

SUBCHAPTER C: ENFORCEMENT REFERRALS TO SOAH
§§70.101 - 70.109
Effective December 31, 2015

§70.101. Executive Director's Preliminary Report.

(a) Any enforcement action brought under these rules may be initiated by an EDPR being filed by the executive director with the chief clerk.

(b) An EDPR shall include a brief statement of the nature of the violation, the statute or statutes violated, the facts relied upon by the executive director in concluding that a violation has occurred, a recommendation that an administrative penalty be assessed, the amount of the recommended penalty, any corrective action to be taken by the respondent, and an analysis of the factors required in the relevant statute and rules to be considered by the commission in determining the amount of the penalty.

Adopted June 16, 1999

Effective July 7, 1999

§70.102. Pleadings Other Than the Executive Director's Preliminary Report.

(a) In a contested enforcement case, all pleadings for which no other form is prescribed shall contain:

- (1) the name of the party seeking to bring about or prevent action by the commission;
- (2) the names of all other known parties;
- (3) a concise statement of the facts and the law relied upon by the pleader;
- (4) a prayer stating the type of relief, action, or order desired by the pleader;
- (5) any other matter required by statute;
- (6) a certificate in accordance with §1.11 of this title (relating to Service on Judge, Parties, and Interested Persons), showing service; and
- (7) the signature of the submitting party or the party's authorized representative.

(b) All pleadings shall include the docket number assigned the case by the chief clerk and shall be served on the parties in accordance with Chapter 1 of this title (relating to Purpose of Rules, General Provisions).

(c) Within seven days of the date of the evidentiary hearing, parties may file pleadings, supplemental or amended, so long as these pleadings do not operate as a surprise to the opposite party. Pleadings filed after the seventh day before the evidentiary hearing shall be filed only after leave of the judge is obtained. Leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party. Late-filed amendments may constitute grounds for a continuance.

(d) The executive director may amend an EDPR by filing a petition with the chief clerk, in which the executive director may make such changes as the law allows, including, but not limited to, changes in the following: the amount of the penalty, up to the maximum allowable by statute; the violations alleged, to include any or all violations which are not precluded by law from being brought; the number of days of occurrence of previously alleged violations; and the injunctive relief (or remedial ordering provisions) sought. The right to change the violations alleged includes the right to add causes of action based on statutes within the commission's jurisdiction other than the one or ones upon which the EDPR in the case was based. In addition, the executive director may also amend to add or non-suit parties to the contested enforcement case. Petitions are pleadings and shall be served on the parties in accordance with this Chapter and Chapter 1 of this title.

(e) Any pleading may adopt and incorporate, by specific reference thereto, any part of any document or entry in the official files and records of the agency. Copies of the relevant portions of such documents must be attached to the pleadings.

Adopted June 16, 1999

Effective July 7, 1999

§70.103. Petitions which Initiate a Cause of Action.

(a) Generally. The executive director may file a petition as the instrument for initiating an enforcement action. The EDPR, when properly noticed and served, constitutes a petition.

(b) Service. Where enforcement actions are initiated with a petition, as per this section, and there is a statutory requirement that the respondent be given notice, the petition shall be filed and notice given as if it were an EDPR, in accordance with §70.104 of this title (relating to Notice of Executive Director's Preliminary Report).

Adopted May 8, 1996

Effective June 6, 1996

§70.104. Notice of Executive Director's Preliminary Report.

(a) General requirements. Not later than the 10th day after the date on which the EDPR is issued, the executive director shall give written notice of the EDPR to the respondent. The EDPR is considered issued when it is filed with the office of the chief clerk. Notice shall consist of a copy of the EDPR, a statement of the amount of the penalty recommended, if any, and a statement of the right of the respondent to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(b) Timeliness and method of service. Notice shall be timely served if:

(1) sent to the respondent by registered or certified mail, return receipt requested, no later than the 10th day after the date on which the EDPR is issued; or

(2) delivered to the respondent in person, with the date of delivery endorsed thereon, no later than the 10th day after the date on which the EDPR is issued.

(c) Additional methods of service. Where the executive director has been unable to deliver notice to the respondent through reasonable attempts to serve respondent by the methods described in subsection (b) of this section, notice may be effected by:

(1) publishing in a newspaper of general circulation in the county of the last known business or residential address of the respondent, for a period of seven consecutive days, the following:

(A) the name of the person charged;

(B) a brief summary of the charges;

(C) a statement of the amount of the penalty recommended, if any;

(D) a statement that injunctive or remedial relief is sought; and

(E) a statement of the right of the person charged to a hearing on the occurrence of the violation, the amount of the penalty, or both;

(2) mailing the EDPR by both certified mail, return receipt requested, and by first class mail, postage prepaid simultaneously. When the executive director gives the respondent notice of the EDPR to the respondent's last known address in the manner provided by this paragraph, timely service will be presumed if the certified mail is returned to the executive director as unclaimed by the postal service, and the first class mail is not similarly returned; or

(3) sending the EDPR by telephonic document transfer or facsimile not later than the tenth day after the date on which the EDPR is issued, at or before 5:00 p.m. local time for the respondent. Service by telephonic document transfer after 5:00 p.m. local time of the respondent shall be deemed service on the following day.

(d) Proof of notice. Where proof of notice of the EDPR or petition is relevant, such as at a hearing for default judgment, a certificate by a party or an attorney of record or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. In addition, the executive director may offer live testimony as well as such other documentary evidence as permitted by the presiding officer, showing that the notice has been perfected. Nothing herein shall preclude any party from offering proof that the notice was not received, or if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the presiding officer may extend the time for taking the action required of such party or grant such other relief as it deems just.

Adopted June 16, 1999

Effective July 7, 1999

§70.105. Answer.

(a) A respondent may file with the chief clerk a written response to the EDPR or a pleading entitled an answer which may deny the alleged violations and/or the amount of the penalty. Through the answer, the respondent may either agree to the amount of the penalties and corrective actions recommended in the EDPR or request a contested enforcement case hearing. Any answer must be filed no later than 20 days after the date on which the respondent receives notice of an EDPR. Failure to file the answer by the 20th day after the date on which the respondent receives notice of an EDPR may result in a default order, as described in §70.106 of this title (relating to Default Order), being issued against the respondent.

(b) If the person charged consents to the EDPR including the recommended penalty, the answer shall so state.

(c) An answer must also be filed in response to a petition which initiates an enforcement action.

(d) Answers to amended or supplemental petitions shall be filed if additional facts and claims are alleged in response to the amended or supplemental petitions.

(e) Any affirmative defenses must be specifically pled in an answer.

(f) A respondent may consent in writing to parts of the EDPR, initial petition, or amended or supplemental petition, whichever is the most recent pleading. If the enforcement action is referred to SOAH for a contested case hearing under Chapter 80 of this title (relating to Contested Case Hearings), the respondent may also enter into agreements with the executive director regarding evidence or other issues pending in the enforcement action by stipulations presented in writing to the judge.

Adopted June 16, 1999

Effective July 7, 1999

§70.106. Default Order.

(a) If any respondent to an executive director's preliminary report (EDPR) or petition initiating an enforcement action fails to timely file an answer as required by §70.105 of this title (relating to Answer), the executive director may file a motion with the chief clerk recommending that a default order be entered against the respondent. The executive director may support the motion with such documentary evidence, including affidavits, exhibits and pleadings, and oral testimony, to demonstrate that the respondent received proper notice under §70.103 or §70.104 of this title (relating to Petitions Which Initiate a Cause of Action and Notice of Executive Director's Preliminary Report) of the pleading initiating the cause of action; and that the respondent failed to timely file an answer under §70.105 of this title and that the respondent is liable for the violations asserted in the cause of action. The chief clerk will schedule the default order for consideration at a commission meeting under Chapter 10 of this title (relating to Commission Meetings). The executive director may also present documentary evidence and oral testimony regarding the amount of penalties that should be assessed against the respondent. In the motion for default order, or at the hearing on the motion, the executive director may also ask for additional penalties for violations alleged in the EDPR or petition, which have continued from the time of the filing of the EDPR or petition, up to the date of the default order. If the executive director recommends additional penalties for continuing violations, he shall briefly describe, either orally or in writing, the continuing violations and the evidence, circumstantial or otherwise, that form the basis for the allegation that the violations are in fact continuing. The commission may grant the relief recommended in the EDPR or petition, or such other amount as may be justified by the evidence presented by the executive director.

(b) Even though some or all of the parties fail to appear at a contested enforcement case hearing in person or through their duly authorized representatives, the commission may consider fully and dispose of the matter pending if notice has been given in accordance with law.

(c) Upon issuance of a default order, notice of such order shall be given to the respondent in accordance with Texas Government Code, §2001.142.

(d) The effective date of a default order shall be the date on which the order is signed by the commission or the executive director.

Adopted December 9, 2015

Effective December 31, 2015

§70.107. Enforcement Hearings.

If required by law, an enforcement hearing shall be held before any final enforcement order is issued. In cases for which an enforcement hearing is not required by law to be held before an enforcement order is issued, the commission may elect to hold a hearing, on its own motion, or upon the request of the executive director, before issuing a final enforcement order or direct SOAH to hold such a hearing. In those cases for which an enforcement hearing is not required by law to be held before an enforcement order is issued, or for which procedures for an enforcement hearing are not specifically prescribed by rule or statute, the commission may elect to have SOAH hold such hearings under the commission's rules, including the procedures established by this chapter.

Adopted May 8, 1996

Effective June 6, 1996

§70.108. Contested Enforcement Case Hearings To Be Held by SOAH.

In a contested enforcement case, unless the commission chooses to hear the case itself, SOAH shall have the delegated authority to preside over the case under Chapter 80 of this title (relating to Contested Case Hearings).

Adopted May 8, 1996

Effective June 6, 1996

§70.109. Referral to SOAH.

Not less than 30 days after the respondent has filed an answer under §70.105 of this title (relating to answer), either the respondent or the executive director may request that the chief clerk refer the case to SOAH for a contested enforcement case hearing. The parties may request this referral by filing a letter with the chief clerk and serving that letter on the other parties. If the chief clerk receives authorization to refer a case to SOAH, the chief clerk shall refer the case to SOAH under §80.5 of this title (relating to Referral to SOAH).

Adopted May 8, 1996

Effective June 6, 1996

Derivation Table
Rule Log No. 95123-263-AD
Procedural Rules
Adopted May 8, 1996
Effective June 6, 1996

Chapter 70 - Enforcement
Subchapter C: Enforcement Referrals to SOAH

This table tracks sections during and after rule revisions. The column on the left lists the current sections prior to the revision. The column on the right lists where the section is proposed to end up in the final adoption.

New Section	Old Section
§70.101	§337.23
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§70.103	§337.25
§70.104	§337.26
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