resulting debt service schedule is level to the satisfaction of the executive administrator, then the proposed loan interest rate will be the loan interest rate for the loan. If the resulting debt service schedule is not level to the satisfaction of the executive administrator, then the executive administrator may adjust the interest rate for any or all of the maturities to identify the loan interest rate that as closely as possible achieves the interest savings applicable.

(B) A borrower may request a debt service schedule in which the annual debt service payments are not level through the term of the loan, as determined by the executive administrator. In this event, the executive administrator will approximate a level debt service schedule for the loan amount and identify a proposed loan interest rate that provides for annual debt service payments that are level for the term of the loan following the procedures set forth in paragraph (1)(A) of this subsection. From the level debt service schedule, the executive administrator will determine the amount of the subsidy that would have been provided if the annual debt service payments had been level. The executive administrator will then identify the loan interest rate that as closely as possible provides the borrower the identified subsidy amount for the principal schedule requested by the borrower.

(d) Fixed rates for federally funded loans. The fixed interest rates for CWSRF loans under this subchapter are set at rates not to exceed 195 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) of this subsection, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (2) of this subsection. The fixed rate index rates shall be established for each uninsured borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales (Delphis) or the 90 index scale of the Delphis for borrowers with either no rating or a rating less than investment grade, using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale. The fixed rate index rates shall be established for each insured borrower based on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.

(1) Under §375.16 of this chapter (relating to Fees of Financial Assistance) an additional reduction not to exceed 25 basis points will be used, for total fixed interest rates not to exceed 195 basis points below the fixed index rates for such borrower.

(2) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the Board for borrowers filing applications on or after September 21, 1997 for loans that have debt schedules less than 20 years and that produce a total fixed lending rate reduction in excess of a standard loan structure (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraph (1) of this subsection to determine the total fixed lending rate reduction.

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the Board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan that has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan that has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The Board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(e) Variable Rates. The interest rate for CWSRF variable rate loans under this chapter will be set at a rate equal to the actual interest cost paid by the Board on its outstanding variable rate debt plus the cost of maintaining the variable rate debt in the CWSRF. Variable rate loans are required to be converted to long-term fixed rate loans within 90 days of project completion unless an extension is approved in writing by the executive administrator. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the executive administrator and submittal of a resolution requesting such conversion. The fixed lending rate will be calculated under the procedures and requirements of subsections (b), (c) and (d) of this section.

(f) Private and taxable borrowers. The interest rate for loan agreements for those borrowers receiving financial assistance who are determined to be private or taxable issuers will be 140% of the rate pursuant to subsections (b), (d), and (g) of this section.

(g) Adjustments. The executive administrator may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

§375.16. Fees of Financial Assistance.

Loan Origination Fee. A loan origination fee equal to 1.85% of the CWSRF loan amount will be assessed, as a one-time non-refundable charge. The fee is due and payable at the time of loan closing and may be financed as a part of the CWSRF loan. However, no fees or costs shall be assessed on those projects or portions that are subsidized though loan forgiveness or other subsidies as detailed in the IUP.

§375.17. Term of Loan.

(a) The Board may offer loans for the following terms:

(1) up to ten years for the planning, acquisition, and design of an eligible project; or

(2) up to 30 years for the construction of an eligible project

(b) Notwithstanding the terms in subsection (a) of this section, the term of a loan may not exceed the design life of an eligible project.

§375.18. Subsidies.

(a) The Board may provide subsidies for financial assistance for:

(1) an entity that meets the affordability criteria established in this chapter and in the IUP for a Disadvantaged Community; or

(2) an entity that meets the criteria established in the IUP for other subsidies allowed under the federal appropriations law or the capitalization grant.

(b) Total amount of subsidies. The total amount of subsidies may not exceed the percentages established by federal law or by the capitalization grant.

§375.19. Financial Guarantees for Political Subdivision Bonds.

(a) Financial Guarantees. The Board will consider accepting surety bonds in lieu of required cash reserve deposits and insurance policies for political subdivision bonds. At the time of loan commitment and at loan closing, only those financial guarantors that have been approved by the Board are authorized to underwrite financial guarantee policies on political subdivision bonds approved by the Board.

(b) Criteria for Authorized List. The Board will maintain a list of authorized financial guarantors. In order to be considered for placement on the list, a guarantor must meet the following minimum criteria:

(1) the financial guarantor must be a nationally recognized provider of municipal bond insurance and must have a triple-A stable insurer financial strength rating with Standard & Poor's, Moody's Investors Service, Inc. and Fitch, Inc.; and

(2) the financial guarantor must have a triple-A insurer financial enhance rating with Standard & Poor's.

(c) Review of Policies. The executive administrator shall review all policies of insurance submitted by authorized financial guarantors and may reject any policy of insurance or surety bond that does not protect the interests of the Board's financial program.

(d) Removal from Authorized List. The executive administrator may remove a financial guarantor from the authorized list at any time that a change in status would cause the financial guarantor to fail to meet the minimum criteria.

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

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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SUBCHAPTER C. INTENDED USE PLAN

31 TAC §§375.30 - 375.33

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.30. Submission of Project Information Forms.

(a) The executive administrator will request eligible Applicants to submit a project information form for rating and ranking on the applicable IUP. Applicants shall submit a complete and accurate project information form by the date included in the notice. The required information will include, but is not limited, to the following:

(1) a detailed description of the proposed project;

(2) a county map(s) showing the location of the service area;

(3) an estimated total project cost which:

(A) for an estimated financial assistance amount greater than $100,000, the project information form shall be certified by a registered professional engineer; or

(B) for an estimated financial assistance amount less than $100,000, the project information form shall be accompanied by a statement signed by the system operator establishing the basis for the estimate;

(4) an estimated project schedule;

(5) the population currently served by the Applicant;

(6) the status of the Applicant's water conservation plan;

(7) signature of the Applicant's authorized representative; and

(8) additional information, as detailed within the solicitation for project information forms, needed to establish the priority rating score.

(b) The Applicant's failure to submit all of the information requested may result in a failure to include the project in the IUP.

§375.31. Rating Process.

(a) Rating Criteria. For the Act's §212 projects involving the construction or improvements to publically owned treatment works the following factors will be considered:

(1) Impacts to water quality--Projects that protect stream segments and groundwater from pollution.

(2) Unserved areas--Projects that will bring individual systems into a centralized system or projects that address on-site systems.

(3) Regionalization of treatment works--Projects that will consolidate and eliminate systems.

(4) Reduction or prevention of sewer system overflows and inflow and infiltration.

(5) Emergency relief--Projects which are affected by disaster.

(6) Affordability--A Project located in a disadvantaged community shall have an affordability rating factor as defined within the IUP.

(7) Additional factors as designated within the applicable IUP and determined by the executive administrator.

(b) Previously funded projects. Planning, acquisition, or design phase projects, completed within three years from loan closing will receive a priority for construction funding if there are no significant changes that affect the original project rating and the project is ready to proceed.

(c) Nonpoint source and estuary management projects will be rated as described in the IUP and based on the following:

(1) Public health--Ability to improve conditions that a public health official has determined are a nuisance and are dangerous to public health and safety and that may result from water supply and sanitation problems in the area to be served by the proposed project.

(2) Groundwater--Minimization of impact of pollutants to an aquifer or groundwater.

(3) Impaired water body--Ability to improve conditions in any water body that does not meet applicable water quality standards or is threatened for one or more designated uses by one or more pollutants.

(d) Subsequent to adoption of an IUP, certain changes to a ranked project may be allowed without requiring re-ranking in the following circumstances:

(1) the Applicant for a proposed project may change;

(2) the number of participants in a regional project may change provided that the change does not affect the total rating points assigned to the project; and

(3) the total cost of a proposed project may not increase in an amount more than 10% of the amount listed in the adopted IUP.

§375.32. Public Notice.

In accordance with the Act, the Board shall hold public hearings or allow a period for public review and comment before considering the adoption and approval of the IUP, the project priority list and any amendments thereto.

§375.33. Criteria and Methods for Distribution of Funds.

(a) Amount of Available Funds. Annually, the executive administrator will determine the amount of funds available for wastewater system improvements and other projects for the fiscal year.

(b) Subsidy limits. The total amount of subsidies in any fiscal year may not exceed the percentages established by federal law or by the capitalization grant.

(c) Small systems. Small systems are those systems that serve a population of not more than 10,000 individuals. Projects with identical combined rating scores, including rating scores of zero, will be listed in order of population. Projects serving fewer people will be listed above those projects serving a greater number of people.

(1) To the extent that eligible Applicants are available, a minimum of 15% of the funds will be made available to small systems.

(2) If small system projects above the funding line are less than 15%, then the executive administrator may bypass projects for systems serving larger populations to ensure inclusion of small system projects for at least 15% of available funds.

(d) Priority list of projects. Available program funds will be applied to the list of projects designated to receive funding. The methods used for ranking include:

(1) Project costs. Project costs will be determined by cost estimates contained in the project information form if the executive administrator deems those costs reasonable and acceptable; the costs also will be reflected in the IUP.

(2) Tie-breakers. If two or more projects receive the same rating, then the executive administrator will use the tie-breaker procedures described in the IUP.

(3) Bypass procedure. The executive administrator may pass over higher rated and ranked projects to ensure that funding is dedicated to disadvantaged communities, green project reserve, additional subsidization, and other priorities described in the IUP.

(e) Funding line and invitation and intent to apply for funds. After projects have been rated and ranked, funding lines will be drawn on the priority list to the limit of available funds. Applicants with projects above the funding line will be invited to submit applications for financial assistance and shall confirm their intent to apply as directed by the executive administrator. The intent to apply must be received within 30 days from the executive administrator's invitation or the project will be bypassed for the applicable funding cycle.

(f) Additional funds. When invited Applicants decline the invitation to apply for funds or when additional funds become available, the executive administrator shall redraw the funding line and shall continue the process described in this section to ensure the use of all available funds.

(g) Bypass. All projects for which no or incomplete applications for financial assistance are received or where invitations to apply were declined shall be bypassed. This process shall continue to ensure the use of all available funds.

(h) Invitation to apply for funds. After the funding line is redrawn, the executive administrator shall provide written notice to all potential Applicants about the availability of funds for their project and shall invite the submittal of applications for financial assistance. Applicants shall submit their complete application within three months of the invitation or the project will be ineligible for funding in the applicable IUP.

(i) Utilization of remaining funds. If there are insufficient applications for financial assistance to obligate available funds for the funding year, then the executive administrator shall utilize the remaining funds during the next funding year.

(j) Fund shortages. When the amount of funds required to fund all complete applications for financial assistance exceeds the amount of funds available in the funding year, a shortage of funds exists. In such an instance, the Board will fund Applicants in order of priority ranking until all funds have been utilized.

This 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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Kenneth L. Petersen
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SUBCHAPTER D. APPLICATION FOR ASSISTANCE

31 TAC §§375.40 - 375.44

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.40. Pre-application Conferences.

An Applicant may make an appointment with the Board staff for a pre-application conference to discuss the eligibility of the project and of the Applicant for financial assistance; the general, engineering, environmental, fiscal, and legal requirements of an application; and to assist the Applicant in completing an application. The following individuals should attend the conference: a member of the governing body of the Applicant; the consulting engineer; and the financial advisor.

§375.41. Timeliness of Application and Required Application Information.

(a) Time to submit applications. Applications and required additional data or information shall be submitted within the timelines established in this section. The failure to timely submit the application, the information necessary to complete the application or additional requested information will result in project on the priority list being bypassed.

(1) Deadline to submit application. Applications shall be submitted no later than three months from the invitation to apply for financial assistance. The Applicant will be notified when an application is administratively complete.

(2) Incomplete applications. An Applicant shall cure any deficiency in an application upon request from the executive administrator and shall submit all requested information within fourteen days from receipt of the notice of a deficiency.

(3) Additional information. The Applicant shall submit any additional or modified information or data required by the executive administrator within fourteen days of the request for same, regardless of the expiration of other applicable deadlines in this section.

(4) Extension of time. The executive administrator may grant an extension of time to complete the application or to receive additional information and data if the Applicant can show good cause for the delay or if the delay is caused by an event of force majeure. The executive administrator exercises sole discretion in determining whether and to what extent to grant a time extension.

(b) Required Application Information. An application shall be in the form and numbers prescribed by the executive administrator and, in addition to any other information that may be required by the executive administrator or the Board, the Applicant shall provide at a minimum, the following documentation:

(1) a resolution from its governing body that shall:

(A) request financial assistance, identifying the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the Board on behalf of the Applicant, and submit such other documentation as may be required by the executive.

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the Board was made in a public meeting held in accordance with the Open Meetings Act (Government Code, Chapter 551) and after providing all such notice as is required by the Open Meetings Act;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the Applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issues of any kind or nature by EPA, the commission, Texas Comptroller of Public Accounts, Office of the Secretary of State, or any other federal, state or local government that would materially affect the Applicant's ability to repay its debt or identifying such judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue as may be outstanding for the Applicant;

(D) the Applicant warrants compliance with the representations made in the application in the event that the Board provides the financial assistance; and

(E) the Applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the Board;

(3) copies of the following project documents:

(A) any draft or existing contracts for financial advisory and bond counsel consulting services to be used by the Applicant in applying for financial assistance; and

(B) any draft or executed contracts for engineering services including the scope of services, level of effort, costs, project schedules, and other information sufficient to enable the executive administrator to perform an adequate review of the application. A project schedule shall be provided with the contract; the schedule must provide firm timelines for the completion of each phase of a project and note the milestones within the phase of the project.

(4) a citation to the specific legal authority in the Texas Constitution and statutes pursuant to which the Applicant is authorized to provide the service for which the Applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the Applicant;

(5) if the Applicant provides or will provide wastewater service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(6) documentation of the ownership interest, with supporting legal documentation, of the property on which proposed project shall be located, or if the property is to be acquired, certification that the Applicant has the necessary legal power and authority to acquire the property;

(7) if financing of the project will require a contractual loan agreement or the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which Applicant's gross income is expected to accrue. Before a loan is closed, an Applicant shall submit executed copies of such contracts to the executive administrator;

(8) if the bonds to be sold to the Board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body for all prior and outstanding bonds shall be furnished;

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require Applicant to provide the election date and election results necessary for the issuance of the bonds as part of the application or prior to closing;

(10) if financing of the project requires the sale of bonds to the Board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which Applicant's gross income is expected to accrue. Before a loan is closed, an Applicant shall submit executed copies of such contracts to the executive administrator; and

(11) an audit of the Applicant for the preceding year prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant.

§375.42. Review of Applications.

(a) Review of applications. The executive administrator will review the application to ensure that sufficient information has been provided to support the eligibility of the Applicant and the project. The executive administrator may request that the information or data for any portion of the application be modified or supplemented.

(b) Submittal of requested information. If the Applicant fails to submit information or data requested within the established time period, then the executive administrator may notify the Applicant that the application is incomplete and will be bypassed.

§375.43. Required Water Conservation Plan.

An Applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

§375.44. Board Approval of Funding.

(a) Presentation to Board. The Board must consider each application at a public meeting. The executive administrator will notify the Applicant when the Board's consideration of the application is scheduled for a public meeting.

(b) Action by Board. After considering the executive administrator's recommendation and comments from the Applicant and other interested persons, the Board may:

(1) resolve to approve an application only when it finds that the revenue or taxes or both revenue and taxes pledged by the Applicant will be sufficient to meet all obligations that will be assumed by the Applicant;

(2) resolve to disapprove or amend the proposed conditions for the financial assistance;

(3) request additional information related to the eligibility of the Applicant or the project or continue the application for consideration at another time; and

(4) approve an application for pre-design funding despite a negative recommendation from the executive administrator.

(c) Board's resolution. The Board's approval of an application is recorded through the issuance of a resolution. A resolution is a binding commitment by the Board to provide the financial assistance if the Applicant timely meets the conditions in the resolution.

(d) Expiration of Board commitment. The Board's commitment for financial assistance expires on the date noted in the commitment or if no date is noted then the commitment expires after:

(1) 12 months for a commitment for financial assistance that includes planning, acquisition, design and construction, including financial assistance under the pre-design funding option; and

(2) six months for a commitment for financial assistance for planning, acquisition and design.

(e) Extension of commitment. The Board is not required to approve the request for an extension of time to close the loan. The Board is released from its offer to provide financial assistance for the project when the commitment expires. However the Applicant may receive one extension of time by submitting a written request:

(1) at least 30 days prior to the expiration of the commitment, and by showing good cause for the failure to timely close the loan and with a specific date for closing; or

(2) as soon as reasonably possible after the force majeure event.

This 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 E. ENVIRONMENTAL REVIEWS AND DETERMINATIONS
DIVISION 1. STATE PROJECTS

31 TAC §§375.50 - 375.56

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.50. Definitions for State Funded Projects.

(a) Applicability. This Division applies to state funded financial assistance, unless otherwise stated in an IUP.

(b) Unless specifically defined differently within this subchapter, the following terms and acronyms mean:

(1) Affected community--Community wherein the proposed project is expected to result in environmental impacts or potential human health or environmental effects including minority communities, low-income communities or federally-recognized Indian tribal communities.

(2) Avoidance--Completely avoiding the environmental impact by not taking a certain action or parts of an action during project implementation.

(3) Minimization--minimizing environmental impacts by limiting the degree or magnitude of the action during project implementation.

(4) Mitigation--A sequence of measures designed to:

(A) avoid;

(B) minimize;

(C) rectify an impact by repairing, rehabilitating, or restoring the affected environment;

(D) reduce or eliminate the environmental impact over time by preservation and maintenance operations during the life of the project; and

(E) compensation for the impact by replacement or provision of substitute resources or habitats.

§375.51. Environmental Review Process.

(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the CWSRF. The Board will consider environmental, social, and economic impact as relevant in any hearing or matter in which the Board is directed by law to consider information or to determine whether and how any proposed project affects the quality of the natural and human environment. Environmental review of all proposed infrastructure projects is a condition of the use of CWSRF funds. This subchapter follows the procedures approved by EPA for implementing the state's CWSRF alternative state environmental review process set forth at 40 CFR Part 35.3140(c). The environmental review must be completed prior to the release of funds for design and construction and is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the determinations resulting from the environmental review.

(b) Types of environmental determinations. An environmental determination is issued by the executive administrator at the culmination of the process described in this subchapter. After gathering and reviewing relevant information and data, soliciting comments from state and federal agencies and receiving and analyzing public comments, the executive administrator will issue one of the following determinations:

(1) a Categorical Exclusion (CE), based on submission of information from the Applicant; or

(2) a full review.

(c) General review by Executive Administrator.

(1) The executive administrator shall conduct an inter-disciplinary, inter-agency and public review consistent with the National Environmental Policy Act. This purpose of this review is to ensure that the proposed project will comply with the applicable local, state, and federal laws and regulations relating to the identification of the environmental impacts of a proposed project and the necessary steps required to avoid, minimize and, if necessary, mitigate such impacts. The scope of the environmental review will depend upon the type of proposed action, the reasonable alternatives and the type of environmental impacts.

(2) For all environmental determinations that are five years old or older, and for which the proposed infrastructure project has not yet been implemented, the executive administrator must re-evaluate the proposed financial assistance application as well as the environmental conditions and public comment to determine whether to conduct a supplemental environmental review in compliance with the NEPA, or to reaffirm the original determination. If there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns, the executive administrator must conduct a supplemental environmental review and complete an appropriate determination in compliance with the National Environmental Policy Act. The executive administrator may consider environmental determinations issued by other entities.

§375.52. Types of Environmental Determinations: Categorical Exclusions (CE).

(a) Projects eligible for categorical exclusions. CE's are generally available for projects that will not result in significant impacts on the quality of the human environment and that do not involve circumstances preventing use of a CE. Projects that may be eligible for a CE include the following:

(1) those that include only minor upgrading or expansion of system capacity;

(2) the rehabilitation or functional replacement of existing system and system components such as collection lines, interceptor sewers, or force mains located within their existing right-of-ways and easements;

(3) the construction of new minor ancillary facilities located on the same property as existing facilities that do not affect the degree of treatment or the capacity of the works; and

(4) the construction of facilities that will provide a capacity increase to serve a population of no greater than 30% the size of the existing population.

(b) Projects not eligible for CE:

(1) Projects that would otherwise be eligible for a CE but due to circumstances detailed in subsection (c) of this section are not eligible for a CE;

(2) the construction of new collection lines, interceptor sewers, or force mains;

(3) a new discharge or relocation of an existing discharge;

(4) a substantial increase in the volume or loading of pollutants; and

(5) projects needed primarily to serve future growth by providing capacity for a population 30% greater than the existing population.

(c) Circumstances preventing use of categorical exclusion. Circumstances may become known at any time during the planning, design or construction of a project and may cause the project to be ineligible for a CE. These circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

(2) disproportionally high and adverse human health or environmental effects on any community, including minority, low-income or Indian tribes;

(3) an effect or potential taking of a federal or state-listed threatened or endangered species or critical habitat;

(4) a significant effect on national or state natural landmarks or property with national or state historic, architectural, prehistoric, archeological or cultural value;

(5) a significant effect on environmentally important natural resource areas such as wetland, floodplains, water of the United States, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;

(6) significant adverse air quality effects;

(7) significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas;

(8) significant public controversy about a potential environmental impact;

(9) the cost-effectiveness of the project; and

(10) any conflict with existing federal, state, local, or Indian tribe resources protection or land-use laws and regulations.

(d) Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.

(e) Applicant Requirements. An Applicant shall submit sufficient information to demonstrate why the project is eligible for a CE including, but not necessarily limited to the following documentation in the Engineering Feasibility report:

(1) a brief but complete description of the project;

(2) an alternatives analysis demonstrating the cost-effectiveness of the project;

(3) plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

(4) the names of widely-circulated, local newspapers serving the community affected by the project;

(5) a discussion of the project's eligibility for a CE under the criteria listed in subsection (a) of this section; and

(6) a statement explaining why no extraordinary circumstances, as listed in subsection (c) of this section, apply to the proposed action.

(f) Review of proposed project eligibility for CE. The executive administrator shall review the information submitted and may request additional information as needed to complete the determination regarding the eligibility of a proposed project.

(g) Public notice. The executive administrator's determination relating to a CE shall be subject to public notice that shall be published in a newspaper of wide circulation in the affected community.

§375.53. Types of Environmental Determinations: Full Review.

(a) Purpose and Applicability. A Full Review determination may be issued if the proposed action will not have a significant effect on the human and natural environment. The determination shall be based upon the Environmental Assessment (EA) submitted by the Applicant and a summary of the review conducted by the EA.

(b) Full Review. A full review is required when the proposed project is expected to result in environmental impacts and the significance of those impacts is not known. When the executive administrator preliminarily determines that the impacts will not be significant and may be addressed by ordinary avoidance, minimization, or mitigation measures, then a full review will be prepared. A full review is required for proposed projects involving construction of new components in areas where none are currently located.

(c) Contents of the Summary of a Full Review.

(1) A full review shall include a brief discussion of the following:

(A) the purpose and need for the proposed project and an estimate of cost of the project;

(B) a brief summary of the alternatives considered, including the no action alternative, and the reasons for the rejection or acceptance of the alternatives;

(C) a brief summary of the affected environment, including baseline conditions that may be impacted by the proposed actions and the alternatives;

(D) the environmental impacts of the proposed project and the alternatives, including any unresolved conflicts concerning alternative use of available resources; and

(E) applicable environmental laws and executive orders.

(2) It should contain a listing or summary of coordination and consultation undertaken with any federal, state, or local government regarding compliance with applicable environmental laws and executive orders;

(3) It should identify and describe the mitigation measures considered, including any avoidance, minimization, or mitigation measures that must be adopted to ensure the proposed project will not have significant impacts; and

(4) It should incorporate documents by reference, including the Environmental Assessment submitted by the Applicant.

(d) Contents of the Full Review Environmental Determination. When the full review supports a finding that the proposed project will not have a significant effect on the human environment, then the Board may issue an environmental finding based on this review. The finding must include the following components:

(1) a review summary;

(2) a brief description of the reasons why there are no significant impacts;

(3) any commitments to avoidance, minimization, or mitigation measures that are necessary to reduce the impacts of the proposed project;

(4) the executive administrator's statement that the Applicant has committed to the avoidance, minimization, or mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to mitigation; and

(5) the date of issuance and signature of the executive administrator.

§375.54. Environmental Assessment: Applicant Requirements.

(a) Applicant requirements. An Applicant shall prepare an EA in consultation with the executive administrator when a project is not eligible for a CE. The executive administrator will provide guidance on the format and contents of the EA prior to the initiation of planning for the proposed project or as soon as practicable upon receipt of an application for financial assistance.

(b) Coordination. The Applicant shall coordinate the preparation of the EA as well as consultations with appropriate federal agencies, state and local governments, and other potentially affected parties with the executive administrator. The Applicant must also notify the executive administrator regarding any non-governmental entities or organizations affected by the proposed project.

(c) Proposed project changes during review. The Applicant must notify the executive administrator if, prior to issuance of the environmental determination, the Applicant:

(1) changes its plans for the project as originally submitted; or

(2) changes its schedule for the project from the originally submitted schedule.

(d) Contents of EA. The EA shall include, but is not limited to:

(1) a description of the project;

(2) the need for the proposed project;

(3) the alternatives to the project, including the no-action alternative;

(4) the affected environment, including existing conditions that may be impacted by the proposed project and the alternatives;

(5) the environmental impacts of the proposed action and alternatives, including unsettled conflicts concerning alternative uses of available resources;

(6) potential impact on resources protected by state and federal environmental statutes or regulations;

(7) proposed mitigation measures;

(8) documentation showing that the requisite public participation requirements have been satisfied; and

(9) any other information required by the executive administrator.

§375.55. Environmental Determinations Affected by Proposed Project Alterations.

(a) Alterations of Proposed Project. If the Applicant decides to alter the proposed project after the issuance of an environmental determination, then the Applicant shall immediately notify the executive administrator in writing and shall briefly describe the reason(s) for the alterations in the proposed project.

(b) Prior to approval of the proposed alteration, the executive administrator shall examine the contract documents, loan application and other related documents to evaluate the proposed alterations to ensure consistency with the environmental determination. The executive administrator's review of proposed project alterations may result in:

(1) the reaffirmation of the original environmental determination;

(2) the issuance of a FER environmental determination when a CE has been revoked; or

(3) the issuance of a supplement to a FER environmental determination, or the revocation of the FER environmental determination and issuance a public notice that financial assistance for the proposed project will not be provided.

(c) Minor differences between the approved project and alterations that will not create previously unconsidered, adverse environmental impacts will generally not affect the ability of the proposed project alterations to proceed without additional formal environmental review.

(d) Major differences between the approved project and alterations that have the potential to generate new and previously unexamined, adverse environmental impacts may result in a decision to revoke a CE and to proceed with a more detailed level of environmental review consistent with this subchapter.

§375.56. Use of Environmental Determinations Prepared by Other Entities.

(a) Adoption of previous determination. The executive administrator may adopt previous environmental determinations issued by the EPA and other state or federal agencies whose determinations were produced through procedures in compliance with NEPA. The executive administrator must re-evaluate the proposed financial assistance application as well as environmental conditions and public comment to determine whether to conduct a supplemental environmental review of the action and complete an appropriate document in compliance with this subchapter, or to reaffirm the original determination.

(b) Previously required avoidance, minimization, or mitigation measures. Any and all avoidance, minimization, or mitigation measures specified in the previous determinations shall be applied as conditions of the loan commitment and the loan closing documents and shall be consistent with the requirements of this subchapter.

(c) Method of adoption of previous determination. The executive administrator will adopt the previous determination by means of a CE when the proposed project and its previous determination will be adopted without change. The executive administrator may also adopt the previous determination in a full review environmental determination detailing the modifications to the proposed project, the potential environmental impacts identified during an environmental review, and any avoidance, minimization, or mitigation measures proposed in addition to those included in the federal environmental determination.

(d) Validity of previous environmental determinations and reevaluation. Another entity's environmental determination shall be re-evaluated if it was issued five years or more prior to the executive administrator's environmental review and if:

(1) the proposed project has not yet been implemented;

(2) there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns; and

(3) there are significant new circumstances or information relevant to environmental impacts of the proposed action.

(e) Dissemination of information about mitigation measures. The executive administrator may issue a public notice describing the outcome of the mitigation measure proposed in an environmental determination to interested agencies and public groups.

This 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 June 21, 2010.

TRD-201003503
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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DIVISION 2. FEDERAL PROJECTS

31 TAC §§375.60 - 375.70

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.60. Definitions for Federally Funded Projects.

(a) This section applies to federally funded financial assistance.

(b) Unless specifically defined differently within this subchapter, the following terms and acronyms, used in this subchapter, mean:

(1) Affected community--A community where the proposed project is expected to result in environmental impacts or potential human health or environmental effects including minority communities, low-income communities or federally-recognized Indian tribal communities.

(2) Avoidance--Avoiding the impact altogether by not taking a certain action or parts of an action during project implementation.

(3) NEPA--The federal National Environmental Policy Act, 42 U.S.C. 4321 et seq. as amended.

(4) Indian tribes--Federally recognized Indian tribes.

(5) Minimization--Minimizing impacts by limiting the degree or magnitude of the action during project implementation.

(6) Mitigation--

(A) avoiding;

(B) minimizing;

(C) rectifying an impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

§375.61. Environmental Review Process.

(a) Policy and purpose. This subchapter governs the environmental review of projects funded in whole or in part by the CWSRF. Environmental review of all proposed infrastructure projects is a condition of the use of federal CWSRF funds. This subchapter follows the procedures established by EPA for implementing the NEPA set forth at 40 CFR Part 6. The environmental review must be completed prior to the release of federal funds for design and construction and the review is subject to public comment. The Applicant, at all times throughout the design, construction, and operation of the project, shall comply with the determinations resulting from the environmental review.

(b) Types of environmental determinations. An environmental determination is issued by the executive administrator at the culmination of the process described in this subchapter. After gathering and reviewing relevant information and data, soliciting comments from state and federal agencies and receiving and analyzing public comments, the executive administrator will issue one of the following determinations:

(1) a Categorical Exclusion, based on submission of information from the Applicant;

(2) a Finding of No Significant Impact, based on review of the Applicant's Environmental Information Document and the Board's Environmental Assessment; or

(3) a record of decision, based on an environmental impact statement.

(c) General review by executive administrator.

(1) The executive administrator shall conduct an inter-disciplinary, inter-agency and public review consistent with the NEPA. The purpose of this review is to ensure that the proposed project will comply with the applicable local, state, and federal laws and regulations relating to the identification of the environmental impacts of a proposed project and the necessary steps required to avoid, minimize and, if necessary, mitigate such impacts. The scope of the environmental review will depend upon the type of proposed action, the reasonable alternatives and the type of environmental impacts.

(2) For all environmental determinations that are five years old or older, and for which the proposed infrastructure project has not yet been implemented, the executive administrator must re-evaluate the proposed financial assistance application as well as the environmental conditions and public comment to determine whether to conduct a supplemental environmental in compliance with the NEPA, or to reaffirm the original determination. If there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns, the executive administrator must conduct a supplemental environmental review and complete an appropriate determination in compliance with the NEPA. The executive administrator may consider environmental determinations issued by other entities.

§375.62. Types of Environmental Determinations: Categorical Exclusions.

(a) Projects eligible for categorical exclusions. Categorical Exclusions are generally available for projects that will not result in significant impacts on the quality of the human environment and that do not involve extraordinary circumstances. Projects that may be eligible for a categorical exclusion (CE) include the following:

(1) those that include only minor upgrading or minor expansion of system capacity;

(2) the rehabilitation or functional replacement of existing system and system components such as distribution lines located within existing right-of-ways and easements;

(3) the construction of new minor ancillary facilities located on the same property as existing facilities that do not affect the degree of treatment or the capacity of the works; and

(4) the construction of facilities that will provide a capacity increase to serve a population of no greater than 30% the size of the existing population.

(b) Projects not eligible for CE are:

(1) Projects that would otherwise be eligible for a CE but due to extraordinary circumstances are not eligible for a CE;

(2) the construction of new distribution lines;

(3) actions not supported by the State or Regional Water Plan; and

(4) projects needed primarily to serve future growth.

(c) Extraordinary circumstances. Extraordinary circumstances become known at any time during the planning, design or construction of a project and may cause the project to be ineligible for a CE. Extraordinary circumstances include, but are not limited to, the following known or expected impacts:

(1) potentially significant environmental impacts on the quality of the human environment either individually or cumulatively over time;

(2) disproportionally high and adverse human health or environmental effects on any community, including minority, low-income or Indian tribes;

(3) a significant effect on federal or state-listed threatened or endangered species or their critical habitat;

(4) a significant effect on national or state natural landmarks or property with national or state historic, architectural, prehistoric, archeological or cultural value;

(5) a significant effect on environmentally important natural resource areas such as wetland, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;

(6) significant adverse air quality effects;

(7) significant effect on the pattern and type of land use or growth and distribution of population including altering the character of existing residential areas;

(8) significant public controversy about a potential environmental impact;

(9) the cost-effectiveness of the project; and

(10) any conflict with existing federal, state, local, or Indian tribe environmental resources protection or land-use laws and regulations.

(d) Upon the discovery of extraordinary circumstances, the executive administrator may deny a CE or rescind an existing CE.

(e) Applicant requirements. An Applicant shall submit sufficient information to clearly describe why the project is eligible for a CE including, but not necessarily limited to the following documentation:

(1) a brief but complete description of the project;

(2) an alternatives analysis demonstrating the cost-effectiveness of the project;

(3) plan maps or maps of the project depicting the location of all construction areas, the planning area boundaries, and any known environmentally important natural areas;

(4) the names of widely-circulated, local newspapers serving the community affected by the project;

(5) a discussion of the project's eligibility for a CE under the criteria listed in subsection (a) of this section; and

(6) a statement explaining why no extraordinary circumstances, as listed in subsection (c) of this section, apply to the proposed action.

(f) Review of proposed project eligibility for CE. The executive administrator shall review the information submitted and may request additional information as needed to complete the determination regarding the eligibility of a proposed project.

(g) Public notice. The executive administrator's determination relating to a CE shall be subject to public notice which shall be published in a newspaper of wide circulation in the affected community.

§375.63. Types of Environmental Determinations: Finding of No Significant Impact.

(a) Purpose and applicability. A Finding of No Significant Impact (FONSI) may be issued if the proposed action will not have a significant effect on the human environment. A FONSI determination shall be based upon the information submitted by the Applicant and upon the issuance of an environmental assessment (EA) prepared by the executive administrator.

(b) Environmental assessment. An EA is required when the proposed project is expected to result in environmental impacts and the significance of those impacts is not known. When the executive administrator preliminarily determines that the impacts will not be significant and may be addressed by ordinary avoidance, minimization, or mitigation measures, then an EA will be prepared. An EA will result in either the decision to issue a FONSI or to prepare an Environmental Impact Statement. An EA is required for proposed projects involving new construction.

(c) Contents of an EA.

(1) An EA shall include a brief discussion of the following:

(A) the purpose and need for the proposed project and an estimate of cost of the project;

(B) the alternatives considered, including the no action alternative, and the reasons for the rejection or acceptance of the alternatives;

(C) the affected environment, including baseline conditions that may be impacted by the proposed actions and the alternatives;

(D) the environmental impacts of the proposed project and the alternatives, including any unresolved conflicts concerning alternative use of available resources; and

(E) applicable environmental laws and executive orders.

(2) The form of the EA generally shall include:

(A) a listing or summary of coordination and consultation undertaken with any federal, state, local or Indian tribe government regarding compliance with applicable environmental laws and executive orders;

(B) identification and description of the mitigation measures considered, including any avoidance, minimization, or mitigation measures that must be adopted to ensure the proposed project will not have significant impacts; and

(C) incorporation of documents by reference, including the Environmental Information Document submitted by the Applicant.

(d) Contents of a FONSI. When the EA supports a finding that the proposed project will not have a significant effect on the human environment, then the Board may issue a FONSI. The FONSI must include the following components:

(1) an EA;

(2) a brief description of the reasons why there are no significant impacts;

(3) any commitments to avoidance, minimization, or mitigation measures that are essential to render the impacts of the proposed project insignificant;

(4) the date of issuance and signature of the executive administrator; and

(5) the executive administrator's statement that the Applicant has committed to the avoidance, minimization, or mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to mitigation;

(e) Public comments and the issuance of FONSI.

(1) The executive administrator shall publish the preliminary FONSI for public comment for a period of at least thirty (30) days.

(2) If no substantive comments are received, a FONSI may be issued and the Board may proceed with the proposed project subject to the avoidance, minimization or other mitigation measures identified in the FONSI. If substantive comments are received, then the execu-

tive administrator shall respond to the comments and revise the FONSI accordingly, if necessary.

(3) The executive administrator shall ensure that the avoidance, minimization, or mitigation measures necessary to the FONSI determination are enforceable and shall conduct appropriate monitoring of these measures.

(f) Dissemination of information about mitigation measures. The executive administrator may issue a statement of findings describing the outcome of the mitigation measure proposed in an environmental determination to interested agencies and public groups.

§375.64. Environmental Information Document: Applicant Requirements.

(a) Applicant requirements. An Applicant shall prepare an Environmental Information Document (EID) in consultation with the executive administrator when a project is not eligible for a CE, FONSI or when an Environmental Impact Statement (EIS) may be required. The executive administrator will provide guidance on the format and contents of the EID prior to the initiation of planning for the proposed project or as soon as practicable upon receipt of an application. An EID is not required when:

(1) the project is eligible for a CE or requires the preparation of an EIS; or

(2) the Applicant prepares and submits a draft EIS and supporting documents.

(b) Coordination. The Applicant shall coordinate the preparation of the EID as well as consultations with appropriate federal agencies, state and local governments, Indian tribes and other potentially affected parties with the executive administrator. The Applicant must also notify the executive administrator regarding any private entities or organizations affected by the proposed project.

(c) Contents of EID. The EID shall include, but is not limited to:

(1) a description of the project;

(2) the need for the proposed project;

(3) the alternatives to the project, including the no action alternative;

(4) the affected environment, including baseline conditions that may be impacted by the proposed project and the alternatives;

(5) the environmental impacts of the proposed action and alternatives, including unresolved conflicts concerning alternative uses of available resources;

(6) potential impact on resources protected by the federal environmental "cross-cutter" statutes, regulations and executive orders;

(7) proposed mitigation measures supporting the issuance of a FONSI or a Record of Decision;

(8) documentation showing that the requisite public participation requirements have been satisfied; and

(9) any other information required by the executive administrator.

§375.65. Decision to Prepare an Environmental Impact Statement: Notice of Intent.

(a) Notice of intent to prepare an EIS. When the executive administrator recommends the issuance of an EIS, a notice of intent will be published in the *Texas Register* in order to provide the public with the opportunity to participate in a scoping meeting.

(b) Contents of notice of intent. The notice of intent shall contain information about a scoping meeting which shall be held no sooner than fifteen days after the publication of the notice of intent. The public comment period for the proposed scope of the EIS shall be at least forty-five days.

§375.66. Types of Environmental Determinations: Record of Decision.

(a) General. A record of decision (ROD) results from an extensive environmental review of a proposed project's potential environmental impacts as detailed in an EIS.

(b) Contents of record of decision. A ROD records the Board's decision on the proposed project and must include the following components:

(1) a brief description of the proposed project and the alternatives considered in the EIS as well as the environmental factors considered and the project's impacts;

(2) commitments to implement avoidance, minimization, or mitigation measures;

(3) an explanation if the environmentally preferred alternative was not selected;

(4) responses to substantive comments on the final EIS;

(5) the executive administrator's statement that the Applicant has committed to the avoidance, minimization, or mitigation measures and that the Applicant has the ability and the authority to fulfill the commitment to the measures; and

(6) the date of issuance and the signature of the executive administrator.

(c) Issuance of the ROD. The issuance of a ROD allows the Applicant to proceed with the proposed action subject to avoidance, minimization, or mitigation measures described in the ROD. The ROD shall be made available to the public.

(d) Monitoring of avoidance, minimization, or mitigation measures. The executive administrator shall ensure that adequate monitoring of the avoidance, minimization, or mitigation measures occurs throughout the construction of the project. Additionally all contracts, plans, specifications and other applicable documents used during the planning, design and construction of the project shall contain reference to or descriptions of the avoidance, minimization, or mitigation measures.

(e) Dissemination of information about mitigation measures. The executive administrator issues a statement of findings describing the outcome of the mitigation measure proposed in an environmental determination to interested agencies and public groups.

§375.67. Environmental Impact Statements.

(a) Purpose and applicability. An EIS examines impacts from the proposed project that significantly affecting the human environment, requires close coordination with the TWDB and other agencies and results in the issuance of a Record of Decision.

(b) Required EIS. An EIS shall be prepared for:

(1) new regional water supply systems for a community with a population greater than 100,000;

(2) actions likely to have a significant adverse effect on:

(A) local ambient air quality;

(B) local ambient noise levels;

(C) surface water reservoirs or navigation projects;

(D) the environment due to the releases of radioactive, hazardous or toxic substances or biota;

(E) federal or state natural landmarks or any property eligible for the national or state register of historic places; or

(F) environmentally important natural resources such as wetland, floodplains, significant agricultural lands, aquifer recharge zones, coastal zones, barrier islands, wild and scenic rivers and significant fish or wildlife habitat;

(3) actions inconsistent with federal, state, local or Indian tribe environmental, resources protection or land use laws or approved land use plans or regulations;

(4) actions likely to significantly affect the pattern and type of land use or growth and distribution of population including altering the character of residential areas;

(5) actions that in conjunction with federal, state, local or Indian tribe projects likely to produce significant cumulative impacts; and

(6) actions with uncertain environmental effects or highly unique environmental risks that are likely to be significant.

§375.68. Environmental Impact Statement: Applicant Requirements.

(a) Third party contractor. The Applicant shall contract with a third-party contractor at its own expense to prepare an EIS and any associated documents required for consideration by the executive administrator.

(b) Executive administrator approval. The executive administrator must participate in and approve of the Applicant's selection of the third-party contractor. The third party contractor shall be selected on the basis of its qualifications to prepare the EIS, including experience with data collection and analyses as well as with the clear presentation of information and data. The third-party contractor shall be responsible for providing technical advice to the Applicant and for receiving and incorporating technical advice from the executive administrator.

(c) The third-party contractor shall not have any financial or other interest in the proposed project and must submit a disclosure statement to the executive administrator documenting the fact that it has no financial or other interest in the project.

(d) Contract with third party. The Applicant and the executive administrator must agree to the creation and terms of a contract with the third party jointly selected by them to prepare the EIS. The contract terms must ensure that the third party does not have recourse to the TWDB or the Environmental Protection Agency for financial or other claims arising under the contract.

(e) The third-party contractor shall cooperate with the executive administrator and shall provide draft documents, analyses and conclusions that adequately assess the relevant environmental issues for review, comment and direction from the executive administrator. The executive administrator shall have sole responsibility to ensure that the EIS and any associated documents adequately address the relevant environmental issues.

§375.69. Proposed Project Alterations.

(a) Proposed project changes during review. The Applicant must notify the executive administrator if during the environmental review process, the Applicant:

(1) changes its plans for the project as originally submitted; or

(2) changes its schedule for the project from the originally submitted schedule.

(b) Alterations of proposed project. Any alteration to a project after the issuance of an environmental determination requires the Applicant to timely notify the executive administrator in writing. The Applicant shall briefly describe the reasons for the alterations in the proposed project.

(c) The executive administrator shall examine the contract documents, application and other related documents to evaluate the proposed alterations to ensure consistency with the environmental determination. The executive administrator's review of proposed project alterations may result in:

(1) the reaffirmation of the original environmental determination;

(2) the issuance of a FONSI when a CE has been revoked, or the issuance a public notice that the preparation of an EIS will be required;

(3) the issuance of an amendment to a FONSI, or the revocation of a FONSI and the issuance of a public notice that the preparation of an EIS will be required; or

(4) the issuance of a supplement to a ROD, or the revocation of the ROD and issuance a public notice that financial assistance for the proposed project will not be provided.

(d) Minor changes to the proposed or reviewed project that do not create previously unconsidered adverse environmental impacts usually will not affect the ability of the proposed project alterations to proceed without additional formal environmental review.

(e) Major changes to the proposed or reviewed project that are previously unexamined and that have the potential to create adverse environmental impacts may result in a decision to revoke a CE or a FONSI and to proceed with a more detailed level of environmental review consistent with this subchapter.

§375.70. Use of Environmental Determinations Prepared by Other Entities.

(a) Adoption of previous determination. The executive administrator may adopt previous environmental determinations issued by the EPA and other federal agencies whose determinations were produced through procedures in compliance with the NEPA. The executive administrator must re-evaluate the proposed financial assistance application as well as environmental conditions and public comment to determine whether to conduct a supplemental environmental review of the action and complete an appropriate document in compliance with the NPEA, or to reaffirm the original determination.

(b) Previously required avoidance, minimization, or mitigation measures. Any and all avoidance, minimization, or mitigation measures specified in the previous determinations shall be applied as conditions of the commitment and closing for financial assistance documents and shall be consistent with the requirements of this subchapter.

(c) Method of adoption of previous determination. The executive administrator will adopt the previous determination by means of a statement of findings when the proposed project and its previous determination will be adopted without substantial modifications. The executive administrator may also adopt the previous determination in a FONSI detailing the modifications to the proposed project, the potential environmental impacts identified during an environmental review, and any avoidance, minimization, or mitigation measures proposed in addition to those included in the federal environmental determination.

(d) Validity of previous environmental determinations and re-evaluation. Another entity's environmental determination shall be re-evaluated if it was issued five years or more prior to the executive administrator's environmental review and if:

(1) the proposed project has not yet been implemented;

(2) there has been substantial change in the proposed infrastructure project that is relevant to environmental concerns; and

(3) there are significant new circumstances or information relevant to environmental impacts of the proposed action.

(e) Dissemination of information about mitigation measures. The executive administrator issues a statement of findings describing the outcome of the mitigation measure proposed in an environmental determination to interested agencies and public groups.

This 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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Kenneth L. Petersen
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SUBCHAPTER F. ENGINEERING REVIEW AND APPROVAL

31 TAC §§375.80 - 375.83

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.80. Applicability.

This subchapter applies to financial assistance for state funded and federally funded loans.

§375.81. Engineering Feasibility Report.

(a) The Applicant shall submit an engineering feasibility report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, shall provide:

(1) a description and purpose of the project;

(2) the names of the entities to be served, current population and projections of future population;

(3) the cost of the project;

(4) a description of the alternatives considered and reasons for selecting the proposed project;

(5) sufficient information to evaluate the engineering feasibility and biddability and constructability;

(6) maps and drawings as necessary to locate and describe the project area;

(7) sufficient detail to document that the project will remedy the issues and problems that were evaluated for rating on the IUP;

(8) documentation of the project's cost effectiveness; projects implementing new systems or significantly altering current systems may require a detailed cost-effective analysis, including detailed operation and maintenance costs, to document program eligibility;

(9) a discussion of any known permitting, social, economic and cultural impacts that could result from project construction and implementation; and

(10) any other information or data necessary to evaluate the proposed project. The Applicant must submit any additional information requested by the executive administrator to document the project's eligibility for funding by the program.

(b) Approval of Engineering Feasibility Report. The executive administrator will approve the engineering feasibility report when:

(1) the items listed in subsection (a) of this section have been completed, including any submission of documents in response to requests for additional information or data;

(2) the appropriate environmental determinations have been completed in accordance with Subchapter E of this chapter and the Applicant has agreed to incorporate into project documents, including contracts, and all mitigation measures as a result of the environmental review;

(3) the project and alternatives to the project have been analyzed and the proposed project is cost effective.

(c) Request for project change. A request for a change, after the approval of the engineering feasibility report, to a project shall be granted only if the project remains consistent with the original project and if it will remedy the problems and issues identified in the project information form. Significant changes in a project require previous approval by the executive administrator and the Applicant shall:

(1) provide a description of and the need for changes;

(2) submit additional engineering or environmental information as requested by the executive administrator;

(3) provide an estimate of any increase or decrease in total project costs resulting from the proposed change; and

(4) certify that the proposed changes will not significantly alter the purpose of the project.

§375.82. Contract Documents: Review and Approval.

(a) Contract documents mean the documents that form the construction contracts and for alternative methods of project delivery, the documents that include construction and that may include other phases of the project.

(b) An Applicant shall submit three copies of proposed contract documents, including the engineering plans and specifications, which shall be as detailed as would be required for submission to contractors bidding on the work. The Applicant shall provide the executive administrator with all contract documents proposed for bid advertising. The executive administrator shall review contract documents:

(1) to ensure consistency with the approved engineering feasibility report and with approved environmental planning documents;

(2) to ensure the Applicant meets the requirements of biddability, operability and constructability;

(3) to ensure consistency with state and federal law;

(4) to ensure the contract documents notify the contractor about the Board's authority to audit and inspect during construction; and

(5) to ensure compliance with other requirements as provided in guidance forms and documents.

(c) Other approvals. The Applicant shall obtain the approval of the plans and specifications from any other local, state and federal agencies having jurisdiction over the project. The executive administrator's approval is not an assumption of the Applicants' liability or responsibility to conform to all requirements of applicable laws relating to design, construction, operation or performance of the project.

§375.83. Advertising and Awarding Construction Contracts.

(a) Applicable laws and rules. The Applicant shall comply with State procurement laws and rules and with applicable federal procurement rules depending on the source of the funds for the financial assistance.

(b) Executive administrator approval required. The Applicant shall not proceed to advertising for bids on the project until express written approval of the solicitation documents has been received from the executive administrator.

(c) Changes prior to award. If the Applicant needs to alter the plans and specifications or the contract documents after the executive administrator's approval, then the Applicant shall provide the information relating to the change and the reasons therefore. The executive administrator must affirmatively approve the changes. This subsection does not apply to addenda issued in the ordinary course of the solicitation.

(d) Contract award. The text of a construction contract or a contract containing construction phase work submitted for approval prior to advertising shall contain the same language and provisions as the contingently executed contract.

(e) Pre-construction conference. The Applicant shall conduct a preconstruction conference on significant construction contracts to address the contents of the executed contract documents with the project owner, the project engineer, the prime contractor, and other appropriate parties in attendance. The Applicant shall provide the executive administrator with at least five days advance notice of the date, time and location of the conference.

(f) Notice to proceed. The executive administrator shall review the executed contract documents and upon acceptance of same shall advise the Applicant that a notice to proceed may issue to the contractor.

(g) No liability. The executive administrator and the Board shall have no liability for any event arising out of or in any way related to the contracts for or construction of the project.

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

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Kenneth L. Petersen
General Counsel
Texas Water Development Board
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SUBCHAPTER G. LOAN CLOSINGS AND AVAILABILITY OF FUNDS

31 TAC §§375.90 - 375.93

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.90. Applicability.

This subchapter applies to state funded financial assistance and to federally funded financial assistance.

§375.91. Loans Secured by Bonds or other Authorized Securities.

(a) Disbursement required. No loan shall close unless the Applicant provides an outlay report requesting a disbursement at least seven days prior to the loan closing date.

(b) Instruments needed for closing. The documents that shall be required at the time of closing shall include the following:

(1) evidence that applications have been filed for all licenses, permits, registrations, and other authorizations required by local, state and federal laws and rules that are necessary for planning, design, acquisition and construction of the authorized project;

(2) a certified copy of the ordinances or resolutions adopted by the governing body authorizing the issuance of debt sold to the Board that has received prior approval by the executive administrator and that shall have sections providing as follows:

(A) that an escrow or trust account shall be created that shall be separate from all other funds and as follows:

(i) the account shall be maintained at a designated state depository institution or a properly chartered and licensed trust institution approved by the executive administrator;

(ii) funds shall not be released from the escrow or trust account without approval of the executive administrator who shall issue written authorization for the release of the funds;

(iii) escrow and trust account statements shall be provided on a monthly basis to the executive administrator;

(iv) the investment of any loan or grant proceeds deposited into an approved escrow or trust account, including any proceeds invested with an investment pool, shall be handled in a manner that complies with the Public Funds Investment Act, Texas Government Code, Chapter 2256 as amended; and

(v) the escrow or trust account shall be adequately collateralized in a manner sufficient to protect the Board's interest in the Project in a manner that complies with the Public Funds Collateral Act; Texas Government Code, Chapter 2257, as amended.

(B) that a home rule municipality with a population of more than 1,000,000 persons whose charter provides for an elected comptroller, auditor or treasurer may execute a Trust and Agency Certificate in lieu of establishing an escrow account or trust account in accordance with the Local Government Code, Chapter 104, as amended; and

(C) that a construction fund shall be created at a designated state depository institution that shall be kept separate from all other funds of the Applicant.

(D) that the Applicant fix and maintain rates, in accordance with state law, and to collect charges to provide adequate operation and maintenance of the project;

(E) the use of a book-entry-only system;

(F) the use of a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(G) the payment all DTC closing fees assessed by the Board's custodian bank be directed to the Board's custodian bank by the Applicant;

(H) evidence that one fully registered bond has been sent to the DTC or to the Applicant's paying agent/registrar prior to closing;

(I) the initial payment made to the Board be paid via wire transfer at no cost to the Board;

(J) the partial redemption of bonds or other authorized securities be made in inverse order of maturity;

(K) that insurance coverage be obtained and maintained in an amount sufficient to protect the Board's interest in the project;

(L) that the Applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the Applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis as required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the Board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the Board and the beneficial owner of the political subdivision's obligations, if the Board sells or otherwise transfers such obligations, and the beneficial owners of the Board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12. The ordinance or resolution shall also contain any other requirements of the SEC or the IRS relating arbitrage, private activity bonds or other relevant requirements regarding the securities held by the Board.

(M) the maintenance of current, accurate and complete records and accounts in accordance with generally accepted accounting standards to demonstrate compliance with requirements in the loan documents;

(N) the Applicant shall annually submit an audit, prepared by a certified public accountant in accordance with generally accepted auditing standards;

(O) the Applicant shall submit a final accounting at the final release of retainage;

(P) the Applicant shall document the adoption of a water conservation program and the implementation of an approved water conservation program for the duration of the loan;

(Q) the Applicant's agreement to comply with special environmental conditions specified in the Board's environmental determination as well as with any applicable Board laws or rules relating to use of the loan funds;

(R) that the Applicant shall establish a dedicated source of revenue for repayment of the financial assistance;

(S) that interest payments shall commence no later than 1 year after the date of closing and annual principal payments will commence either one year after completion of project construction; and

(T) any other recitals mandated by the executive administrator.

(3) unqualified approving opinions of the attorney general of Texas and, if bonds or other authorized securities are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(4) an unqualified approving opinion by a recognized bond attorney;

(5) assurances that the Applicant will comply with any special conditions specified by the Board's environmental determination until all financial obligations to the state have been discharged;

(6) a private placement memorandum containing a detailed description of the issuance of debt to be sold to the Board. The Applicant shall submit a draft private placement memorandum at least 30 days prior to loan closing; a final electronic version of the memorandum shall be submitted no later than seven days before closing; and

(7) any additional information specified in writing by the executive administrator.

(c) Certified transcript. Within sixty (60) days of closing the loan, the Applicant shall submit a transcript of proceedings relating to the debt purchased by the Board that shall contain those instruments normally furnished by a purchaser of debt.

(d) Phased closing. The executive administrator may determine that closing a loan in phases is appropriate when:

(1) the project has distinct phases for planning, design, acquisition and for construction or if any one of the phases can be logically and practically divided into discrete sections;

(2) the project utilizes the design-build or construction manager-at-risk process or any process wherein there is simultaneous design and construction;

(3) there are limitations on the availability of funds;

(4) additional oversight is required due to the financial condition of the Applicant or the complexity of the project; or

(5) due to any unique facts arising from the particular transaction.

§375.92. Disbursement of Funds.

(a) Method of accessing funds. Applicants shall submit an outlay report supported by detailed invoices of expenditures for reimbursement of past costs or for releases from an escrow or trust account, as applicable. The outlays and the releases from escrow or trust account shall be consistent with the approved project schedule

(b) Sequence of availability of funds. Financial assistance shall be available for disbursement in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan and a project schedule;

(2) for design costs, after receipt of executed contracts for the design phase, after approval of an engineering feasibility report, a project schedule and the Board's approval of the environmental review; and

(3) for construction costs, after issuance of any applicable permits, and after contract documents, including plans and specifica-

tions and a project schedule are approved and executed construction documents are contingently awarded.

(c) Outlay reports. Applicants shall submit outlay reports, in a form determined by the executive administrator, as follows:

(1) at loan closing for incurred costs;

(2) for financial assistance for planning, acquisition and design, quarterly; and

(3) for financial assistance for construction, monthly.

(d) Environmental affirmation. The release of federal funds for design, acquisition, and construction or for a pre-design funding option project shall not occur until the executive administrator summarizes the project's environmental review and informs the Board about recommended mitigation measures. The Board may affirm or alter the conditions of the original commitment or withdraw the commitment based upon the environmental review and mitigation measures.

(e) Escrow of funds. The executive administrator may release funds to an escrow or trust account at the time of closing of the loan or closing of a portion of the loan. Releases from escrow shall occur sequentially as described in subsection (b) of this section. The Applicant shall submit outlays for all expenses incurred for the prior sequence of work prior to the release of funds for the next sequence of work.

(f) Consistency for project schedules and outlays. The executive administrator shall ensure that projects proceed in accordance with approved project schedules as closely as possible, and that outlays are submitted as required in subsection (c) of this section

§375.93. Surplus Funds.

(a) Surplus funds means those funds remaining after the approved project is completed.

(b) After the final accounting, the executive administrator shall notify the Applicant if surplus funds exist and advise the Applicant that the surplus funds may be used only for:

(1) payment of bonds in inverse order of maturity;

(2) deposit into the interest and sinking fund; or

(3) enhancements to the project that are explicitly approved by the executive administrator, including green components.

(c) Determination of the use of any surplus funds is within the sole discretion of the executive administrator.

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

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Kenneth L. Petersen
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SUBCHAPTER H. CONSTRUCTION AND POST CONSTRUCTION REQUIREMENTS

31 TAC §§375.100 - 375.110

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.100. Applicability.

This subchapter applies to state funded and to federally funded projects.

§375.101. Inspection During Construction.

(a) Applicant's inspection. The Applicant shall provide for the adequate qualified inspection of the project under the supervision of a registered engineer and shall require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications and other engineering design or permit documents, approved alterations or changes, and in accordance with the requirements in the environmental determination applicable to the project and to the sound engineering principles and construction practices.

(b) Board's inspection. The executive administrator may, at his discretion, inspect the construction and materials of any project at any time. The purpose of the inspection is to determine whether the contractor is substantially complying with the approved engineering plans of the project and is constructing the project in accordance with sound engineering principles and the approved project schedule. The inspection by the Board does not subject the state to any civil liability.

(c) Scope of inspections. Inspections may include, but are not limited to:

(1) review of the physical conditions at the construction sites, including compliance with environmental mitigation measures;

(2) review of documents related to the construction projects, including but not limited to:

(A) payroll, daily attendance, and any other records relating to person employed during the construction, and records relating to the Davis Bacon Act and related federal laws and regulations relating to prevailing wage rates;

(B) invoices, receipts for materials, accounting ledgers and any other documents related to expenditure of funds to facilitate tracking project's progress;

(C) evidence of testing of installed materials and equipment;

(D) deviations from approved plans and specifications;

(E) change orders and supporting documents; and

(F) review of any other documents to ensure compliance with the terms of the approved contract documents and the Board's rules.

(d) Inspectors may document issues to ensure compliance with applicable laws, rules and contract documents, and may recommend to the owner that certain corrective actions occur to ensure compliance with laws, rules and approved plans and specifications.

(e) The Applicant shall provide the inspectors with a response to the issues relating to compliance.

§375.102. Alterations During Construction.

(a) Changes after approval of engineering feasibility report. The Applicant shall notify the executive administrator of any changes

to the project that occur after the approval of the report but prior to the start of construction. The executive administrator shall review the proposed changes and notify the Applicant if additional engineering or other information is required. No changes may be implemented without the express written approval of the executive administrator.

(b) Changes during construction. Any proposed change to the construction contract must be submitted to the executive administrator in the form of a formal change order; the change order will be reviewed for compliance with program requirements. Depending upon the scope and complexity of the proposed change, approval by the executive administrator also may require amendments to other engineering and environmental documents.

§375.103. Force Account.

Force Account Policy. The executive administrator expects that all significant elements of a project shall be constructed with skilled laborers and mechanics obtained through the competitive bidding process. Notwithstanding that expectation, the Applicant, with the prior approval of the executive administrator, may utilize its own employees and equipment for inspection or minor construction upon a showing that it possesses the necessary competence required to accomplish such work and that the work can be accomplished more economically by the use of the force account method.

§375.104. As Built Plans.

After a project is completed, the Applicant shall notify the executive administrator that of the receipt of a complete set of as-built drawings of the project from the project construction engineer.

§375.105. Certificate of Approval and Project Completion.

(a) Purpose. A Certificate of Approval (certificate) shall be issued by the executive administrator upon the completion of all work under each prime construction contract.

(b) Final prime construction contract. A certificate shall be issued at the completion of all work under the final prime construction contract. This certificate will be transmitted to the Applicant as well as a statement that the project is complete and that the Board's inspection process is complete.

§375.106. Final Accounting.

Within sixty days of Applicant's receipt of the certificate of approval for the final prime construction contract and the final inspection report, the Applicant shall submit a final accounting and a final funds requisition form.

§375.107. Records Retention.

The Applicant shall retain all documents, records, invoice, and records whether in electronic form or otherwise relating to the expenditure of all financial assistance from the CWSRF for a period of three full state fiscal years after the completion of the project and the final certificate of approval.

§375.108. Release of Retainage.

(a) Retainage. The Applicant will withhold a minimum of five percent of each progress payment throughout the course of the construction contract.

(b) Full release of retainage. The executive administrator will approve the full release of retainage on a contract when:

(1) the Applicant's engineer approves the contractor's request for release of retainage; and

(2) the Applicant's governing body approves the release of retainage.

(c) Partial release of retainage. If a project is substantially complete, the executive administrator may approve a partial release of retainage.

§375.109. Responsibilities of Applicant.

After the satisfactory completion of the project, the Applicant remains responsible for compliance with applicable laws and rules relating to the project and to the financial assistance documents required by the Board resolution or the bond ordinance or resolution including but not limited to submission of an annual audit, implementation and enforcement of the approved water conservation program and other assurances made to the Board. The Board has a continuing interest in the state's investment; therefore, the Applicant shall be subject to the continuing authority of the Board and the executive administrator through final payment of the financial assistance.

§375.110. Authority of the Executive Administrator.

(a) The financial assistance provided by the Board is based on the project's economic feasibility, and the Board shares the Applicant's desire to maintain this feasibility in the project's operation and maintenance at all times. The executive administrator shall periodically inspect, analyze, and monitor the project's revenues, operation, and any other information the Board requires in order to perform its duties and to protect the public interest.

(b) After construction is complete, the executive administrator is authorized:

(1) to inspect the project at any time. If the executive administrator determines that the project is being improperly or inadequately operated and maintained to the extent that the project purposes are not being properly fulfilled or that integrity of the state's investment is being endangered, the executive administrator may require the Applicant to take corrective action;

(2) to inspect certified copies of all minutes, operating budgets, monthly operating statements, contracts, leases, deeds, audit reports, and other documents concerning the operation and maintenance of the project;

(3) to inspect and review the project and to obtain information through documents or interviews with appropriate personnel to ensure the Applicant is complying with the requirements of the covenants of the bond indenture and/or the master agreement;

(4) to inspect accounting and financial records to ensure that the Applicant maintains debt service fund accounts and all other fund accounts related to the CWSRF debt in accordance with standards set forth by the Governmental Accounting Standards Board; and

(5) to request the Applicant to determine the status of compliance with mitigation measures as required in the final environmental determination.

This 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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Kenneth L. Petersen
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SUBCHAPTER I. NONPOINT SOURCE POLLUTION LINKED DEPOSITS PROGRAM

31 TAC §§375.200 - 375.214

STATUTORY AUTHORITY.

These rules are proposed under the authority of Texas Water Code, Chapter 15, Subchapter J, §15.6041(a) relating to the manner in which financial assistance shall be provided; §15.605 relating to rules necessary to carry out Subchapter J; and §15.609 relating to authority to charge fees.

Cross-reference to statute: Texas Water Code Chapters 15, 16 and 17.

§375.200. Applicability.

This subchapter applies to a program for linked deposits to eligible lending institutions to allow the lending institutions to provide loans for nonpoint source pollution control projects.

§375.201. Definitions.

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

(1) Eligible lending institution--A financial institution that makes commercial loans, is either a designated as a official state depository by the Texas comptroller of public accounts, herein referred to as a state depository, or an institution of the Farm Credit System headquartered in this state, agrees to participate in a linked deposit program established under §15.611 of the Water Code, and is willing to agree to provide collateral equal to the amount of linked deposits placed with it.

(2) Individual water quality management plan--An approved land management plan that considers site-specific characteristics (such as soil types, slope, climate, vegetation and land usage) to improve or conserve water resources.

(3) Linked deposit--A deposit governed by a linked deposit agreement between the Board and an eligible lending institution that requires that:

(A) the eligible lending institution pay interest to the Board on the deposit at a rate equal to the asking yield for a U.S. Treasury note with a twelve-month maturity as of the date five days preceding the submission of all the documents required of the eligible lending institution requesting a linked deposit agreement;

(B) the state not withdraw any part of the deposit except as according to the terms of the linked deposit agreement and the terms of this division; and

(C) the eligible lending institution agree to lend the value of the deposit to a person at a rate not to exceed the interest paid by the eligible lending institution to the Board plus four percent.

(4) Linked deposit agreement--A written agreement between the Board, acting through the executive administrator, and an eligible lending institution providing for the deposit by the Board of an amount of funds from the CWSRF program account with the eligible lending institution executed pursuant to the authority and according to the conditions of this subchapter.

(5) Pledged security--Means the securities authorized by these rules and the linked deposit agreement negotiated to secure the Board's deposit of funds with the eligible lending institution.

§375.202. Authorization to Execute Agreements.

The executive administrator is authorized to execute a linked deposit agreement with an eligible lending institution to provide funds from the CWSRF program account according to and in compliance with this division.

§375.203. Conditions Prior to Execution.

(a) Before the executive administrator may execute a linked deposit agreement, a lending institution shall submit to the executive administrator:

(1) the application of a person determined by the eligible lending institution to be eligible and creditworthy to receive a loan according the criteria of the institution;

(2) a draft loan agreement with such person that:

(A) identifies the principal amount of the loan that shall not exceed $250,000;

(B) identifies the interest rate to be paid by the borrower that shall not exceed the interest rate paid by the eligible lending institution to the Board plus four percent;

(C) includes a repayment schedule that identifies the dates on which payments are due from the loan recipient to the lending institution;

(D) limits the use of the loan funds to the project which is certified pursuant to this subchapter; and

(E) contains all such other terms and conditions determined by the eligible lending institution in its sole discretion to be reasonable for the purposes of a private loan agreement;

(3) a certification:

(A) from the eligible lending institution of the interest rate applicable to the proposed loan;

(B) for proposed project as identified under this subchapter; and

(4) such other information or documentation as determined by the executive administrator to be reasonable and necessary to fulfill the objectives of this division.

(b) Before the executive administrator executes a linked deposit agreement, the executive administrator shall review the information submitted in this section to determine if:

(1) the lending institution is an eligible lending institution as defined §375.302 of this subchapter;

(2) the documents submitted by the lending institution comply with the requirements of this division; and

(3) execution of the linked deposit agreement fulfills the purposes and intent of this subchapter, the Clean Water Act, and the public interest.

§375.204. Project Certifications.

(a) If the proposed project is an agricultural or silvicultural nonpoint source pollution control project, in order to be eligible to receive a linked deposit a director of a soil and water conservation district for the district in which the project is located must certify that:

(1) the loan recipient has a water quality management plan certified by the State Soil and Water Conservation Board; and

(2) the project furthers or implements such plan.

(b) For all projects that are not an agricultural or silvicultural nonpoint source pollution control project, in order to be eligible to receive a linked deposit the executive director must certify that the loan recipient's proposed project implements the NPS Management Report.

§375.205. Board Obligations in Linked Deposits.

(a) Upon execution of a linked deposit agreement by the executive administrator and an eligible lending institution, the Board, acting through its executive administrator, shall:

(1) deposit with the lending institution the amount of funds identified in the linked deposit agreement from the CWSRF program account; and

(2) perform such other terms and conditions as specified in the linked deposit agreement.

(b) The Board or the executive administrator may withdraw linked deposits and accrued interest from the lending institution without penalty according to the terms of the linked deposit agreement or if the institution ceases to be either a state depository or a Farm Credit System institution headquartered in Texas.

§375.206. Lending Institutions Obligations in Linked Deposits.

(a) Upon execution of a linked deposit agreement and receipt of funds from the Board, the lending institution shall:

(1) provide collateral as required in this subchapter;

(2) lend the value of the deposit being provided by the Board substantially according to the terms and conditions of the draft loan agreement submitted by the lending institution to the executive administrator;

(3) pay to the Board interest on the deposit at a rate equal to the asking yield for a U.S. Treasury note with a twelve-month maturity as of the date five days preceding the submission of all the documents required of the eligible lending institution to the executive administrator requesting a linked deposit agreement;

(4) submit compliance reports to the executive administrator annually providing information on loans made, the performance of the terms of the loan by the person receiving the loan from the lending institution and such other information or documents as specified in the linked deposit agreement;

(5) return the amount of funds provided as a linked deposit as specified in the linked deposit agreement; and

(6) perform such other terms and conditions as specified in the linked deposit agreement, this subchapter, the rules of the Board, and applicable federal and state law.

(b) A delay in payment or a default on a loan by the recipient of the loan from the lending institution does not affect the validity of the deposit agreement or the repayment of the deposit in accordance with the terms of the deposit agreement.

§375.207. Requirements after Execution.

After the executive administrator has executed a linked deposit agreement, the executive administrator shall:

(1) at the next available Board meeting and each month thereafter, provide a report to the Board that:

(A) identifies all linked deposit agreements; and

(B) the status of the loans made by lending institutions; and

(2) in the event of noncompliance on the part of an eligible lending institution, inform the Texas comptroller of public accounts of the noncompliance and include information regarding the noncompliance in the monthly report to the Board.

§375.208. No State Liability.

The state is not liable to an eligible lending institution for payment of the principal, interest, or any late charges on a loan made to an approved Applicant. A linked deposit is not an extension of the state's credit within the meaning of any state constitutional prohibition.

§375.209. Collateral for Linked Deposits.

(a) Eligible lending institutions shall secure funds that the Board deposits pursuant to a linked deposit agreement in an amount not less than the amount of the deposit under the linked deposit agreement:

(1) increased by the amount of any accrued interest; and

(2) reduced to the extent that the United States or an instrumentality of the United States insures the deposit.

(b) For the purposes of this subchapter, the value of securities shall be the market value obtained from a nationally-recognized, financial information service based upon the previous day's closing market quotations.

(c) If the market value of the securities pledged by the eligible lending institution becomes less than the amount of funds on deposit in the depository by the Board, the executive administrator shall require that additional collateral be pledged immediately, or that the amounts of Board funds on deposit be reduced. If the collateral pledged by an eligible lending institution is in excess of that required by the market value of funds on deposit by the Board, the executive administrator may allow the release of the excess collateral.

(d) Eligible lending institutions shall secure funds that the Board deposits pursuant to a linked deposit agreement using only the following as pledged securities except as further limited by subsection (e) of this section:

(1) obligations, including letters of credit, of the United States or its agencies and instrumentalities;

(2) direct obligations of this state or its agencies and instrumentalities;

(3) other obligations, the principal and interest of which are unconditionally guaranteed or insured by, or backed by the full faith and credit of, this state or the United States or their respective agencies and instrumentalities; and

(4) obligations of states, agencies, counties, cities, and other political subdivisions of any state rated as to investment quality by a nationally recognized investment rating firm not less than A or its equivalent.

(e) The following may not be used to secure funds that the Board deposits pursuant to a linked deposit agreement:

(1) obligations whose payment represents the coupon payments on the outstanding principal balance of the underlying mortgage-backed security collateral and pays no principal;

(2) obligations whose payment represents the principal stream of cash flow from the underlying mortgage-backed security collateral and bears no interest;

(3) collateralized mortgage obligations that have a stated final maturity date of greater than 10 years; and

(4) collateralized mortgage obligations the interest rate of which is determined by an index that adjusts opposite to the changes in a market index.

(f) An eligible lending institution may substitute one group of securities eligible under this section and the linked deposit agreement for another group of securities eligible under this section and the linked deposit agreement.

(g) Within the limits of this section, the executive administrator may limit the selection of eligible investment securities for linked deposits in the linked deposit agreement.

§375.210. Records of Depository.

(a) Eligible lending institutions shall maintain a separate, accurate, and complete record relating to the pledged securities, the deposit of the Board's funds, and all transactions related to the pledged securities.

(b) The comptroller or the executive administrator may examine and verify at any reasonable time the pledged securities or a record an eligible lending institution maintains under this section.

§375.211. Deposit of Pledged Security with Custodian.

(a) An eligible lending institution shall deposit with a custodian a pledged security. The custodian and the executive administrator shall agree in writing on the terms and conditions for securing a linked deposit.

(b) A custodian must be approved by the executive administrator, either in the linked deposit agreement or separately, and be:

(1) a state or national bank that:

(A) is designated by the comptroller as an official state depository institution;

(B) has its main office or a branch office in this state; and

(C) has a capital stock and permanent surplus of $5 million or more;

(2) the Texas Treasury Safekeeping Trust Company;

(3) a Federal Reserve Bank or a branch of a Federal Reserve Bank; or

(4) a federal home loan bank.

(c) A custodian holds in trust the pledged securities used to secure the Board's deposit in the eligible lending institution.

(d) A custodian, whether acting alone or through a permitted institution under §375.212 of this subchapter (relating to Custodian's Deposit of Pledged Security with Another Institution), is for all purposes the bailee or agent of the Board.

(e) On receipt of a pledged security, a custodian shall:

(1) immediately identify on its books and records, by book entry or another method, the pledge of the security to the Board; and

(2) promptly issue and deliver to the executive administrator a trust receipt for the pledged security. If the custodian deposits the pledged security pursuant to this subchapter, the trust receipt shall so indicate.

(f) An eligible lending institution may not itself be the custodian of securities it pledges for the linked deposit, nor may it deposit the securities with an entity of which the eligible lending institution is a branch.

(g) The eligible lending institution shall pay any charges of the custodian bank for accepting and holding the securities.

§375.212. Custodian's Deposit of Pledged Security with Another Institution.

(a) The custodian may deposit a pledged security with one of the following institutions:

(1) a Federal Reserve Bank;

(2) a clearing corporation as defined by §8.102, Texas Business and Commerce Code;

(3) a bank eligible to be a custodian; or

(4) a state or nationally chartered bank that is controlled by a bank holding company that controls a bank eligible to be a custodian.

(b) The custodian may not deposit a pledged security with an eligible lending institution or an entity of which the eligible lending institution is a branch.

(c) If a deposit is made under subsection (a) of this section, the institution to which the deposit is made shall:

(1) hold the pledged security to secure funds the Board deposits with the eligible lending institution; and

(2) on receipt of deposit, immediately issue to the custodian an advice of transaction or other document that is evidence of the deposit of the pledged security.

(d) An institution may apply book entry procedures when an investment security held by a custodian is deposited under this section. The records must at all times state the name of the custodian that deposits an investment security in the institution.

§375.213. Records of Custodian.

(a) The custodian shall maintain a separate, accurate, and complete record relating to each pledged security and each transaction relating to a pledged security.

(b) The comptroller or the executive administrator may examine and verify at any reasonable time a pledged security or a record a custodian maintains under this section. The Board or its agent may inspect at any time a pledged security evidenced by a trust receipt.

(c) The custodian shall file a collateral report with the comptroller in the manner and on the dates prescribed by the comptroller.

§375.214. Audit and Examinations.

As part of an audit or regulatory examination of an eligible lending institution or custodian, the auditor or examiner shall examine and verify pledged securities and records maintained under this subchapter, and shall report any significant or material noncompliance with this subchapter to the comptroller and the Board.

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

Filed with the Office of the Secretary of State on June 21, 2010.

TRD-201003508
Kenneth L. Petersen
General Counsel
Texas Water Development Board
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 463-8061

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

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

34 TAC §3.369

The Comptroller of Public Accounts proposes new §3.369, concerning sales tax holiday--certain Energy Star products. The new section implements House Bill 3693, 80th Legislature, 2007, which adds Tax Code, §151.333 regarding exemption for certain Energy Star qualified products sold during a three-day period in May. The new section also implements certain existing sections of the Tax Code to provide policy for tax treatment of items set out in §151.333.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman 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 by clarifying the procedures for obtaining a sales and use tax exemption on the purchase of certain Energy Star appliances. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

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

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

The new section implements Tax Code, §§151.0047, 151.0048, 151.005, 151.007, 151.009, 151.010, 151.0101, 151.051, 151.056, 151.101 and 151.333.

§3.369. Sales Tax Holiday--Certain Energy Star Products.

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

(1) Energy-efficient product--A product that has been designated as an Energy Star qualified product under the Energy Star program jointly operated by the United States Environmental Protection Agency and the United States Department of Energy.

(2) Exchange--The act of giving or taking one thing in return for another.

(3) Exemption period--The period beginning at 12:01 a.m. on the Saturday preceding the last Monday in May (Memorial Day) and ending at 11:59 p.m. on the last Monday in May.

(4) Layaway sales--A transaction in which merchandise is set aside for future delivery to a person who makes a deposit, agrees to pay the balance of the purchase price over a period of time, and, at the end of the payment period, receives the merchandise. An order is accepted for layaway by the retailer when the retailer removes the items from normal inventory or clearly identifies the items as sold to the person.

(5) Qualifying products--Energy-efficient products eligible for exemption from sales and use tax if purchased, leased or rented during the period described in paragraph (3) of this subsection as established under Tax Code, §151.333. Qualifying products are limited to the following energy-efficient products:

(A) air conditioners priced at $6,000 or less (room and central units);

(B) clothes washers;

(C) ceiling fans;

(D) dehumidifiers;

(E) dishwashers;

(F) incandescent or fluorescent light bulbs;

(G) programmable thermostats; and

(H) refrigerators (including mini-fridges) priced at $2,000 or less.

(6) Rain check--A document assuring that a person can take advantage of a sale or special offer made by a seller at a later time if the item offered is not available.

(b) Exempt sales.

(1) Sales or use tax is not due on the sale of a qualifying product if the sale takes place during the exemption period.

(2) There is no limit to the number of qualifying products one can purchase exempt from sales tax during the exemption period.

(3) The exemption applies to each qualifying product sold during the exemption period, regardless of how many qualifying products are sold on the same invoice to a person. For example, if a person purchases two refrigerators for $1,800 each, then both refrigerators qualify for the exemption, even though the person's total purchase price ($3,600) exceeds $2,000.

(4) Rentals and leases of qualifying products, including "rent to own" contracts, qualify for exemption when the contract for the rental or lease is entered into during the exemption period. The exemption applies only to the specified rental or lease period designated by the contract. Extensions or renewals of rental or lease contracts do not qualify for the exemption unless the contract is renewed or extended during the exemption period.

(c) Taxable sales. The exemption under this section does not apply to:

(1) items not specifically identified in subsection (a)(5) of this section, including other types of energy-efficient products such as home insulation materials, water heaters, clothes dryers, attic fans, heat pumps, wine refrigerators, kegerators, freezers, or residential beverage chillers;

(2) repair or replacement parts for Energy Star qualified products that are used to repair or remodel products already owned by a person and that do not otherwise qualify for exemption. For example, an individual may own a central air conditioner with a faulty compressor. The individual cannot obtain the exemption on the purchase of a new Energy Star qualified compressor;

(3) the first $6,000 of an Energy Star qualified air conditioner that sells for more than $6,000. For example, if a person purchases an Energy Star qualified air conditioner that costs $6,055, then sales tax is due on the entire $6,055;

(4) the first $2,000 of an Energy Star qualified refrigerator that sells for more than $2,000. For example, if a customer purchases an Energy Star qualified refrigerator that costs $2,055, then sales tax is due on the entire $2,055;

(5) system components sold individually. Qualifying products must be sold as a unit in order to qualify for the exemption. The components cannot be priced separately and sold as individual items in order to obtain the exemption. For example, central air conditioners priced at $6,000 or less must be sold as a unit in order to qualify for the exemption. If an Energy Star qualified central air conditioner sells for $7,000, the entire $7,000 charge is subject to tax and cannot be split into separate charges for a compressor, metering device, evaporator coil and blower in order to qualify for the exemption; and

(6) disposal fees charged for the removal of old appliances. Disposal or "haul away" fees charged for the removal of an old appliance are taxable as a waste removal service.

(d) Sales of pre-packaged combinations containing both exempt and taxable items.

(1) When a qualifying product is sold together with taxable merchandise in a pre-packaged combination or single unit, the full price is subject to sales tax unless the price of the qualifying product is separately stated. For example, a clothes washer and clothes dryer sold as a "set" for a single price is taxable if the washer and dryer are separate appliances. A separately stated charge for the Energy Star rated washing machine is eligible for the sales tax exemption during the holiday period. Tax is due on the dryer. An Energy Star rated combination washer and dryer unit that is designed to be sold as a single unit and that cannot be sold separately will, however, qualify for the exemption.

(2) When a qualifying product is sold in a pre-packaged combination that also contains a taxable item as a free gift, and no additional charge is made for the gift, the qualifying product may qualify for the exemption under this section. For example, the sale of a dishwasher may include a free bottle of rinse aid. If the price of the set is the same as the price of the dishwasher sold separately, the product that is being sold is the dishwasher, which is exempt from tax if sold during the exemption period. Note: When a retailer gives a taxable item away free of charge, the retailer owes sales or use tax on the purchase price that the retailer paid for the item. See §3.301 of this title (relating to Promotional Plans, Coupons, Retailer Reimbursement).

(e) Delivery charges.

(1) Air conditioners and refrigerators. Delivery charges that are billed by the seller to the purchaser are included as part of the total sales price of a qualifying product, regardless of whether the charges are separately stated, and as such must be considered when determining whether air conditioners and refrigerators qualify for the exemption. The addition of delivery charges to the retail price of a refrigerator or air conditioner will cause the loss of the exemption if the total price exceeds the applicable cap. For example, assume a person purchases an Energy Star qualified refrigerator priced at $1,985. The charge to deliver the refrigerator is $25, causing the total sales price to be $2,010. Since the total sales price of the refrigerator exceeds $2,000, the refrigerator does not qualify for the exemption, and tax is due on the total sales price of $2,010.

(2) Items other than air conditioners and refrigerators. Delivery charges that are billed by the seller to the purchaser are exempt if the product sold is exempt. For example, delivery fees billed in connection with the sale of a qualifying energy-efficient dishwasher during the exemption period are exempt.

(3) "Per item" delivery fees. Delivery charges billed on a "per item" basis must be properly allocated when a delivery to the same person contains both exempt and taxable items. Except as provided in paragraph (4) of this subsection, if multiple items are shipped on a single invoice, the delivery charges must be allocated to each item ordered and separately identified on the invoice. For example, assume that a person purchases a qualifying clothes washer tax-free during the exemption period. The same person also purchases a clothes dryer, which does not qualify for the exemption. The retailer charges the person an additional fee of $25 per appliance for delivery. The $25 delivery fee connected to the delivery of the qualifying clothes washer is exempt from sales tax, but the $25 fee connected to the delivery of the clothes dryer is subject to tax.

(4) "Flat rate" delivery fees. If the delivery charge is a flat rate per delivery address, and the amount charged is the same regardless of how many items are included in the delivery, for purposes of the exemption, the total charge may be attributed to one of the items in the delivery rather than proportionately allocated between the items. The delivery fee can be allocated to either an exempt qualifying product or a taxable product. The following examples illustrate the way these charges should be handled.

(A) Delivery fee allocated to exempt item. Assume a seller charges a flat fee of $50 per customer address for delivery regardless of the number of items delivered to that address and during the exemption period, a person purchases an Energy Star qualified refrigerator priced at $1,900, a taxable stove and a taxable microwave. The seller may attribute the $50 delivery charge to the sale of the refrigerator bringing the sales price of the refrigerator to $1,950. The refrigerator sales price does not exceed $2,000, so it still qualifies for the exemption. The seller does not have to allocate the delivery charge between the refrigerator, stove and microwave. The sales invoice must clearly identify that the delivery charge was attributed to the exempt item and must separately state the tax due on the taxable items.

(B) Delivery fee allocated to taxable item. Assume a seller charges a flat fee of $50 per customer address for delivery regardless of the number of items delivered to that address and during the exemption period, a person purchases an Energy Star qualified refrigerator priced at $1,975 and a taxable stove. The seller may attribute the entire $50 delivery charge to the sale of the stove, thus allowing the total sales price of the refrigerator to remain $1,975. Since the refrigerator sales price does not exceed $2,000 it still qualifies for the exemption. The seller does not have to allocate the delivery charge between the refrigerator and stove. The sales invoice must clearly identify that the delivery charge was attributed to the taxable stove and must separately state the tax due on the taxable item.

(f) Installation charges. A charge for the installation of a qualifying product purchased during the exemption period qualifies for exemption only if the item remains tangible personal property after installation. If the product becomes real property after installation, the charge for installation labor may be taxable or nontaxable depending on whether the product is installed in residential or nonresidential property or as part of a new construction contract.

(1) Tangible personal property. Products that are free-standing or mobile, such as clothes washers, dehumidifiers, refrigerators, portable dishwashers and window or room air conditioning units are tangible personal property. If qualifying tangible personal property retains its identity as tangible personal property after installation, the installation charge billed by the seller of the item becomes part of the sales price of the item. As part of the sales price, an installation charge billed by the seller qualifies for the exemption, even if the installation is performed after the exemption period. If however, the charge for installation of an Energy Star qualified refrigerator, which remains tangible personal property after installation, causes the total sales price to exceed $2,000, the entire charge of the refrigerator, delivery and installation, is taxable.

(2) Improvements to real property. Items such as programmable thermostats, central air conditioning units, ceiling fans

and built-in refrigerators and dishwashers that are plumbed, wired or otherwise permanently attached to a building structure are improvements to real property. For items that become improvements to real property, the taxability of the installation labor is determined by the type of jobsite: residential, new construction or nonresidential repair or remodeling.

(A) Residential and new construction. No tax is due on charges for labor to install items such as ceiling fans, programmable thermostats or central air conditioning units in residential property or during a new construction project. See §3.291 of this title (relating to Contractors).

(B) Nonresidential repair and remodeling. Nonresidential repair and remodeling is a taxable service. Therefore, tax is due on charges for labor to install ceiling fans, built-in appliances, programmable thermostats and central air conditioning units in existing nonresidential real property, regardless of when the installation is performed. Charges for installation labor performed on existing nonresidential real property should be separately stated on the invoice from the sales price of the qualifying product. A lump sum charge for the purchase of a qualifying product and installation labor is subject to tax as the purchase of nonresidential repair and remodeling. See §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(g) Purchases by real estate developers, dealers, service providers and contractors. Real estate developers, dealers, service providers and contractors may purchase qualifying products tax-free during the sales tax holiday.

(1) An exemption or resale certificate is not required, and there is no limit to the number of qualifying products such persons may purchase tax-free during the exemption period.

(2) Held in inventory. Qualifying products purchased tax-free during the exemption period may be held in inventory until ready for use.

(A) No use tax is due if a qualifying product purchased tax free during the exemption period by a contractor, developer, etc., is subsequently incorporated into the realty of a contractor's customer under a lump sum contract for new construction or residential repair and remodeling. See §3.291 of this title.

(B) Sales tax is due on sales of qualifying products transferred to customers as part of a nonresidential repair and remodeling contract preformed after the exemption period. Nonresidential repair and remodeling service providers are responsible for collecting sales tax from customers on sales of qualifying products under a separated contract or under a lump sum contract for nonresidential repair and remodeling, unless the transaction (the sale of the qualifying product) between the customer and service provider, dealer or contractor occurs during the exemption period under a separated contract. See §3.357 of this title.

(h) Discounts and coupons. An Energy Star qualified air conditioner must be priced at $6,000 or less in order to qualify for the exemption. An Energy Star qualified refrigerator must be priced at $2,000 or less to qualify for the exemption. A seller may offer a discount or a coupon that reduces the sales price of an Energy Star qualified air conditioner or refrigerator. A discount or a coupon affects the application of the exemption as explained in paragraphs (1) and (2) of this subsection. The total sales price of the product includes delivery and installation charges as explained in subsections (e) and (f) of this section. See §3.301 of this title.

(1) Discounts. If a discount reduces the sales price of an Energy Star qualified air conditioner to $6,000 or less, or reduces the sales price of an Energy Star qualified refrigerator to $2,000 or less, the air conditioner or refrigerator qualifies for the exemption under this section. For example, a person buys an Energy Star qualified free-standing refrigerator that has a sales price of $2,050, including shipping, handling and installation of tangible personal property, from a seller who offers a 10% discount. After application of the 10% discount, the final sales price of the refrigerator is $1,845. The refrigerator is exempt because its sales price does not exceed $2,000.

(2) Coupons. When sellers accept a manufacture's or other coupon as a part of the sales price of any taxable item, the value of the coupon reduces the sales price, the same as a cash discount, regardless of whether the retailer is reimbursed for the amount that the coupon represents. Therefore, a coupon can be used to reduce the sales price of an Energy Star qualified air conditioner to $6,000 or less, or to reduce the sales price of an Energy Star qualified refrigerator to $2,000 or less. The item then qualifies for exemption under this section. For example, a person buys an Energy Star qualified free-standing refrigerator that has a sales price of $2,050, including shipping, handling and installation of tangible personal property, with a coupon worth $100. After application of the $100 coupon, the sales price of the refrigerator is $1,950. The refrigerator is exempt because its sales price does not exceed $2,000.

(i) Rebates.

(1) Retailer rebates. Rebates provided by a seller are cash discounts when given at the time of sale and as such are excludable from the tax base. The discount, like a discount when taken at the time of the sale, is a reduction in the amount subject to tax.

(2) Third party and manufacturer rebates. Third party and manufacturer rebates occur after the sale and do not change the sales price of an item and therefore, do not affect whether the exemption provided by this section applies. The full amount of the sales price, before the rebate, is used to determine whether the exemption applies. For example, if a person purchases an Energy Star qualified air conditioner for $6,050 and receives a $300 rebate from the manufacturer, the seller must collect tax on the $6,050 sales price of the air conditioner.

(j) Layaway sales. The sale of a qualifying product under a layaway plan qualifies for exemption when either:

(1) final payment is made by, and the merchandise is transferred to, the purchaser during the exemption period; or

(2) the purchaser selects the qualifying product and the seller accepts the order for the item during the exemption period, for immediate delivery upon full payment, even if delivery is made after the exemption period.

(k) Rain checks. Qualifying products that are purchased during the exemption period with use of a rain check qualify for the exemption regardless of when the rain check was issued. However, issuance of a rain check during the exemption period will not cause the purchase of a qualifying product to be exempt if the item is actually purchased after the exemption period.

(l) Exchanges.

(1) If a person purchases a qualifying product during the exemption period, and, after the exemption period has ended, exchanges the item for the same type of qualifying product of equal or lesser value, no additional tax is due. For example, a person purchases a $60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for a $60 qualifying dehumidifier of a different brand. Tax is not due on the $60 sales price of the new dehumidifier.

(2) If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the product for the same type of qualifying product of greater value, tax is due on the difference between the prices of the two products. For example, assume a person purchases a $60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for a $70 qualifying dehumidifier. Tax is due on the $10 difference between the two sales prices.

(3) If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the product for a different type of qualifying product, tax is due on the original sales price of the qualifying product the person obtained in the exchange. For example, assume a person purchases a $60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for $60 in qualifying light bulbs. Tax is due on the $60 sales price of the qualifying light bulbs.

(4) If a person purchases a qualifying product during the exemption period, and after the exemption period has ended, exchanges the products for a nonqualifying item, tax is due on the original sales price of the nonqualifying item. For example, assume a person purchases a $60 qualifying dehumidifier during the exemption period. After the exemption period, the person exchanges it for a $60 nonqualifying microwave. Tax is due on the $60 sales price of the nonqualifying microwave.

(5) If a person purchases a qualifying product before the exemption period, but, during the exemption period, returns the product and receives credit on the purchase of a different qualifying product, no sales tax is due on the sale of the new product if the new item is purchased during the exemption period. For example, assume a person purchases a $60 qualifying dehumidifier before the exemption period. During the exemption period, the person returns the dehumidifier and receives credit on the purchase of a $70 qualifying ceiling fan. No tax is due on the sale of the ceiling fan if it is purchased during the exemption period.

(m) Returned merchandise. For a 30-day period after the exemption period, when a person returns an item that would qualify for the exemption, no credit for or refund of sales tax shall be given unless the person provides a receipt or invoice that shows tax was paid, or the retailer has sufficient documentation to show that tax was paid on the specific item.

(1) This 30-day period begins the Tuesday after the last Monday in May and ends 30 calendar days later with no exclusions for weekend days or holidays.

(2) This 30-day period is set solely for the purpose of designating a time period during which the purchaser must provide documentation that shows that sales tax was paid on returned merchandise. The 30-day period is not intended to change a retailer's policy on the time period during which the retailer will accept returns.

(n) Purchases by means other than in person. A qualifying product purchased by mail, telephone, email, Internet or custom order qualifies for the exemption if:

(1) the item is both transferred to and paid for by the person during the exemption period; or

(2) the person orders and pays for the item and the seller accepts the order during the exemption period for immediate shipment, even if delivery is made after the exemption period. The seller accepts an order when the seller has taken action to fill the order for immediate shipment. Actions to fill an order include placement of an "in date" stamp on a mail order, or assignment of an "order number" to a telephone order. An order is for immediate shipment when the purchaser does not request delayed shipment. An order is for immediate shipment notwithstanding that the shipment may be delayed because of a backlog of orders or because stock is currently unavailable to, or on back order by the seller.

(o) Documenting exempt sales. A seller is not required to obtain an exemption certificate on sales of qualifying products during the exemption period; however, the retailer's records should clearly identify the type of item sold, the date on which the item was sold, and the sales price of the item.

This 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 June 16, 2010.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 475-0387

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CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM

SUBCHAPTER L. PREPAID TUITION UNIT UNDERGRADUATE EDUCATION PROGRAM: TEXAS TOMORROW FUND II

34 TAC §§7.122, 7.125, 7.136, 7.141

The Comptroller of Public Accounts (comptroller) proposes to amend §7.122, concerning definitions, §7.125, concerning redemption of tuition units, §7.136, concerning transfers to institutions on redemptions of tuition units, and §7.141, concerning effect of program termination on contract. These sections are amended to implement amendments to the Education Code by Senate Bill 1941, 81st Legislature, 2009 by adding career schools to the program and conforming calculation of the transfer value of tuition units to the year units are transferred or redeemed. The prepaid tuition unit undergraduate education program was created in the 80th Legislature by House Bill 3900 which allows a person to prepay the costs of all or a portion of a beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, or accredited out-of-state institution of higher education.

Senate Bill 1941 enables beneficiaries of Texas Tuition Promise Fund contracts to use tuition units towards the cost of tuition and required fees at career schools. Previously, tuition units could only be used towards the cost of tuition and required fees at general academic teaching institutions, two-year institutions of higher education, private or independent institutions of higher education, or accredited out-of-state institutions of higher education.

Senate Bill 1941 also clarifies that the calculation of the transfer value of tuition units is determined by data from the year in which the units are transferred or redeemed rather than data from the year in which the units were purchased.

Section 7.122, new paragraph (4) is added to define 'career school' and paragraphs (4) through (29) are renumbered. Paragraphs (2), (5), (15), and (27) are amended to add 'career school' to the list of educational institutions. Paragraph (26) is amended to clarify that the calculation of Transfer Value is determined by data from the year in which tuition units are transferred or redeemed rather than from the year in which tuition units are purchased.

Section 7.125, subsections (a) and (e) are amended to include 'career school' in the list of educational institutions.

Section 7.136, subsection (b) is amended to include 'career school' in the list of educational institutions eligible to receive payment.

Section 7.141, subsection (a) is amended to include 'career school' in the list of educational institutions.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rules will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has 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 by facilitating the broader use of the Texas Tomorrow Fund II program. The proposed amendment would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the proposed rules may be submitted to Linda Fernandez, Manager, Educational Opportunities and Investment Division, Post Office Box 13407, Austin, Texas 78711-3407, or transmitted electronically to linda.fernandez@cpa.state.tx.us.

The amendments are proposed under Texas Education Code, §54.752(b)(1) which authorizes the Board to adopt rules to implement the Program.

The proposed amendments implement Texas Education Code, §§54.751, 54.753, 54.754, 54.765, 54.767, 54.7671, 54.769, 54.774, and 54.775.

§7.122. Definitions.

The following words, terms, and phrases, when used in this subchapter, shall have the following meanings:

(1) "Accredited out-of-state institution of higher education" means a public or private institution of higher education that:

(A) is located outside this state; and

(B) is accredited by a recognized accrediting agency.

(2) "Beneficiary" means the person designated under a prepaid tuition contract as the person entitled to apply one or more tuition units purchased under the contract to the payment of the person's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education.

(3) "Board" means the Prepaid Higher Education Tuition Board.

(4) "Career school" means a career school or college as defined by Education Code, §132.001 that offers a two-year associate degree as approved by the Texas Higher Education Coordinating Board.

(5) [~~(4)~~] "Eligible educational institution" means a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education, that qualify as eligible educational institutions under Internal Revenue Code, §529.

(6) [~~(5)~~] "Enrollment period" means the period established by the board during which a purchaser may enter into a contract with the board to purchase tuition units. The initial enrollment period is September 1 through the end of February. For beneficiaries who are newborn infants under one year of age at the time of enrollment, the initial enrollment period will be extended to cover the period of September 1 through July 31. These enrollment periods will apply annually thereafter subject to change by the board. The executive director may establish a provisional enrollment process to allow potential applicants to begin the enrollment process outside of the enrollment period with pricing to be established in the next enrollment period.

(7) [~~(6)~~] "First payment due date" means the date the first payment is due after enrolling in the program and establishing a new prepaid tuition contract. The first payment due date will be specified in the prepaid tuition contract, and shall initially be established as May 1st. The first payment due date serves as the anniversary date for establishing the three-year holding period. The first payment due date may be changed subsequently by the board for future enrollment periods.

(8) [~~(7)~~] "Fund" means the Texas Tomorrow Fund II.

(9) [~~(8)~~] "General academic teaching institution" has the meaning assigned by Education Code, §61.003, except that the term does not include a public state college.

(10) [~~(9)~~] "Market value" means an amount equal to the total purchase price of any unused tuition units, plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns).

(11) [~~(10)~~] "Matriculation" means enrollment as a member of the student body at an eligible educational institution.

(12) [~~(11)~~] "Paid in full" means that all the required payments for the tuition units and any assessed fees under the prepaid tuition contract have been received and credited to the account.

(13) [~~(12)~~] "Pay-As-You-Go" means purchasing tuition units at the price in effect for that type of tuition unit on the day payment is received for the tuition unit. Pay-As-You-Go includes paying for tuition units with a lump sum payment or multiple lump sum payments, without being obligated to pay for any additional tuition units.

(14) [~~(13)~~] "Plan manager" means a professional investment manager that is under contract with the board to serve as a plan administrator and to invest the assets of the fund on behalf of the board.

(15) [~~(14)~~] "Prepaid tuition contract" means a contract under which a person purchases from the board on behalf of a beneficiary one or more tuition units that the beneficiary is entitled to apply to the payment of the beneficiary's undergraduate tuition and required fees at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education.

(16) [~~(15)~~] "Prepayment" means payment of the balance due or a portion of the balance due under a prepaid tuition contract, ahead of the schedule provided in the contract.

(17) [~~(16)~~] "Private or independent institution of higher education," "public junior college," "public state college," "public technical institute," and "recognized accrediting agency" have the meanings assigned by Education Code, §61.003.

(18) [~~(17)~~] "Program" or "Plan" means the prepaid tuition unit undergraduate education program. The board may select a different name for the program for marketing purposes.

(19) [~~(18)~~] "Purchaser" means a person who enters into a prepaid tuition contract with the board on behalf of a beneficiary for the purchase of one or more tuition units.

(20) [~~(19)~~] "Redemption" means the exchange of one or more tuition units to pay costs of tuition and required fees at an eligible educational institution.

(21) [~~(20)~~] "Reduced Refund Value" means the lesser of:

(A) the amount paid by the purchaser or other contributor to purchase any unused tuition units under the contract on behalf of the beneficiary; or

(B) the current market value of the invested payments or contributions for any unused tuition units, as determined by the plan manager. Reduced Refund Value does not include any state provided or procured matching contributions or any earnings on state provided or procured matching contributions.

(22) [~~(21)~~] "Refund Value" means an amount equal to the total purchase price of the unused tuition units to be refunded from the account, plus annual net earnings on the contributions made to the account to purchase the tuition units that are being refunded (including any negative returns), with the earnings rate to be set by the board at a rate that is up to two percent less than the actual investment return for the fund for each of the years the contract is in effect, provided that in no event shall the annual net earnings on the contributions ever exceed five percent annually, and provided further that for any year in which the investment return does not support payment of any earnings, the board may elect not to credit and pay any earnings on the contributions, to preserve the actuarial soundness of the fund. Refund Value does not include any state provided or procured matching contributions or any earnings on State provided or procured matching contributions.

(23) [~~(22)~~] "Required fee" means a fee, other than a laboratory fee for a specific course, that is charged by a public or private institution of higher education to all students at the institution who are not exempt from the fee. For purposes of this subdivision, a fee is a required fee only to the extent that the fee is considered a qualified higher education expense under Internal Revenue Code, §529. Required fees are generally those fees imposed on all students as a condition of enrollment. Required fees do not include fees such as equipment usage fees required for particular courses, charges for room and board, book costs, or any optional fees.

(24) [~~(23)~~] "Sales period" means the year long period from September 1 through August 31 during which a purchaser who has established a prepaid tuition contract may make purchases under the contract at the price(s) established under the contract, or at the price established for tuition units applicable to the sales period if additional tuition units are purchased during the sales period.

(25) [~~(24)~~] "Three-year holding period" means the period of time that must transpire before a beneficiary or purchaser may redeem a tuition unit to pay for qualified higher education expenses, as provided under §7.125(g) of this title (relating to Redemption of Tuition Units).

(26) [~~(25)~~] "Transfer value" means the value of the prepaid tuition contract at the time of transfer, that is the lesser of:

(A) an amount equal to the cost, at the time of the transfer, of the tuition and required fees that would be covered by redemption of the number and type of tuition units to be transferred from the account (but not including any units resulting from any State provided or procured matching funds) if the beneficiary were redeeming the units at a general academic teaching institution or two-year institution of higher education as follows:

(i) for a Type I unit, at the general academic teaching institution that[~~, in the sales year in which the unit was purchased,~~] had the highest tuition and required fee cost;

(ii) for a Type II unit, at a general academic teaching institution that[~~, in the sales year in which the unit was purchased,~~] had tuition and required fee cost at the weighted average; and

(iii) for a Type III unit, at a two-year institution of higher education that[~~, in the sales year in which the unit was purchased,~~] had tuition and required fee cost at the weighted average; or

(B) an amount equal to the current market value of the unused tuition units to be transferred from the account, which is an amount equal to the total purchase price of the unused tuition units to be transferred from the account (but not including any state provided or procured matching contributions), plus the portion of the total net earnings on assets of the Fund attributable to that amount (including any negative returns), but not including any earnings on state provided or procured matching contributions, as determined by the plan manager.

(27) [~~(26)~~] "Tuition" means the charges imposed by a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education, on undergraduates as a condition of enrollment, which are identified by such institution as tuition.

(28) [~~(27)~~] "Tuition unit" means a portion of the cost of undergraduate resident tuition and required fees that may be prepaid, whose assigned value, when used to pay the cost of tuition and required fees at an eligible educational institution, is equal to:

(A) for a Type I tuition unit, one percent of the cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by the general academic teaching institution with the highest such tuition and fee costs for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(d);

(B) for a Type II tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by general academic teaching institutions for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(e); or

(C) for a Type III tuition unit, one percent of the weighted average cost of undergraduate resident tuition and required fees for one academic year consisting of 30 semester hours charged by two-year institutions of higher education for the academic year in which the unit is redeemed, determined as provided by Education Code, §54.753(f).

(29) [~~(28)~~] "Two-year institution of higher education" means a public junior college, a public state college, and a public technical institute, as those terms are defined in Education Code, §61.003.

(30) [~~(29)~~] "Weighted average" with respect to tuition and required fees means:

(A) for Type II tuition units, a weighted average cost for undergraduate resident tuition and required fees of general academic teaching institutions for the applicable academic year, computed by the method specified in Education Code, §54.753(e); and

(B) for Type III tuition units, a weighted average cost for undergraduate resident tuition and required fees of two-year institutions of higher education for the applicable academic year, computed by the method specified in Education Code, §54.753(f).

§7.125. Redemption of Tuition Units.

(a) In accordance with this subchapter, when a beneficiary under a prepaid tuition contract redeems tuition units to pay costs of tuition and required fees, the board shall apply money in the Fund, in the amount provided by Education Code, §54.765, to pay all or the applicable portion of the costs of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education in which the beneficiary enrolls.

(1) Subject to subsection (c)(2) of this section, and the other provisions of this section, a beneficiary may redeem any type of tuition unit or partial tuition unit for attendance at an institution described by this section.

(2) A general academic teaching institution or two-year institution of higher education shall accept the amount transferred to the institution under Education Code, §54.765(c), when the unit or units are redeemed as payment for all or the applicable portion of the beneficiary's tuition and required fees.

(b) To pay for the entire cost of undergraduate resident tuition and required fees for an academic year consisting of 30 semester credit hours:

(1) redemption of 100 Type I tuition units (or an approximate equivalent amount of Type II or III units) is required at the general academic teaching institution with the highest tuition and fee cost as described by Education Code, §54.753(d);

(2) redemption of 100 Type II tuition units (or an approximate equivalent amount of Type I or III units) is required at a general academic teaching institution with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(e); and

(3) redemption of 100 Type III units (or an approximate equivalent amount of Type I or II units) is required at a two-year institution of higher education with the applicable tuition and fee cost at the Weighted Average as described by Education Code, §54.753(f).

(c) The number of tuition units that must be redeemed to pay for the entire cost of tuition and required fees for an academic year at another general academic teaching institution or two-year institution of higher education may be higher or lower:

(1) in proportion to the amount that the cost of tuition and required fees at that institution is higher or lower than the amount determined for the institution with the highest cost or Weighted Average cost, as applicable; or

(2) if a more or less valuable type of tuition unit is redeemed.

(d) To assist purchasers in determining the number of tuition units a beneficiary must redeem to cover the costs of tuition and required fees at general academic teaching institutions and two-year institutions of higher education, each year the board shall prepare a tuition unit redemption chart and will post the chart on the board's Internet website. The chart will show for each general academic teaching institution and for each two-year institution of higher education the number of each type of units purchased that year that would be required to cover the cost of tuition and required fees, based on an academic year consisting of 30 semester credit hours.

(1) The exact amount of tuition units that will be required to attend a particular institution will depend upon the cost of tuition and required fees at the institution in the year of redemption.

(2) For Type I tuition units, the number of units required to attend a particular institution may be less than anticipated when purchased if that institution's costs are less than the general academic teaching institution with the highest tuition and fee cost in the year of redemption.

(3) For Type II and III tuition units, the number of units required to attend a particular institution may be more or less than anticipated when purchased, and will depend on whether that institution's costs are higher or lower than the Weighted Average cost in the year of redemption. To the extent the cost of a particular institution is higher than the Weighted Average cost, the beneficiary will have to redeem additional tuition units to cover the higher cost, or pay the amount of the difference as provided in subsection (e) of this section.

(e) If a beneficiary redeems fewer tuition units of the type or combination of types necessary to pay the total cost of the beneficiary's tuition and required fees at the general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education at which the beneficiary enrolls, the beneficiary is responsible for paying the amount of the difference between the amount of tuition and required fees for which the beneficiary pays through the redemption of one or more tuition units and the total cost of the beneficiary's tuition and required fees at the institution.

(f) A beneficiary who redeems Type III tuition units (or an approximate equivalent amount of Type I or II units) to attend a public junior college and who does not reside within the taxing jurisdiction of the junior college is responsible for paying any portion of the tuition charged by the junior college to persons who do not reside within that taxing jurisdiction.

(g) A beneficiary or purchaser may not redeem a tuition unit earlier than the third anniversary of the date the unit was purchased.

(1) For the purpose of calculating the three-year holding period for an initial Pay-As-You-Go purchase, the first payment due date after initially enrolling in the program is considered the date the initial units were purchased. These units may not be redeemed to pay for tuition and required fees until the third anniversary after the payment due date.

(2) For installment plan payments, the three-year holding period is considered met if the purchaser enrolls in the program and the first payment due date is at least three years prior to any redemption of tuition units, and the installment plan is paid in full before redemption of any of the tuition units.

(3) Additional Pay-As-You-Go purchases start a new three-year holding period as of the date payment is received for the additional tuition units.

(4) Under the three-year holding period, the latest date that a purchaser could purchase tuition units to pay for a semester of undergraduate education using Pay-As-You-Go purchases is three years prior to the date of expected redemption of the tuition units, subject to the requirement that all tuition units under the contract must be used not later than the 10th anniversary of the date the beneficiary is projected to

graduate from high school, not counting time spent by the beneficiary as an active duty member of the United States armed services.

(5) If all of the tuition units in an account do not meet the three-year holding period, the purchaser may redeem those units or fractional units that meet the three-year holding period, and redeem the remaining tuition units in the account when the three-year holding period is met.

(h) A beneficiary may redeem more than 100 tuition units in one academic year of the type or combination of types as needed to pay the total cost of the beneficiary's tuition and required fees at an eligible educational institution.

(i) To accommodate part-time attendance or the enrollment in more or less semester hours than the contemplated 30 credit hours in an academic year, the board may calculate a per credit hour tuition unit cost for the eligible educational institution applicable to the year of redemption, whereby the number of tuition units required to be redeemed shall be in proportion to the amount that tuition and required fees to be charged to the beneficiary by the eligible educational institution are more or less costly than the cost for attending two semesters of 15 credit hours each or 30 total credit hours in an academic year.

(j) A beneficiary may redeem fractional tuition units as needed to pay the cost of the beneficiary's tuition and required fees at an eligible educational institution.

§7.136. Transfer to Institutions on Redemptions of Tuition Units.

(a) When a beneficiary enrolls at a general academic teaching institution or two-year institution of higher education and notifies the institution that payment will be made by redeemed tuition units, the comptroller will arrange for the transfer to the institution of the appropriate amount specified under Education Code, §54.765(c), (d) and (e).

(b) When a beneficiary enrolls at a private or independent institution of higher education, career school, or accredited out-of-state institution of higher education, upon request the comptroller will arrange for the transfer to the institution of the amount specified under Education Code, §54.765(f).

§7.141. Effect of Program Termination on Contract.

(a) A prepaid tuition contract remains in effect after the program is terminated if, when the program is terminated, the beneficiary:

(1) has been accepted by or is enrolled at a general academic teaching institution, two-year institution of higher education, private or independent institution of higher education, career school, or accredited out-of-state institution of higher education; or

(2) is projected to graduate from high school not later than the third anniversary of the date the program is terminated.

(b) A prepaid tuition contract terminates when the program is terminated if the contract does not remain in effect under subsection (a) of this section.

(c) For contracts that are terminated pursuant to subsection (b) of this section, the purchaser is entitled to a refund of the Refund Value, less any fees that are past due and payable to the program under the board's fee 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.

Filed with the Office of the Secretary of State on June 16, 2010.

TRD-201003384

Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 3. TEXAS HIGHWAY PATROL

SUBCHAPTER A. CRASH INVESTIGATIONS

37 TAC §3.1, §3.4

The Texas Department of Public Safety (the department) proposes amendments to §3.1 and §3.4, concerning Crash Investigations.

The department has limited commissioned resources in the Texas Highway Patrol (THP) to use in responding to a wide span of duties. THP allocates resources and assigns duties with priorities to criminal and traffic enforcement responsibilities. In certain high density population regions of the state, growth has extended into unincorporated areas in which large shopping center complexes have become a major part of the commercial landscape. Those shopping centers are a prolific source of minor crashes between motor vehicles. Even in rural and less densely populated counties, the use of resources to investigate a crash on private property should be a decision of that area's management, to include consideration of the available resources. Each parking lot crash reduces department resources for patrol in criminal and highway traffic enforcement.

The department has always and will continue to pursue Driving While Intoxicated (DWI) violators in any public place (including parking lots) and will certainly respond to assist or address matters involving serious bodily injury or deaths in unincorporated areas, including major shopping complex parking lots and as authorized by Texas law. Many of these same areas experience extraordinarily high levels of traffic on highways and are growth areas that require increased levels of criminal enforcement responsibility. The department's regional commanders need the ability to deploy resources to address criminal and traffic enforcement in these unincorporated areas without the burden of responding to every traffic crash in parking lots. These amendments are sought to provide guidance to THP and regional commanders for using limited resources in public places outside highways (such as parking lots).

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no significant fiscal implications for state or local government, or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments as proposed. There are no anticipated economic costs to individuals who are required to comply with the amendments as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five-year period the amendments are in effect the public benefit anticipated as a result of enforcing the rule will be current and updated rules.

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 rule. Accordingly, the department is not required to complete a takings impact assessment regarding the amendments.

Comments on the proposal may be submitted to Major Ron Joy, Texas Department of Public Safety, 5805 North Lamar Boulevard, Austin, Texas 78752, (512) 424-2115.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

Texas Government Code, §411.004(3) is affected by this proposal.

§3.1. Responsibility and Reporting.

(a) Officers of the department are charged with the responsibility of investigation and properly reporting rural motor vehicle crashes occurring upon public highways [~~or other ways or places open to the use of the public~~] without regard as to severity of the crash [~~accident~~]. Officers of the department will investigate and properly report motor vehicles crashes occurring on other places open to the use of the public only when serious bodily injury or death has occurred.

(b) (No change.)

§3.4. Crashes and Violations--Private Ways and Places.

(a) Department interpretations. Department interpretations of territorial applicability of the Texas Transportation Code [~~this Act~~] are as follows.

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

(b) Guide. If the owner or person in control of the way or area does not intend to be open for public use, then the Texas Transportation Code [~~this Act~~] has no application.

(c) Investigation. In investigating crashes coming within the provisions of the Texas Transportation Code [~~this Act~~], the investigating officer may [~~will~~] follow regular crash investigation procedure as though the crash occurred on a rural highway.

(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 June 21, 2010.

TRD-201003481

Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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CHAPTER 27. CRIME RECORDS
SUBCHAPTER L. DNA SUPPORTED SUSPECTED OFFENDER FILE

37 TAC §§27.161 - 27.164

The Texas Department of Public Safety (the department) proposes new §§27.161 - 27.164, concerning DNA Supported Suspected Offender File. This new subchapter is necessary to clarify the methods by which a criminal justice agency must report information entered into the DNA Supported Suspected Offender File and the methods by which the designated offender may access the information and request the department review information and correct inaccuracies.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the new rules are in effect, there will be no fiscal impact for state and local government or local economies.

Ms. MacBride has determined that for each year of the first five-year period the new rules are in effect, the public benefit anticipated as a result of enforcing the new rules will be publication of the method available to a person to review information in the DNA Supported Suspected Offender File relating to that person and publication of the method to request the department correct inaccurate information.

Ms. MacBride has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the new rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the new rules as proposed. There is no anticipated negative impact on local employment.

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 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. 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 rule. Accordingly, the department is not required to complete a takings impact assessment regarding the new rules.

Comments on the proposal may be submitted to Louis Beaty, Manager, Crime Records Service, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0230, (512) 424-5836.

The new rules are proposed pursuant to Texas Government Code, §411.0604, which authorizes the director to adopt rules

to implement and enforce Texas Government Code, Chapter 411, Subchapter D-1.

Texas Government Code, Chapter 411, Subchapter D-1 is affected by this proposal.

§27.161. Entry of Information.

(a) The department maintains a DNA Supported Suspected Offender File to collect and disseminate information regarding additional offenses that forensic DNA test results indicate may have been committed by a person who has been arrested for or charged with any felony or misdemeanor offense, other than a misdemeanor offense punishable by fine only.

(b) Information may only be entered into the DNA Supported Suspected Offender File if based on forensic DNA test results indicating the DNA profile of the person cannot be excluded as a donor to the DNA profile of a person suspected to have committed an offense.

(c) To be entered into the DNA Supported Suspected Offender File, the information must meet the following criteria:

(1) submitted in the form of an affidavit signed by an investigating criminal justice agency;

(2) approved by a district judge;

(3) accompanied by the submission of the subject's fingerprints; and

(4) accompanied by a completed DNA Supported Suspected Offender File (CR-40).

§27.162. Confidentiality and Dissemination.

(a) Information entered into the DNA Supported Suspected Offender File is confidential and may not be disseminated except as provided by Texas Government Code, Chapter 411, Subchapter D-1.

(b) The department will disseminate the information contained in the DNA Supported Suspected Offender File to a criminal justice agency upon inquiry. A criminal justice agency may disseminate the information to any other criminal justice agency for a criminal justice purpose.

§27.163. Notice of Entry.

(a) A person may request to determine whether the department has entered information relating to that person in the DNA Supported Suspected Offender File as follows:

(1) The person must be fingerprinted by a criminal justice agency or other entity on a department approved fingerprint card, or by the department approved electronic fingerprint submission vendor. The criminal justice agency, other entity or the department approved vendor for the electronic submission of fingerprints must establish the person's identity by requiring the person to produce a government issued photo identification document.

(2) The criminal justice agency or other entity must include the following identifying information of the person on the fingerprint card:

(A) the person's complete name (LAST, FIRST, MIDDLE), including any other names used by the person;

(B) the person's sex, race, and date of birth (MONTH, DAY, YEAR); and

(C) a complete, legible set of ten rolled fingerprints and simultaneous impressions taken from the person.

(3) The person must mail the completed fingerprint card and a signed, written request that the department search the DNA Supported Suspected Offender File for information relating to the person to Crime Records Service, Attn: DNA Supported Suspected Offender File, Texas Department of Public Safety, P.O. Box 4143, Austin, Texas 78765-4143. The written request must include the printed name, phone number, and return mailing address of the person designated to receive the result of the search.

(4) Fingerprint cards with illegible prints or incomplete information will be returned to the address provided in the written request for proper re-submission.

(b) Upon receipt of a request described by this section, the department will conduct a fingerprint based search of the DNA Supported Suspected Offender File. If an entry relating to the person is located, a printout of the information and the requesting letter will be returned to the designee. If information relating to the person is not located, a certified letter will be returned to the designee stating, "No entry on file." and the requesting letter will be returned to the person. The department will respond within ten (10) business days of the receipt of the request.

§27.164. Review of Entry.

(a) If a person believes an entry or information maintained by the department relating to the person in the DNA Supported Suspected Offender File is inaccurate, the person may return a copy of the department's correspondence and a written request that the department review the information to DNA Supported Suspected Offender File, P.O. Box 4143, Austin, Texas 78765-4143. The request to review entry must allege the department may have entered inaccurate information relating to the person.

(b) Upon receipt of a request to review entry, the department shall review the information to determine whether there is a high likelihood that the information is accurate.

(c) If the department determines there is not a high likelihood the information relating to the person is accurate, the department will:

(1) promptly remove the information from the DNA Supported Suspected Offender File; and

(2) notify appropriate divisions of the department, the investigating criminal justice agency, and the subject of the determination and removal of the information.

(d) If the department determines there is a high likelihood that information relating to the defendant is accurate, the department shall notify the subject of the determination.

This 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 June 21, 2010.

TRD-201003486
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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CHAPTER 35. PRIVATE SECURITY
SUBCHAPTER F. ADMINISTRATIVE HEARINGS

37 TAC §35.93

The Texas Department of Public Safety (the department) proposes amendments to §35.93, concerning Administrative Hearings, in order to comply with the statutory mandate provided through the 81st Legislature's amendment of Texas Occupations Code, §1702.402, requiring a rule-based standardized penalty schedule. *See* HB 2730, §4.100. This rule will provide guidance to the Private Security Bureau staff and the regulated industry regarding the fines associated with various rule and statutory violations by the regulated community.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments. There are no economic costs to individuals who are required to comply with the amendments. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be more transparency and greater consistency relating to the manner in which the department administers the statute. There should be no economic costs resulting from the amendments of this rule.

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 the risks to human health from environmental exposure.

The department has determined that Texas Government Code, Chapter 2007, does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding the amendments.

Written comments on the proposed amendments may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter, and Texas Occupations Code, §1702.402(c), which requires the adoption of this rule.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b) and §1702.402(c).

§35.93. Penalty Range.

The board hereby adopts the following as [~~shall develop, utilize, and publish~~] guidelines for administrative penalties to be used in proceedings under Subchapter Q of the Act (§1702.401 et seq.) for violations of the Act and this chapter [~~these rules~~]. The following fines are to be construed as maximum penalties only. In assessing fines, department personnel are encouraged to consider the factors provided in §1702.402 of the Act.

Figure: 37 TAC §35.93

This 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 June 18, 2010.

TRD-201003425
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER L. GENERAL REGISTRATION REQUIREMENTS

37 TAC §35.181

The Texas Department of Public Safety (the department) proposes amendments to §35.181, concerning Employment Requirements, in order to clarify the nature of the employer/employee relationship required in order to satisfy the statutory requirement of insurance coverage for regulated services. This rule provides guidance to the Private Security Bureau staff and the regulated industry regarding appropriate employment arrangements.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments. There are no economic costs to individuals who are required to comply with the amendments. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be greater assurance that regulated service providers are properly insured against claims arising from the provision of such services. There should be no economic costs resulting from the amendments of this rule.

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 the risks to human health from environmental exposure.

The department has determined that Texas Government Code, Chapter 2007, does not apply to this rule. Accordingly, the de-

partment is not required to complete a takings impact assessment regarding the amendments.

Written comments on the proposed amendments may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b).

§35.181. Employment Requirements.

(a) The employment relationship between a licensed company and its registrants or commissioned guards must be such that the licensee's commercial liability insurance policy provides coverage for claims arising from the regulated services provided on behalf of the licensee by its registrants or commissioned guards. The failure to obtain and maintain such coverage is a violation of §1702.123 of the Act. [~~A registrant or commissioned security officer of a licensed company must meet the specifications defined by the Internal Revenue Service as an "employee" or "contract laborer."~~]

(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.

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003426
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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SUBCHAPTER S. CONTINUING EDUCATION

37 TAC §35.292

The Texas Department of Public Safety (the department) proposes amendments to §35.292, concerning Requirements for Continuing Education Courses, in order to render the rule consistent with the proposed amendments to §35.70, regarding Fees published in the May 21, 2010, issue of the *Texas Register* (35 TexReg 3962). These amendments address the specific fee for continuing education schools. Its adoption provides guidance to the Private Security Bureau staff and the regulated industry regarding the fines associated with various rule and statutory violations by the regulated community.

Cheryl MacBride, Assistant Director, Finance, has determined that for each year of the first five-year period the amendments are in effect there will be no fiscal implications for state or local government or local economies.

Ms. MacBride also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendments. There are no economic costs to individuals who are required to comply with the amendments. There is no anticipated negative impact on local employment.

In addition, Ms. MacBride has determined that for each year of the first five years the proposed amendments are in effect, the public benefit anticipated as a result of the amendments will be consistency in the Private Security Board's approved fee schedule. There should be no economic costs resulting from the amendments of this rule.

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 the risks to human health from environmental exposure.

The department has determined that Texas Government Code, Chapter 2007, does not apply to this rule. Accordingly, the department is not required to complete a takings impact assessment regarding the amendments.

Written comments on the proposed amendments may be sent to Steve Moninger, Legal Staff, Regulatory Licensing Service-Private Security Bureau, P.O. Box 4143, MSC-0242, Austin, Texas 78765-0242, (512) 424-5842.

The amendments are proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer this chapter.

The proposed amendments affect Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b).

§35.292. Requirements for Continuing Education Courses.

(a) All recognized continuing education schools shall be licensed by the Private Security Bureau (the bureau).

(b) All continuing education schools shall comply with the following:

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

(6) Schools shall teach all continuing education courses in the state of Texas, unless the course has a Texas-licensed continuing education school sponsor approved by the bureau [~~Bureau~~]. A Texas school must make a written request to sponsor an out of state course of instruction to the bureau [~~Bureau~~] at least sixty (60) days prior to the course presentation. The Texas school shall maintain records of instructors, courses taught, number of hours presented, and any Texas licensed or registered attendees of the sponsored school for a period of five (5) years.

(c) School directors of licensed continuing education schools shall comply with the following:

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

(6) The school director shall pay an annual licensing fee of $350.00 [~~$300.00~~].

(d) (No change.)

(e) Attendees of courses of continuing education shall maintain certificates of completion furnished by the school director in their files for a period of three (3) years. Attendees shall furnish the bureau [~~Bureau~~] with copies of all certificates of completion upon request.

(f) The bureau [~~Bureau~~] may recognize courses of instruction received through any state-recognized university, college, or community college upon proof of attendance and completion of the course with a passing grade.

(g) Companies licensed by the bureau [~~Bureau~~] with ten (10) or more registered employees may make a written request for a letter of exemption allowing them to provide continuing education to those employees registered under the requesting company's license. Such requests shall be addressed to the bureau manager [~~Bureau Manager~~]. A letter of exemption granted under this section shall be valid for two (2) years. To qualify for a letter of exemption, the company must appoint a training director, assure that all training is in compliance with all related administrative rules, maintain proof of all training, and provide each employee with a certificate of training as required by this section. There is no annual fee associated with a letter of exemption issued under this subsection.

(h) The bureau [~~Bureau~~] shall inspect the continuing education records of 10% of licensees and registrants annually to assure compliance with these requirements and to maintain the integrity of the continuing education program.

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

Filed with the Office of the Secretary of State on June 18, 2010.

TRD-201003427
Stuart Platt
General Counsel
Texas Department of Public Safety
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 424-5848

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PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 159. SPECIAL PROGRAMS

37 TAC §159.17

The Texas Board of Criminal Justice (TBCJ) proposes amendments to §159.17, Employment Referral Services for Offenders--Memorandum of Understanding, which authorizes the Texas Department of Criminal Justice (TDCJ) to adopt a memorandum of understanding between the TDCJ, the Texas Workforce Commission, and the Texas Youth Commission. The proposed amendments are necessary to remove the Windham School District and substitute the TDCJ Reentry and Integration Division as the TDCJ division responsible for coordinating the Project for Reintegration of Offenders (Project RIO) within the TDCJ.

Jerry McGinty, Chief Financial Officer for the TDCJ, has determined that for the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that, for the first five year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, will be to provide employment referral services for offenders for their successful reentry into the community.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of these amendments.

The amendments are proposed under Texas Government Code §501.095 and Texas Labor Code §306.004 and §306.005.

Cross Reference to Statutes: Texas Government Code §492.001 and §§771.001 - 771.010.

§159.17. Employment Referral Services for Offenders--Memorandum of Understanding.

(a) The Texas Department of Criminal Justice (TDCJ) adopts the following memorandum of understanding (MOU) with the Texas Workforce Commission and [~~,~~] the Texas Youth Commission (TYC) [~~and the Windham School District (WSD)~~].

(b) This MOU is required by the Texas Government Code[~~,~~] §501.095 and Texas Labor Code[~~,~~] §306.004 and §306.005.

(c) Copies of the MOU are filed in the TDCJ Reentry and Integration [~~Parole~~] Division, 8610 Shoal Creek Blvd., Austin, Texas 78758 and may be reviewed during regular business hours.
Figure: 37 TAC §159.17(c)

This 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 June 17, 2010.

TRD-201003415
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: August 1, 2010
For further information, please call: (936) 437-6003

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TITLE 43. TRANSPORTATION

PART 3. AUTOMOBILE BURGLARY AND THEFT PREVENTION AUTHORITY

CHAPTER 57. AUTOMOBILE BURGLARY AND THEFT PREVENTION AUTHORITY

43 TAC §57.23

The Automobile Burglary and Theft Prevention Authority (ABTPA) proposes amendments to Chapter 57, §57.23, relating to the ABTPA financial, progress, and inventory reports. The proposed amendments change the reporting requirements for financial, progress and inventory reports from grantees to the ABTPA. The proposed amendments to §57.23 define the reporting period to be on a fiscal year basis, instead of calendar year, beginning September 1 and ending August 31 of each year. Currently, grantee reporting is on a calendar year basis for

required reports. The proposed change to a fiscal year reporting period is consistent with the State of Texas' budgeting and reporting schedules. The amendments also set out deadlines for submission of the required reports and require monthly progress reports instead of the current quarterly reports. Other conforming changes are made to the section for consistency and clarity.

Charles Caldwell, Director of the ABTPA, has determined that for the first five year period the amendments are in effect, there will be no additional fiscal implications for state and local governments as a result of enforcing or administering the proposed amendments.

Mr. Caldwell has also determined that, for each year of the first five years the proposed amendments will be in effect, the public benefit anticipated will be better interface with the State of Texas' budgeting and reporting schedules and requirements, which will facilitate the agency's budget planning and grant monitoring, particularly as the ABTPA converts to an on-line reporting system.

Mr. Caldwell has also determined that, for each year of the first five years the proposed amendments will be in effect, there is no anticipated economic costs to persons required to comply with the rule as proposed for amendment. There is no effect on a local economy. There is no anticipated adverse economic effect on micro or small businesses as a result of the proposed amendments.

Comments on the proposed amendments may be submitted to Charles Caldwell, Director, Automobile Burglary and Theft Prevention Authority, 4000 Jackson Avenue, Austin, Texas 78731, for a period of 30 days from the date that the proposed action is published in the *Texas Register.*

The amendments are proposed under Texas Civil Statutes, Article 4413(37), §6(a), which the Authority interprets as authorizing it to adopt rules implementing its statutory powers and duties.

The following are the statutes, articles, or codes affected by the amendments: Texas Civil Statutes, Article 4413(37), §6(a).

§57.23. Financial, Progress, and Inventory Reports.

(a) Each grantee shall submit financial, monthly progress[,] and inventory reports in accordance with the instructions provided by the ABTPA on forms prescribed by the ABTPA. [~~All reports shall be submitted in accordance with the prescribed ABTPA forms for such reports.~~] Financial and inventory reports must be signed by the financial officer. Progress reports must be signed by the project director. [~~Inventory reports are to accompany the final financial report.~~]

(b) Monthly progress reports are due by the 5th business day of the following month.

(c) Financial reports are due quarterly and are due on the 5th business day of following month after the end of each quarter.

(d) A complete inventory report is due once a year and is to be included with the fourth quarter report.

(e) For purposes of this section, reporting is on a fiscal year basis, beginning September 1 through August 31.

This 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 June 19, 2010.

TRD-201003468
Charles Caldwell
Director
Automobile Burglary and Theft Prevention Authority
Earliest possible date of adoption: August 1, 2010
For further information, please call: (512) 374-5101

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