ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 7. PESTICIDES

SUBCHAPTER H. STRUCTURAL PEST CONTROL SERVICE

The Texas Department of Agriculture (Department or TDA) adopts the repeal of the following Divisions of Subchapter H, Chapter 7: Division 1, §§7.112 - 7.114; Division 2, §§7.121 - 7.129, §7.131, §§7.133 - 7.135; Division 3, §§7.142 - 7.149, §7.153, and §7.156; Division 5, §§7.172 - 7.178; Division 6, §7.192 and §7.194, without changes to the proposal in the November 10, 2017 issue of the *Texas Register* (42 TexReg 6268). Further, the Department adopts new Division 1, §7.114, without changes; Division 2, §§7.121 - 7.136, without changes; Division 3, §§7.142 - 7.149, and §7.156, with changes; Division 5, §§7.172 - 7.178, with changes; and Division 6, §7.192, without changes to the proposal made in the November 10, 2017 issue as published in the *Texas Register.* The adoption is made in order to clarify current requirements related to structural pest control licensing, compliance and enforcement by the Department, and the Structural Pest Control Advisory Committee.

Throughout the rule making process, the Department consulted the Structural Pest Control Advisory Committee (Committee) as required by the Texas Occupations Code, §1951.104. During open Committee meetings, members and industry stakeholders were updated on the rules and the Committee's input was taken into consideration and incorporated into the rule proposal prior to publication. No written comments were received from Committee members after the proposal was published.

The Department received public comments from Mr. Jake Plevelich, on behalf of the National Pest Management Association (NPMA). The Department also received comments from Todd Kercheval, on behalf of the Texas Pest Control Association (TPCA). In addition, the Department also received comments from Grover Campbell, on behalf of the Texas Association of School Boards.

The Department recognizes NPMA and TPCA's concerns that the rule proposal process was burdensome, as the rules were repealed in whole and proposed as new. However, amendments and changes to some sections resulted in the reorganization and renumbering of the rules, which would have resulted in confusion to a reader of the proposal because of extensive bracketing and underlining. Additionally, since rules were added and deleted in Division 2, it was necessary to repeal the rules in their entirety in order to properly number and the new rules in the proposal.

The NPMA and TPCA have requested delayed implementation of the rules in order to ensure affected industry members have time to understand and comply with required changes. The Department provides extensive compliance assistance following any rule change, and will do so here. TDA will provide technical assistance to industry, applicants and licensees as long as necessary, upon request. TDA is confident that, with the assistance of stakeholders and TDA, applicants and licensees will develop a good understanding of the new rules. Accordingly, TDA declines to delay the implementation of the rules, and has filed this adoption so that the rules will become effective 20 days from the date of filing.

TPCA members commented that the new requirement to maintain all records for two calendar years following the calendar year in which the record was created ("two calendar year requirement") will increase costs by requiring new and/or additional recordkeeping and storage. In consideration of industry's comments, the Department has decided to narrow and revise the proposed rules so that the two calendar year requirement applies only to sections regarding verifiable training records for apprentices and technicians, and continuing education for certified applicators. Division 3, §7.144, Division 5, §7.173 and §7.174, along with §7.176 and §7.178, have been revised to mirror the previous requirement that records be maintained for two years total.

DIVISION 1. GENERAL PROVISIONS

4 TAC §§7.112 - 7.114

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

The code affected by the adoption is Occupations Code, Chapter 1951.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2017.

TRD-201705281
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: January 9, 2018
Proposal publication date: November 10, 2017
For further information, please call: (512) 463-4075

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DIVISION 2. LICENSES

4 TAC §§7.121 - 7.129, 7.131, 7.133 - 7.135

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

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DIVISION 3. COMPLIANCE AND ENFORCEMENT

4 TAC §§7.142 - 7.149, 7.153, 7.156

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

The code affected by the adoption is Occupations Code, Chapter 1951.

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DIVISION 5. TREATMENT STANDARDS

4 TAC §§7.172 - 1.178

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DIVISION 6. STRUCTURAL PEST CONTROL ADVISORY COMMITTEE

4 TAC §7.192, §7.194

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

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SUBCHAPTER H. STRUCTURAL PEST CONTROL SERVICE

DIVISION 1. GENERAL PROVISIONS

4 TAC §7.114

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

The code affected by the adoption is Occupations Code, Chapter 1951.

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DIVISION 2. LICENSES

4 TAC §§7.121 - 7.136

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

The code affected by the adoption is Occupations Code, Chapter 1951.

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DIVISION 3. COMPLIANCE AND ENFORCEMENT

4 TAC §§7.142 - 7.149, 7.156

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

The code affected by the adoption is Occupations Code, Chapter 1951.

§7.142. Notice of Employment or Termination.

(a) It shall be the duty of the business licensee or certified noncommercial applicator to inform the Department in writing of its employment and/or termination of all licensees and apprentices.

(b) Notice of employment of all licensees and apprentice registrations must be received by the Department within ten (10) days of the date of employment and must include the full name and license number of the employee, if applicable, the date of employment, and the facility location where the employee training records will be maintained, and other information as may be required.

(c) Notice of termination must include the former employee's name, license number and date of termination, and must be received by the Department within ten (10) days of the date of termination.

§7.143. Employee Supervision.

(a) The responsible certified applicator is responsible for the supervision and training of all licensed or registered personnel and the handling, storage and use of pesticides and devices by all employees of a pest control business.

(b) In order to provide adequate supervision, the responsible certified applicator or designated certified applicator must be physically present to give verbal instructions to an apprentice at least three (3) days a week and to a technician at least one (1) day a week. The responsible certified applicator employed by the business must also be available during business operating hours for questions and instructions, as needed.

(c) Apprentices shall not perform pest control services without physical supervision until they have completed all classroom training, required on-the-job training, have demonstrated proficiency, and verification has been entered in their training records by a licensed applicator.

(d) The business license holder, and the responsible certified commercial applicator or certified noncommercial applicator shall be responsible for actions of employees when they are performing pest control operations.

§7.144. Pest Control Use Records.

(a) The responsible certified applicator or certified noncommercial applicator shall ensure that correct and accurate records of all uses of pesticides and pest control devices registered with the EPA and the Department, including those pesticides that have been exempted from registration by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, Section 25b), are maintained for a period of two (2) years. Pest records must be kept on the premises of the business facility location or, in the case of a certified noncommercial applicator, the employer's premises. The records must include, but are not limited to:

(1) the billing name and address of the customer, or the employer for whom a noncommercial applicator is working;

(2) service address where the pesticides and/or devices were used, except that for utility pole re-treatments, records shall be kept for the location of each pole treated;

(3) name of pesticides or pest control devices used or EPA registration number;

(4) total amounts of each pesticide applied where the percentage of active ingredient was not changed (ready to use pesticides);

(5) pest control devices used and total number of each device;

(6) the mixing rate and total amount of material applied or the percentage of active ingredient(s) and total amount of material applied for manufacturer's formulations that are mixed with water or other material, if applicable;

(7) the target pest or purpose for which the pesticides or devices were used;

(8) date the pesticides or pest control devices were used; and

(9) the name, and license number of the person(s) receiving training, supervising, and applying pesticides or using pest control devices and the TPCL number (and letter if applicable) of the commercial business for which they are performing structural pest control services.

(b) For termite treatments, records must include:

(1) the appropriate unit of measurement of the area treated per application site, i.e. square feet;

(2) if a physical barrier is used, the appropriate unit of measurement (square foot or linear foot) of the physical barrier must be recorded and a diagram describing the installation will be provided; and

(3) for commercial preconstruction treatments other than baits, baiting systems, wood applied termiticide products, or physical barriers, the number of application tanks which were in use for the treatment, the capacity, in gallons, of each application tank, and the start and stop time for the treatment.

(c) These records shall be made available to the Department upon written or verbal request.

§7.145. Contracts and Invoices.

(a) Each written contract, warranty, service agreement, termite disclosure document, or guarantee of a business regulated by the Department must contain on the face of the document the business name, business license number (and letter if applicable), physical address or mailing address, telephone number, and the jurisdiction statement: "Licensed and regulated by: Texas Department of Agriculture, P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481, Fax (888) 232-2567."

(b) The business name, business license number (and letter if applicable), telephone number, and physical address or mailing address must be on the face of any invoice.

(c) The requirements in subsections (a) and (b) of this section must be legible and print shall be in at least 8-point type.

§7.146. Pest Control Sign.

(a) A pest control sign must be provided by the licensee to a residential rental property owner or manager at least 48 hours prior to a planned indoor treatment at a residential rental property with five (5) or more rental units.

(b) A pest control sign must be provided by the licensee to the employer or building manager at least 48 hours prior to a planned indoor treatment at a workplace.

(c) A pest control sign must be provided by the licensee to the chief administrator, IPM Coordinator, or building manager at least 48 hours prior to a planned indoor treatment at a hospital, nursing home, hotel, motel, lodge, warehouse, food-processing establishment, school or educational institution, or day care center.

(d) A person may not be considered in violation of this section if the space to be treated is vacant, unused, and unoccupied, or if extenuating circumstances require an emergency treatment.

(e) Each pest control sign must be at least 8 1/2 inches by 11 inches in size and contain the required information with the first line in a minimum of 24-point type (one-fourth inch) and all remaining lines in a minimum of 12-point type (one-eighth inch). The addition of advertising and logos to the sign is permissible to the extent that such advertising does not interfere with the purpose of public notification of a pest control treatment. A standard sign in Spanish is available from the Department upon request. The sign shall appear in a format approved by the Department. The text and format of the sign is available on the Structural Pest Control Service website at: http://www.TexasAgriculture.gov/spcs, or by contacting the Texas Department of Agriculture, P.O. Box 12847, Austin, TX 78711-2847, (866) 918-4481.

(f) In the space marked "For more information call or contact," the telephone number to obtain information on the pesticide(s) used must be listed, such as the contact number for the apartment manager, building manager, IPM Coordinator, or pest control operator.

(g) In the space marked "phone number of hotline for pesticide information," the following wording must be used: National Pesticide Information Center 1-800-858-7378.

(h) If a workplace has its own pesticide information center, the workplace center telephone number may be listed rather than the information in subsection (g) of this section.

§7.147. Consumer Information Sheet.

(a) For an indoor treatment at a private residence that is not a rental property, the certified applicator or technician must make the consumer information sheet available to the owner of the residence.

(b) For an indoor treatment at a residential rental property with less than five (5) rental units, the certified applicator or technician must make the consumer information sheet available to each resident, upon request, at the time of each treatment.

(c) For an indoor treatment at a residential rental property with five (5) or more rental units, the certified applicator or technician must make the consumer information sheet available to the owner or manager of the complex. The certified applicator or technician must also supply the owner or manager with a pest control sign. The owner or manager or an employee or agent of the owner or manager, other than the certified applicator or technician, must notify residents who live in direct or adjacent areas of the treatment by:

(1) posting the sign in an area of common access to residents at least 48 hours before each planned treatment; or

(2) distributing application information consistent with §7.146 of this title, relating to Pest Control Sign, at least 48 hours before each planned treatment by leaving the sign on the front door of each unit or in a conspicuous place inside each unit.

(d) For an indoor treatment at a workplace, the certified applicator or technician must make the consumer information sheet available and supply a pest control sign to the employer or the building manager. The employer or the building manager or an employee or agent of the owner or manager, other than the certified applicator or technician, must notify individuals at the workplace of the date of the planned treatment by:

(1) posting the sign in an area of common access that the employees are most likely to see at least 48 hours before each planned treatment; and

(2) making available the consumer information sheet to any individual working in the building on request of the individual if the request is made during normal business hours.

(e) For an indoor treatment at a building that is a hospital, nursing home, hotel, motel, lodge, warehouse, food-processing establishment, school or educational institution, or a day care center, the certified applicator or technician must make available the consumer information sheet and a pest control sign to the chief administrator, IPM Coordinator, or building manager. The chief administrator, IPM Coordinator, or building manager must notify the individuals who work or reside in the building of the treatment by:

(1) posting the sign in an area of common access that the individuals are likely to check at least 48 hours before each planned treatment; and

(2) making available the consumer information sheet to any individual working or residing in the building on request of the individual.

(f) The Department's consumer information sheet must be used. Copies of the consumer information sheet are available from the Department in English and Spanish on the Structural Pest Control Service website at: http://www.TexasAgriculture.gov/spcs/, or by contacting the Texas Department of Agriculture, P.O. Box 12847, Austin, TX 78711-2847, (866) 918-4481. The Department's consumer information sheet may be copied and used in accordance with this section.

(g) The pre-notification requirements of §§7.146-7.148 of this title are waived if the customer and certified applicator sign a statement attesting to the fact that an emergency exists which requires immediate treatment. If such an emergency exists, the consumer information sheet must be made available by the licensee. The statement must be kept on file with the pest control use records. If the customer is not available to sign a statement at the time of treatment, that shall be recorded in the use records along with the customer's name and telephone number. An emergency is defined as an imminent hazard to health. An emergency treatment is limited to the localized area of the emergency.

§7.148. Responsibilities of Unlicensed Persons for Posting and Notification.

(a) Owners or managers of residential rental properties with five (5) or more units must:

(1) post a pest control sign at least 48 hours before the planned indoor treatment in an area of common access to residents; or

(2) distribute the application information consistent with §7.146(e) of this title, relating to Pest Control Sign, to each unit planned to be treated and each unit adjacent to those planned to be treated or in an adjacent or area of common access at least 48 hours before the planned time of treatment; and

(3) make the consumer information sheet available upon request.

(b) Employers, building managers, IPM Coordinators, and chief administrators of workplaces, hospitals, nursing homes, hotels, motels, lodges, warehouses, food-processing establishments, school or educational institutions, and day care centers must post a pest control sign in an area of common access at least 48 hours prior to each planned indoor treatment and make a consumer information sheet available to any individual working or residing in the building upon the request of that individual.

(c) Chief administrators or the IPM Coordinators of schools or educational institutions and day care centers must notify the parents or guardians of children attending the facility in writing that pesticides are periodically applied indoors and outdoors, and that information on the times and types of applications and prior notification is available upon request. Such notification must be made at the time of the students' registration. Telephonic, written, or electronic notification of planned applications will meet the notification requirements.

(d) The 48 hour pre-notification requirements of subsections (a) and (b) of this section may be waived if an emergency exists and the customer and certified applicator sign a statement attesting to the fact that an emergency exists that requires immediate treatment. The statement must be kept on file with the pest control use records at the business license location. Certified noncommercial applicators may attest to an emergency by signing a statement attesting to the emergency and must keep the statement on file with the pest control use records. An emergency is defined as an imminent hazard to health and emergency treatment is limited to the localized area of the emergency.

(e) A person may not be considered in violation of this section if a pest control sign is removed by an unauthorized person or if the space to be treated is vacant, unused and unoccupied at the time of treatment.

§7.149. Inspections.

Each licensed pest control business shall be inspected at least once in the business's first year of receiving a license and at least every four (4) years thereafter. School districts will be inspected at least once every five (5) years. The Department may waive these requirements due to Department staff availability, budgetary constraints, inspection trends, or operational efficiencies. Businesses and school districts demonstrating a lack of compliance with Department rules may be inspected more frequently than every four (4) years for businesses and every five (5) years for school districts based on risk using the following elements of consideration:

(1) prior violations;

(2) prior inspection results; and

(3) prior complaints.

§7.156. Entry and Access.

(a) The Department may conduct investigations and inspections of structural pest control activities involving any person in this state to determine compliance with the SPCA, and Department rules.

(b) In conducting investigations, the Department may:

(1) enter the premises of a licensee, business, or facility during normal business hours to examine records, question witnesses, inspect pesticides and equipment used for pest control, and collect samples;

(2) enter premises where individuals are performing or are suspected of performing pest control operations to inspect the use of pesticides and devices, check employee credentials, collect samples, identify pests, and inspect equipment; and

(3) on public property, inspect pesticides and equipment, and question employees of persons conducting or suspected of conducting structural pest control activities.

(c) Any licensee who interferes with an employee of the Department attempting to enter or access property, equipment, or records for purposes of this chapter, shall be subject to disciplinary action up to and including revocation of licenses and/or registrations.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Assistant General Counsel
Texas Department of Agriculture
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DIVISION 5. TREATMENT STANDARDS

4 TAC §§7.172 - 7.178

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

The code affected by the adoption is Occupations Code, Chapter 1951.

§7.172. Subterranean Termite Post Construction Treatments.

(a) All pesticides used for post construction termite treatments must be registered with the EPA and the Department. All pesticide liquid applications must be made by using the application rates and methods and by following the precautionary statements on the labeling of the pesticide being used. All termite baiting system applications must be made using the methods and following the precautionary statements on the product label.

(b) A treatment of less than the entire structure will be permitted to accommodate the customer's requests to allow the treating company to perform the job in a manner prescribed by their professional evaluation and label requirements.

(c) All treatments must strictly adhere to the procedures outlined in the disclosure statement required in §7.174 of this title, relating to Subterranean Termite, Drywood Termite and Related Wood Destroying Insect Treatment Disclosure Documents. A deviation will be permitted when unexpected circumstances occur necessitating a change in the treatment and the applicator responsible for the treatment provides the customer with a written addendum to the contract or disclosure documents at the completion of the treatment.

(d) Upon completion of a termite treatment, or installation of a baiting system, the company responsible for providing the treatment must leave a durable sticker of not less than one (1) inch by two (2) inches in size on the wall adjacent to the water heater, electric breaker box, or beneath the kitchen sink giving the name, address, and telephone number of the business licensee, name and license number of the applicator, product used, the date of the treatment or installation of the baiting system, and a statement that the notice should not be removed.

(e) The business license holder or certified noncommercial applicator must keep and maintain a correct and accurate copy of the Termite Treatment Disclosure Documents for a period of two (2) years.

§7.173. Subterranean Termite Pre-Construction Treatments.

(a) Subsections (b) - (f) of this section do not apply to baits or baiting systems and subsections (c) - (d) of this section do not apply to wood applied termiticide products.

(b) All pesticides used for pre-construction termite treatments must be registered with the EPA and the Department. All pesticide liquid applications must be made by using the application rates and methods and by following the precautionary statements on the labeling of the pesticide being used.

(c) For a full treatment, the entire structure must be treated to provide a continuous horizontal and vertical pesticide barrier. The final treatment shall be performed within thirty (30) days of notification of completion of landscaping or one (1) year from the date of completion of construction, whichever comes first. However, when construction has proceeded to the point that all areas cannot be treated before the company providing the treatment is called to perform the application, a partial treatment is permitted if the owner of the structure or the person in charge of the construction and the licensee for the pest control company sign a statement attesting to the construction conditions, and attach it to the contract with an amended diagram or blueprint or building plat showing the exact areas to be treated and send copies to the owner of the property within seven (7) days of the application. A copy of the disclosure with an amended diagram or blueprint or building plat showing the exact areas to be treated must be made available to the Department upon request. A partial treatment will also be permitted if allowed by label directions and if the licensee proposing the treatment issues a Termite Treatment Disclosure Document prior to the treatment.

(d) In order to comply with subsection (c) of this section, it will be necessary to return to the pretreatment site after the slab has been poured and/or piers and support beams have been placed to complete the treatment for the vertical barrier.

(e) A primary treatment of the wood framing (such as a borate treatment) must follow full label application instructions and must be performed with a termiticide that has specific label instructions to be used as a primary treatment to offer protection for prevention of subterranean termites in new construction. This treatment may be used in lieu of a full, partial, or bait treatment and must include application instructions to exposed surfaces of wood framing with exterior sheathing in place but before any walls are enclosed to a height of not less than two (2) feet above a contact with a slab foundation or a (2) foot horizontal and vertical treatment of wood above contact with a concrete crawlspace or basement foundation. Label instructions must provide application instructions for the prevention of subterranean termite intrusion and tubing onto non-cellulose areas around bath-traps, plumbing penetrations and concrete foundation areas.

(f) Notice of all pre-construction treatments with contracts requiring treatment of a structure other than a single family dwelling must be submitted between the hours of 6:00 a.m. and 9:00 p.m. using the Department's designated notification system at least four (4), and no more than twenty-four (24), hours prior to a termiticide application. The licensee must provide address and site location, type of treatment (partial or full), date and time of treatment, approximate and appropriate unit of measurement used under contract, and the name, license number, and physical address of the pest control business. If the treatment is cancelled, notice of cancellation must be sent using the Department's designated notification system within one (1) hour of the time the pest control business learns of the cancellation.

(g) For all commercial pre-construction treatments other than baits, baiting systems, wood applied termiticide products or physical barriers, the licensee must maintain records of the appropriate unit of measurement treated per application site, amount of termiticide used

per application site, rate at which termiticide is mixed for each application site, number of application tanks which were in use for the treatment, the capacity, in gallons, of each application tank, and the start and stop time for the treatment. The business license holder or, in the case of the certified noncommercial applicator, the applicator must keep and maintain a correct and accurate copy of the pre-construction treatment and disclosure records for a period of two (2) years. A baiting system may be used in lieu of a pre-construction treatment if installed within thirty (30) days of notification of completion of landscaping. All termite baiting system applications must be made using the methods and following the precautionary statements on the product label. If a physical barrier is used, the appropriate unit of measurement of the physical barrier must be recorded and a diagram describing the installation must be provided.

§7.174. Subterranean Termite, Drywood Termite and Related Wood Destroying Insect Treatment Disclosure Documents.

(a) As part of each written estimate submitted for a subterranean termite, drywood termite, powder post beetle, wood boring beetle or related wood destroying insect (excluding carpenter ants) treatment to a customer, the pest control business proposing the treatment must present the prospective customer or designee with disclosure documents. Verbal estimates may be provided to customers to advise of a general range of treatment costs, but a written estimate must be provided before beginning a treatment. Written estimates for termite and related wood destroying insect treatments and treatment disclosure documents shall only be made by licensed technicians or certified applicators licensed in the termite category.

(b) Each subterranean termite, drywood termite, powder post beetle, wood boring beetle or related wood destroying insect (excluding carpenter ants) treatment disclosure document must include, but is not limited to:

(1) the business name, address, phone number, TPCL number, and the date the written estimate was submitted;

(2) the address or physical location of the structure to be treated;

(3) a diagram or blueprint or building plat and description of the structure or structures to be treated to include the following:

(A) numerical perimeter measurements of the entire structure as accurately as practical;

(B) areas of active or previous termite activity;

(C) areas to be treated;

(D) known wood destroying insect activity;

(E) areas of conditions conducive to infestation by wood destroying insects; and

(F) construction details and other information about construction relevant to the treatment proposal;

(4) a label for any pesticide recommended or used. If a physical barrier is used, the appropriate unit of measurement of the physical barrier must be recorded and a diagram describing the installation must be provided;

(5) the complete details of the warranty provided, if any;

(6) the signature of approval on the disclosure documents by a certified applicator or licensed technician in the termite category employed by the company making the proposal;

(7) the concentration of termiticide used or minimum number of bait stations to be installed;

(8) for subterranean termite post construction treatments, the following statements and definitions in at least 8-point type:

(A) A termite treatment may be a partial treatment or spot treatment using termiticide, approved physical barriers, or a baiting system. These types of treatments are defined as follows:

(i) Partial Treatments. This technique allows a wide variety of treatment strategies but is more involved than a spot treatment (see definition below). Ex.: treatment of some or all of the perimeter, bath traps, expansion joints, stress cracks, portions of framing, walls and bait locations.

(ii) Spot Treatments. Any treatment which concerns a limited, defined area less than ten (10) linear or square feet that is intended to protect a specific location or "spot." Often there are adjacent areas that are susceptible to termite infestation which are not treated.

(iii) Baiting Systems. This type of treatment may include interior and/or perimeter placement of monitoring or baiting systems along with routine inspection intervals. The baiting technique may include one (1) or more locations as prescribed by the product label and instructions.

(iv) Barriers. If a physical barrier is used, the square footage of the physical barrier must be recorded and a diagram describing the installation will be provided.

(B) The types of treatment defined may apply to construction types as follows:

(i) Pier and Beam. Treatment of the outer perimeter including porches, patios and treatment of the attached garage. In the crawl space, treatment would include any soil to structure contacts (piers and/or pipes).

(ii) Slab Construction. Treatment of the perimeter and all known slab penetrations as well as any known expansion joints or stress cracks.

(9) for all termite treatments the following statement in at least 8-point type: For all treatments there will be a diagram showing exactly what will be treated. Treatment specifications and warranties for those treatments may vary widely. Review the pesticide label provided to you for minimum treatment specification. If you have any questions, contact the pest control company or the Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711-2847. Phone (866) 918-4481;

(10) for any pre-construction treatment, the "Proper Pre-Construction Subterranean Termite Treatments - A Guide for Builders and Consumers" guide, must be provided to the contractor or purchaser of the pre-treatment service prior to the beginning of the treatment. The text and format of the termite pre-treatment disclosure document is available on the Structural Pest Control Service website at: http://www.TexasAgriculture.gov/spcs, or by contacting the Texas Department of Agriculture at the address provided in paragraph (9) of this subsection;

(11) for drywood termite, powder post beetle, wood boring beetle, and other related wood destroying insect treatments the following statements and definitions in at least 8-point type: A drywood termite, powder post beetle, wood boring beetle, or other related wood destroying insect treatment may be a full treatment or spot treatment. These types of treatments are defined as follows:

(A) Full Treatment: A treatment to control 100% of the insect infestation by tarpaulin fumigation or appropriate sealing method. A full treatment by fumigation is designed to eliminate every

insect colony. It should include the infested structure and all attached structures; or

(B) Spot Treatment: Any treatment less than a full treatment by tarpaulin fumigation. This treatment should be considered only when a drywood termite, powder post beetle, wood boring beetle or related insect infestation has a limited and defined area of infestation. Adjacent areas susceptible to dry wood termite, powder post beetle, wood boring beetle or related insect infestations are not treated. Because of the nature of wood destroying insects, these untreated areas may continue to harbor drywood termites, powder post beetle, wood boring beetle, and related insects throughout the structure without detection;

(12) a consumer information sheet described in §7.147 of this title, relating to Consumer Information Sheet; and

(13) The jurisdiction statement, "Licensed and regulated by: Texas Department of Agriculture, P.O. Box 12847, Austin, TX 78711-2847, Phone (866) 918-4481, Fax (888) 232-2567."

(c) For a re-treatment of a property for an existing customer, the pest control business must provide the following before conducting the re-treatment:

(1) the label of the pesticide to be used;

(2) a diagram or updated diagram of the structure showing areas to be treated; and

(3) a consumer information sheet described in §7.147, of this title.

(d) The business license holder or, in the case of the certified noncommercial applicator, the applicator must keep and maintain correct and accurate copies of the Disclosure Documents for a period of two (2) years.

§7.175. Official Wood Destroying Insect Report Inspection Procedures.

(a) Inspections for the purpose of issuing a WDIR must be conducted in a manner consistent with the procedures described in this section by a licensed certified applicator or technician in the termite category. The printed name and registration number or license number of any employees receiving training that are present for the inspection must be listed on the report. The purpose of the inspection is to provide a WDIR regarding the absence or presence of wood destroying insects and conditions conducive to wood destroying insect infestation. The inspection should provide the basis for recommendations for preventive or remedial actions, if necessary, to minimize economic losses. Only for purposes of a Real Estate Transaction Inspection Report, as described in §7.176 of this title, relating to Real Estate Transaction Inspection Reports, there must be visible evidence of active infestation in the structure or visible evidence of a previous infestation in the structure with no evidence of prior treatment to recommend a corrective treatment. The inspection must be conducted so as to ensure examination of all visible accessible areas in or on a structure in accordance with accepted procedures. While such an examination may reveal wood destroying insects, there are instances when concealed infestations and/or damage may not be discovered. Examinations of inaccessible or obstructed areas are not required.

(b) Inaccessible or obstructed areas recognized by the Department include, but are not limited to:

(1) inaccessible attics or portion thereof;

(2) the interior of hollow walls, spaces between a floor or porch deck and the ceiling or soffit below;

(3) such structural segments as porte cocheres, enclosed bay windows, buttresses, and similar areas to which there is no access without defacing or tearing out lumber, masonry, or finished work;

(4) areas behind or beneath stoves, refrigerators, furniture, built-in cabinets, insulation, floor coverings; and

(5) areas where storage conditions or locks make inspection impracticable.

(c) The inspector must describe the structure(s) inspected and include the following:

(1) the address or location;

(2) a diagram showing:

(A) approximate numerical perimeter measurements of the structure as accurately as practical (does not have to be to scale);

(B) construction details needed for clarity of the report;

(C) areas of current wood destroying insect activity;

(D) areas of previous wood destroying insect activity; and

(E) areas of conditions conducive to infestation by wood destroying insects;

(3) inaccessible or obstructed areas, including, but not limited to the areas listed in subsection (b) of this section.

(d) The inspection must include, but is not limited to, the following areas if accessible and unobstructed:

(1) plumbing, which includes:

(A) bathroom;

(B) kitchen;

(C) laundry; or

(D) other specified area, i.e., hot tub, etc.;

(2) window and door frames and sills;

(3) baseboards, flooring, walls, and ceilings;

(4) entrance steps and porches;

(5) exterior of slab or foundation wall;

(6) crawl spaces, which include:

(A) support piers (include stiff legs);

(B) floor joist;

(C) sub floors;

(D) sill plates; and

(E) foundation wall.

(7) fireplace; and

(8) weep holes.

(e) Visible evidence of the following conditions must be reported:

(1) wood destroying insects or signs of current active infestation;

(2) termite tubes or frass;

(3) exit holes or frass from other wood destroying insects;

(4) evidence of previous treatment or infestation;

(5) conditions conducive to wood destroying insect infestation, including but not limited to:

(A) a structure with wood to ground contact;

(B) formboards left in place;

(C) excessive moisture;

(D) wood debris under or around structure;

(E) footing too low or soil line too high;

(F) insufficient clearance in crawl space;

(G) expansion joints or cracks in slab;

(H) decks; or

(6) infestation of other wood destroying insects.

§7.176. Real Estate Transaction Inspection Reports.

(a) All inspection reports issued regarding the visible presence or absence of termites, other wood destroying insects and conditions conducive to infestation of wood destroying insects in connection with a real estate transaction must be made on a form prescribed by the Department. Forms must be maintained in the inspection file.

(b) Lending providers such as the Veterans Administration may require the inspection results on another form. That form is supplemental to the required Department form and must be maintained in the inspection file.

(c) The Department report form includes a space to report conditions consistent with §7.175 of this title, relating to the Official Wood Destroying Insect Report Inspection Procedures, which is available at: http://www.TexasAgriculture.gov/spcs/, or by contacting the Texas Department of Agriculture, P.O. Box 12847, Austin, TX 78711-2847, (866) 918-4481.

(d) For each inspection, copies of the completed form must be prepared for:

(1) the person who ordered the inspection; and

(2) business files of the business license holder issuing the report.

(e) The licensee issuing the report must retain records of inspection reports for a minimum of two (2) years.

§7.177. Posting Notice of Inspection.

(a) Upon completion of an inspection for the purposes of completing a WDIR, the inspector must post a durable sticker on the wall adjacent to the water heater, electric breaker box, or beneath the kitchen sink giving the name and license number of the licensee, the date of the inspection, and a statement that the sticker should not be removed.

(b) It is a violation of this section for any licensee to remove or deface a posted inspection sticker.

§7.178. Structural Fumigation Requirements.

(a) Fumigation of structures to control wood destroying insects or other pests shall be performed only under the direct on-site supervision of a certified applicator licensed in the category of structural fumigation. Direct on-site supervision means that the certified applicator exercising such supervision must be present at the site of the fumigation during the introduction of the fumigant, any reentry prior to aeration, during the initial aeration process and when the structure is released for occupancy.

(b) All motor vehicles used by a licensee or licensee's employees in conducting structural fumigation services, to include the transportation of tarps and fumigants, shall display the TPCL number of the business. The transportation of all fumigants shall be done consistent with label directions.

(c) A licensee licensed in the structural fumigation category may subcontract the performance of a structural fumigation to another licensee licensed in the structural fumigation category. The primary contractor shall notify the customer that the performance of the structural fumigation service will be performed by another properly licensed business other than the primary contractor. This written notification shall be a part of the disclosure documents as a separate statement itself or attached to the disclosure documents, and must be signed and dated by the customer. Both the primary contractor and the subcontractor shall maintain a copy of the disclosure documents issued to and signed and dated by the customer, and the report as described in subsection (l) of this section for a period of two (2) years.

(d) Structural fumigation shall be performed in compliance with all label requirements applicable to state and federal laws and regulations.

(1) During a fumigation, whenever the presence of two (2) persons trained in the use of fumigant is required by the fumigant label, at least one (1) of these persons must be the certified applicator providing direct on-site supervision as described in subsection (a) of this section and the second person must be trained in the necessary safety precautions.

(2) Two (2) trained persons shall be present at each fumigation site during the introduction of the fumigant, any reentry prior to aeration, during the initial aeration process, and if the label requires, until the active aeration period with all operable doors and windows open is completed and the structure is secured for the remaining aeration period.

(3) During these periods of time, two (2) operational Self-Contained Breathing Apparatuses (SCBA) must be present at the fumigation site. Fumigators must have in their possession any keys necessary to unlock secondary locking devices and/or an access device that would allow for immediate access to the structure the entire time the structure is under fumigation.

(4) A trained person in structural fumigation may be a registered apprentice, licensed technician, or certified applicator in the structural fumigation category having been trained in the proper use of a SCBA and clearing devices.

(e) Prior to the release of the fumigant, warning signs shall be posted in plainly visible locations on or in the immediate vicinity of all entrances to the structure under fumigation and shall not be removed until the premises is determined safe for occupancy. Ventilation shall be conducted with due regard for public safety.

(f) Local fire, police, or emergency authorities shall be notified of the structural fumigation prior to introduction of the fumigant. Notification shall be made in writing, by email or by telephone as long as a record is made of the name of the person that was informed and the date and time. The same agency shall be informed that the structure is released for occupancy.

(g) The space to be fumigated shall be vacated by all occupants prior to the commencement of fumigation. The space to be fumigated shall be sealed in such manner to ensure that the concentration of the fumigant released is retained in compliance with the manufacturer's recommendations. Fumigation tarps with puncture holes, tears, rips, or splitting seams must be taped or repaired in such a manner to ensure that the concentration of the fumigant released is retained in compliance with the manufacturer's recommendations.

(h) Warning signs shall be printed in red on white backgrounds and shall contain the following statement in letters not less than two (2) inches in height: "Danger-Fumigation." Signs must also depict a skull and crossbones, not less than one (1) inch in height, the name of the fumigant, the date and time fumigant was introduced, and the name, license number, and telephone number where the certified applicator performing the fumigation may be reached twenty-four (24) hours a day.

(i) On any structure that has been fumigated, the certified applicator responsible for the fumigation shall, immediately upon completion, post a durable sticker on the wall adjacent to the electric breaker box, water heater, or beneath the kitchen sink. This must be a durable sticker not less than one (1) inch by two (2) inches in size. It must have the name and license number of the certified applicator, date of fumigation, fumigant used, and the purpose for which it was fumigated (target pest).

(j) A certified applicator performing the fumigation shall use adequate warning agents with all fumigants that lack such properties. When conditions involving abnormal hazards exist, the person exercising direct on-site supervision shall take such safety precautions in addition to those prescribed to protect the public health and safety. The certified applicator responsible for the fumigation shall visibly inspect the structures to assure vacancy prior to introduction of fumigant.

(k) The certified applicator responsible for the fumigation shall also post a person or persons to guard the location whenever a licensed applicator is not present from the time the fumigant is introduced until the label concentration for aeration is reached. The person posted at the location shall deter entry into the structure by routinely inspecting the structure under fumigation at least once each hour. The person posted at the location shall remain alert and on duty as directed by the certified applicator. The certified applicator responsible for the fumigation shall secure all entrances to the structure in such a manner as to prevent entry by anyone other than the certified applicator responsible for the fumigation. The structure must remain secured by secondary locking devices until the structure is released for occupancy.

(l) For the purpose of maintaining proper safety, establishing responsibility in handling the fumigants, and to ensure a successful fumigation the business performing the structural fumigation shall compile and retain a report for each fumigation job and/or treatment for a period of at least two (2) years. The certified applicator responsible for the fumigation must have a copy of the report at the time of the fumigation. The report for each fumigation job or treatment must contain the following information to be recorded as the fumigation progresses:

(1) name, address and business license number of the pest control business;

(2) name and address of property and owner;

(3) measured cubic feet fumigated;

(4) target pest or pest controlled;

(5) fumigant or fumigants used, EPA registration number and amount;

(6) name of warning agent and amount used;

(7) temperature and wind conditions;

(8) time gas introduced and aerated (date and hour);

(9) name and license number of the certified applicator responsible for the fumigation and providing direct on-site supervision;

(10) list of any extraordinary safety precautions taken;

(11) date and time released for occupancy (signed by certified applicator);

(12) the dates and times local fire, police or emergency authorities were notified;

(13) the identification of clearing devices used; and

(14) proof that the Department was notified of the structural fumigation with the date and time of the notification.

(m) Fumigations for the purpose of controlling wood destroying insects are subject to the provisions of §7.174 of this title, relating to Subterranean Termite, Drywood Termite and Related Wood Destroying Insect Treatment Disclosure Documents.

(n) Every licensee engaged in application of a fumigant is required to use an approved and calibrated clearance device consistent with the fumigant label.

(1) The approved and calibrated clearance device must be used consistently
with the label.

(2) An independent and qualified facility or person must perform calibration of the clearance device not less than annually and anytime it is suspected to be inaccurate. Calibration must be in compliance with the manufacturer's requirements.

(3) Proof of calibration must be kept on file for a period of two (2) years and available for review by the Department. The record of proof for each clearing device shall contain the date of calibration and the name of the independent and qualified facility or person who performed the calibration.

(o) The certified applicator responsible for the fumigation shall be responsible for following label requirements for aeration and clearing of the structure that is being fumigated.

(p) Notice of all fumigations of a structure must be submitted using the Department's designated notification system between the hours of 6:00 a.m. and 9:00 p.m., at least four (4), and no more than twenty-four (24) hours prior to the structural fumigation application. If the structural fumigation is cancelled, notice of the cancellation must be sent using the Department's designated notification system within three hours of the time the pest control company learns of the cancellation. The licensee must provide:

(1) address and site location;

(2) fumigant to be used;

(3) date and time of treatment (for the purposes of this section the time of treatment is when the business conducting the fumigation is scheduled to arrive at the fumigation site);

(4) measured cubic feet under contract;

(5) the name and license number of the business licensee; and

(6) the name and license number of the certified applicator responsible for overseeing the fumigation.

(q) Before an individual may apply for an initial certified applicator's license in the structural fumigation category the following experience requirements must be met:

(1) Attend a forty (40) hour structural fumigation school that has at least sixteen (16) hours of hands on training, and has been approved by the Department; or

(2) Obtain forty (40) hours of on-the-job training with at least sixteen (16) hours of hands on training that is approved by the

Department. Department approved hands-on-training includes the following:

(A) Inspect structure and identify pest(s) prior to fumigation;

(B) Prepare disclosure documents pursuant to the provisions of §7.174, of this title;

(C) Measure structure and calculate volume;

(D) Calculate dosage of fumigant;

(E) Notify local fire, police or emergency authority as appropriate;

(F) Secure materials left inside structure, check pilot lights & appliances;

(G) Tarp, place snakes, or otherwise seal structure for fumigation;

(H) Post the structure and secure entrances to the structure;

(I) Instruct the person (guard) on duty at the site on responsibilities and safety precautions;

(J) Set up equipment including splash pan and fans;

(K) Introduce fumigant and warning agent (if required) to the structure;

(L) Aerate structure;

(M) Take down tarps, remove snakes, remove locks, or otherwise remove sealing material;

(N) Clear the structure;

(O) Store and/or dispose of fumigant containers;

(P) Prepare the report of fumigation required by subsection (l) of this section; and

(Q) Securing the fumigant for transportation consistent with label directions.

(r) Current certified applicators with the structural fumigation category must receive four (4) hours of training per year to maintain their structural fumigation certification. The four (4) hours of training may be classroom or on the job training. Department approved hands-on-training includes the following:

(1) Inspect structure and identify pest(s) prior to fumigation;

(2) Prepare disclosure documents pursuant to the provisions of §7.174 of this title;

(3) Measure structure and calculate volume;

(4) Calculate dosage of fumigant;

(5) Notify local fire, police or emergency authority as appropriate;

(6) Secure materials left inside structure, check pilot lights & appliances;

(7) Tarp, place snakes, or otherwise seal structure for fumigation;

(8) Post the structure and secure entrances to the structure;

(9) Instruct the person (guard) on duty at the site on responsibilities and safety precautions;

(10) Provide onsite supervision during application (only one applicator per company may claim provision of onsite supervision);

(11) Set up equipment including splash pan and fans;

(12) Introduce fumigant and warning agent (if required) to the structure;

(13) Aerate structure;

(14) Take down tarps, remove snakes, remove locks, or otherwise remove sealing material;

(15) Clear the structure;

(16) Provide onsite supervision during aeration and clearing (only one applicator per company may claim provision of onsite supervision);

(17) Store and/or dispose of fumigant containers;

(18) Prepare the report of fumigation required by subsection (l) of this section; and

(19) Securing the fumigant for transportation consistent with label directions.

(s) In addition to the four (4) hours of training per year, certified applicators must acquire one (1) CEU per year in structural fumigation to maintain the certification following initial testing.

(t) A verifiable performance/training records form will be made available to the Department upon request. These performance/training records forms shall be kept on a format prescribed by the department in the business file for at least two (2) years. The responsible certified applicator for the company that performed the training must certify in the training records of each certified applicator that the certified applicator has completed the required training and has demonstrated competency. The verifiable performance/training records form will be made available to the certified applicator or technician upon written request.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2017.

TRD-201705289
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: January 9, 2018
Proposal publication date: November 10, 2017
For further information, please call: (512) 463-4075

DIVISION 6. STRUCTURAL PEST CONTROL ADVISORY COMMITTEE

4 TAC §7.192

The adoption is made pursuant to the Texas Occupations Code, Chapter 1951, which designates the Department as the sole authority for licensing persons engaged in the business of structural pest control, and provides the Department with the authority to adopt rules to implement and enforce related laws and regulations.

The code affected by the adoption is Occupations Code, Chapter 1951.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2017.

TRD-201705290
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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 10. UNIFORM MULTIFAMILY RULES

SUBCHAPTER D. UNDERWRITING AND LOAN POLICY

10 TAC §§10.301 - 10.306

The Texas Department of Housing and Community Affairs (the "Department") adopts the amendments to 10 TAC Chapter 10, Subchapter D, §§10.301 - 10.306, concerning Underwriting and Loan Policy. Section 10.301 and §§10.304 - 10.306 are adopted without changes to text as published in the October 27, 2017, issue of the *Texas Register* (42 TexReg 5923) and will not be republished. Sections 10.302 and 10.303 are adopted with changes and will be republished.

REASONED JUSTIFICATION. The Department finds that the adoption of the sections will result in a more consistent approach to governing underwriting and analysis activity and to the awarding of funding or assistance through the Department and to minimize repetition. The comments and responses include both administrative clarifications and corrections to the Underwriting and Loan Policy rules based on the comments received. After each comment title numbers are shown in parentheses. These numbers refer to the person or entity that made the comment as reflected at the end of the reasoned response. If comment resulted in recommended language changes to the proposed Underwriting and Loan Policy as presented to the Board in October, such changes are indicated.

SUMMARY OF PUBLIC COMMENT AND STAFF RECOMMENDATIONS.

Public comments were accepted through November 27, 2017, with comments received from (1) Texas Affiliation of Affordable Housing Providers (TAAHP), (2) Darrell Jack, Apartment MarketData, (3) Rural Rental Housing Association (RRHA)

1. §10.302(d)(2)(J) Other Operating Expenses (3)

COMMENT SUMMARY: Commenter (3) suggests that the "Return To Owner" (RTO) as determined and limited by the United States Department of Agriculture (USDA) be included as an operating expense for purposes of calculating the Debt Coverage Ratio. The rationale is that USDA controls the RTO and effectively pays and considers the RTO in establishing the rents paid by USDA under rental assistance agreements. Because USDA considers the RTO as an expense item and TDHCA does not, the Debt Coverage Ratio under §10.302(d)(4)(D) is in many cases exceeds the 1.35:1 times limitation. In most cases this results in a reduction to tax credit allocations on USDA properties. Commenter states that the treatment of the RTO in this manner does not result in over subsidizing the transaction because of control by USDA of the operating budgets and RTO.

STAFF RESPONSE: Staff agrees that the different treatment of the RTO by the Department and USDA creates inconsistencies in the operating assumptions used to determine feasibility, debt coverage ratios and subsidy amounts. These inconsistencies are causing, in some cases, less tax credit equity to be made available for the rehabilitation of some of the USDA financed/subsidized properties. The RTO is controlled by USDA and included as an operating expense in their budget, which is then used for the determination of rents. TDHCA excludes the RTO as an operating expense. Use of the higher USDA rents and the Department's lower operating expenses many times results in a DCR above the 1.35 times maximum (sometimes significantly above). The high DCR requires the Department to assume additional debt in the tax credit sizing which lowers the tax credit equity. While staff agrees that a change to the rule to address this issue is likely warranted, a change now represents a new concept that was not included in the draft rule published for public comment. Staff will work with the interested parties and consider a proposed rule change for the 2019 rules.

Staff recommends no changes based on this comment at this time.

2. §10.302(d)(4)(D) Acceptable Debt Coverage Ratio (1)

COMMENT SUMMARY: Commenter (1) suggests that the calculated minimum debt coverage ratio should be applied to must-pay debt only and not to loans where repayment is subject to available cash flow. This includes cash flow loans made by TDHCA. Additionally, the commenter suggests that the 2017 language allowing Direct Loans to be reclassified as grants should be retained.

STAFF RESPONSE: The minimum debt coverage ratio is a stress test and risk assessment tool used to evaluate the ability of the net operating income generated by a property to service and pay all of the Owner's obligations including debt service. The minimum debt coverage ratio is only applied to "priority or foreclosable lien" financing. If a loan has contingent or cash flow repayment provisions but is foreclosable then it is generally included in the DCR because of the repayment requirements. If a loan is cash flow only without monetary default or foreclosure provisions then it is not included in the debt coverage ratio test.

The Department fully expects repayment on its Direct Loans except for loans otherwise intended to be forgivable pursuant to the relevant NOFA. Applications are underwritten pursuant to all NOFA provisions and the Direct Loan rules. Cash flow loans are generally required for subordinate financing to FHA senior debt. In most cases the funds being used by the Department to make Direct Loans originate from funds received from repayment on existing loans. Therefore, the analysis of the risk of non-repay-

ment is very important to the program's ability to make future loans.

Staff recommends no changes based on this comment.

3. §10.302(i)(1) Gross Capture Rate (1), (2)

COMMENT SUMMARY: Commenter (1) requests an increase in the Gross Capture Rate from 10% to 15% for both elderly and general population developments in larger jurisdictions (populations above 500,000). This change is requested in order to account for high growth areas where available census data does not accurately reflect the pace of population growth. Commenter (2) suggests an increase in the Gross Capture Rate from 10% to 15% on general population, Tax-Exempt Bond Developments in MSAs with populations greater than 1 million where the localized occupancy rates are high.

STAFF RESPONSE: There are many sub-markets within larger cities that are experiencing high growth. Not all sub-markets within the larger cities are experiencing this growth. The data sources currently used to calculate demand do not reflect the most current conditions in some high-growth areas. The 10% capture rate is proving to be a limiting factor for development in areas where it is apparent that demand exists but the data sources are lagging behind actual demand. Staff believes this situation is most relevant to Tax-Exempt Bond Developments because they are generally large properties going into areas where demand is understated either due to lagging growth data or in areas where qualifying residents don't currently reside simply due to the lack of affordable housing in the area. Staff has not seen capture rate issues on smaller developments including 9% transactions in any MSA. Staff agrees that increasing the capture rate on Tax-Exempt Bond Developments in certain localized areas of high growth and high demand is warranted. As a result, Staff proposes changes to paragraph B to increase the capture rate in these situations. (Page 23 of 47)

(B) is outside a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 10 percent *(or 15 percent for Tax-Exempt Bond Developments located in an MSA (as defined in the HTC Site Demographics Characteristics Report) with a population greater than 1 million if the average physical occupancy is 92.5% or greater for all stabilized affordable housing developments located within a 20 minute drive time, as supported by the Market Analyst, from the subject Development);* or

4. §10.303(d)(9)(E)(i)(III) Household Size-Appropriate and §10.303(d)(9)(E)(iii)(I) Household Size

COMMENT SUMMARY: Commenter (1) requests a change in the occupancy standards used in the market analysis from 1.5-persons per bedroom to 2-persons per bedroom for general population developments to be consistent with HUD occupancy standards. Additionally, commenter states that this standard is consistent with standards used by many management companies.

STAFF RESPONSE: The 1.5-persons per bedroom is the assumed occupancy used by Section 42 for determining rent limits. HUD uses a 2-person per bedroom as an occupancy standard. TDHCA's occupancy standards under §10.610(b)(1)(C) require that owners provide written policies and procedures containing tenant selection criteria using a minimum of 2 persons per bedroom unless otherwise constrained by local code or occupancy standards. From a market analysis perspective, the increase from 1.5 persons to 2 persons per bedroom will lower the individual unit capture rates on 2-bedroom and 4-bedroom units. As a result, Staff proposes changes throughout §10.303(d) to reflect the 2-person occupancy standard where applicable to be consistent with other rules. (Pages 31 and 32 of 47)

§10.303(d)(9)(E)(i)(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by number of Bedrooms proposed and rent restriction category based on *2* persons per Bedroom *or one person for Efficiency Units.*

§10.303(d)(9)(E)(i)(IV)(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on *2* persons per Bedroom (round up) or one person for Efficiency Units.

§10.303(d)(9)(E)(iii)(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size.

§10.303(d)(9)(E)(iii)(II)(-b) appropriate household size is defined as *2* persons per Bedroom (rounded up); and

§10.303(d)(9)(E)(iii)(III)(-b) appropriate household size is defined as *2* persons per Bedroom (rounded up); and

5. §10.303(d)(8) Secondary Market Area (1)

COMMENT SUMMARY: Commenter (1) requests that TDHCA retain the Secondary Market Area ("SMA") as part of the Underwriting process for projects for which expansion of the Primary Market Area is needed to justify demand originating from the SMA. Commenter states that the need for using an SMA should be at the discretion of the Market Analyst based on appropriate supporting documentation such as job growth, commute distances, lack of affordable housing supply, high occupancy rates, loss of affordable housing inventory, attributes of the Development's location or features that will draw prospective tenants to the area, and other housing issues in general. Commenter states that the 25% limitation of demand coming from an SMA seems reasonable and they are not requesting a change to that percentage of Gross Demand.

STAFF RESPONSE: Very few market studies are currently using an SMA to justify demand. When used, staff believes most SMAs used by Market Analysts are excessively large based on staff's research of where demand actually comes from. In some cases, the SMA suggests that significant demand will come from hundreds of miles away from the subject site. Data collected during file reviews conducted by the Compliance Division suggests that most residents move from within the zip code in which they currently reside.

Current rule requires the Market Analyst to justify demand coming from an SMA. The proposed rule assumes that 10% of the demand indicated in a PMA, as determined by the Market Analyst, will be coming from outside the PMA and automatically included as additional demand. Additionally, the proposed rule eliminates the requirement that any unstabilized developments outside the PMA be considered as additional supply. In most cases, because Market Analysts are not using SMAs, capture rates will be lower than currently being calculated because of the automatic consideration of this additional demand. Other changes in the proposed rule also work to use a more realistically determination of demand and capture rates, including the change to the person per bedroom limitation and the revised treatment of stabilized developments in the PMA. Use of demand from "ther sources"is retained in the rule if justified by the Market Analyst.

Elimination of the SMA was discussed at a market study round-table prior to the Board's approval of the proposed rule in October. The general consensus of participants at the round-table was to remove the SMA.

Staff recommends no changes based on this comment.

6. §10.304(d)(10)(B) and (C) Value Estimates (3)

COMMENT SUMMARY: Commenter (3) requests that for certain properties, the Department allow for a valuation that is determined by USDA in the Department's cost analysis. The USDA valuation on these properties is based on a market estimate that can include rents above or below the USDA rents currently on the property. In either case, the valuation used by the Department is based on an as-restricted valuation.

STAFF RESPONSE: Staff agrees that there is inconsistency between the valuations used by the Department and USDA in the transfer of the USDA properties. Rather than make a change to the value estimates in the Appraisal Rules, staff recommends that the transfer value as approved by USDA be used in the acquisition cost analysis by the Department under §10.302(e)(1)(C) and (D)(iv). (Page 17 and 18 of 47)

§10.302(e)(1)(C) In no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or if applicable the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph *or the transfer value approved by USDA*. Acquisition cost is limited to appraised land value for transactions which include existing buildings that will be demolished. The resulting acquisition cost will be referred to as the "Adjusted Acquisition Cost."

§10.302(e)(1)(C) the Underwriter will use the value that best corresponds to the circumstances presently affecting the Development that will continue to affect the Development after transfer to the new owner in determining the building value. These circumstances include but are not limited to operating subsidies, rental assistance, *transfer values approved by USDA* and/or property tax exemptions. Any value of existing favorable financing will be attributed prorata to the land and buildings.

CLARIFICATION CHANGE: In addition to above changes resulting from public comment, staff has included a clarification to §10.303(d)(10)(E)(i) with respect to Relevant Supply. The change clarifies that in the case of a subject development that already has occupied units, only the Units to be absorbed are considered as supply in the capture rate analysis. (Page 35 of 47)

§10.303(d)(10)(E)(i) the proposed subject Units *to be absorbed;*

The Board approved the final order adopting the amended 10 TAC Chapter 10, Subchapter D, §§10.301 - 10.306, concerning Underwriting and Loan Policy on December 14, 2017.

STATUTORY AUTHORITY. The amended sections are adopted pursuant to Tex. Gov't Code, §2306.053, which authorizes the Department to adopt rules.

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

§10.302. Underwriting Rules and Guidelines.

(a) General Provisions. Pursuant to Texas Government Code, §2306.148 and §2306.185(b), the Board is authorized to adopt underwriting standards as set forth in this section. Furthermore for Housing Credit Allocation, §42(m)(2) of the Internal Revenue Code of 1986 (the "Code"), requires the tax credits allocated to a Development not to exceed the amount necessary to assure feasibility. Additionally, 24 CFR Parts 92 and 93, as further described in CPD Notice 15-11 require the Department to adopt rules and standards to determine the appropriate Multifamily Direct Loan feasibility. The rules adopted pursuant to the Texas Government Code and the Code are developed to result in an Underwriting Report ("Report") used by the Board in decision making with the goal of assisting as many Texans as possible by providing no more financing than necessary based on an independent analysis of Development feasibility. The Report generated in no way guarantees or purports to warrant the actual performance, feasibility, or viability of the Development.

(b) Report Contents. The Report provides a synopsis and reconciliation of the Application information submitted by the Applicant. For the purpose of this Subchapter the term Application includes additional documentation submitted after the initial award of funds that is relevant to any subsequent reevaluation. The Report contents will be based upon information that is provided in accordance with and within the timeframes set forth in the current Qualified Allocation Plan ("QAP") (10 TAC Chapter 11) or a Notice of Funds Availability ("NOFA"), as applicable, and the Uniform Multifamily Rules (10 TAC Chapter 10, Subchapters A - E and G).

(c) Recommendations in the Report. The conclusion of the Report includes a recommended award of funds or Housing Credit Allocation Amount and states any feasibility or other conditions to be placed on the award. The award amount is based on the lesser of the following:

(1) Program Limit Method. For Housing Credit Allocations, this method is based upon calculation of Eligible Basis after applying all cost verification measures and program limits as described in this section. The Applicable Percentage used is defined in §10.3 of this chapter (relating to Definitions). For Department programs other than Housing Tax Credits, this method is based upon calculation of the funding limit in current program rules or NOFA at the time of underwriting.

(2) Gap Method. This method evaluates the amount of funds needed to fill the gap created by Total Housing Development Cost less total non-Department-sourced funds or Housing Tax Credits. In making this determination, the Underwriter resizes any anticipated deferred developer fee downward (but not less than zero) before reducing the amount of Department funds or Housing Tax Credits. In the case of Housing Tax Credits, the syndication proceeds needed to fill the gap in permanent funds are divided by the syndication rate to determine the amount of Housing Tax Credits. In making this determination and based upon specific conditions set forth in the Report, the Underwriter may assume adjustments to the financing structure (including treatment of cash flow loans as if fully amortizing over its term) or make adjustments to any Department financing, such that the cumulative Debt Coverage Ratio ("DCR") conforms to the standards described in this section. For Housing Tax Credit Developments at cost certification, timing adjusters may be considered as a reduction to equity proceeds for this purpose. Timing adjusters must be consistent with and documented in the original partnership agreement (at admission of the equity partner) but relating to causes outside of the Developer's or Owner's control. The equity partner must provide a calculation of the amount of the adjuster to be used by the Underwriter.

(3) The Amount Requested. The amount of funds that is requested by the Applicant. For Housing Tax Credit Developments (exclusive of Tax-Exempt Bond Developments) this amount is limited to the amount requested in the original Application documentation.

(d) Operating Feasibility. The operating feasibility of a Development funded by the Department is tested by analyzing its Net Operating Income ("NOI") to determine the Development's ability to pay debt service and meet other financial obligations throughout the Affordability Period. NOI is determined by subtracting operating expenses, including replacement reserves and taxes, from rental and other income sources.

(1) Income. In determining the first year stabilized pro forma, the Underwriter evaluates the reasonableness of the Applicant's income pro forma by determining the appropriate rental rate per unit based on subsidy contracts, program limitations including but not limited to utility allowances, actual rents supported by rent rolls and Market Rents and other market conditions. Miscellaneous income, vacancy and collection loss limits as set forth in subparagraphs (B) and (C) of this paragraph, respectively, are used unless well-documented support is provided and independently verified by the Underwriter.

(A) Rental Income. The Underwriter will review the Applicant's proposed rent schedule and determine if it is consistent with the representations made throughout the Application. The Underwriter will independently calculate a Pro Forma Rent for comparison to the Applicant's estimate in the Application.

(i) Market Rents. The Underwriter will use the Market Analyst's conclusion of Market Rent if reasonably justified and supported by the attribute adjustment matrix of Comparable Units as described in §10.303 of this chapter (relating to Market Analysis Rules and Guidelines). Independently determined Market Rents by the Underwriter may be used based on rent information gained from direct contact with comparable properties, whether or not used by the Market Analyst and other market data sources. For a Development that contains less than 15% unrestricted units, the Underwriter will limit the Pro Forma Rents to the lesser of Market Rent or the Gross Program Rent at 60% AMI. As an alternative, if the Applicant submits market rents that are up to 30% higher than the 60% AMI gross rent and the Applicant submits an investor commissioned market study with the application, the Underwriter has the discretion to use the market rents supported by the investor commissioned market study in consideration of the independently determined rents. The Applicant must also provide a statement by the investor indicating that they have reviewed the market study and agree with its conclusions.

(ii) Gross Program Rent. The Underwriter will use the Gross Program Rents for the year that is most current at the time the underwriting begins. When underwriting for a simultaneously funded competitive round, all Applications are underwritten with the Gross Program Rents for the same year. If Gross Program Rents are adjusted by the Department after the close of the Application Acceptance Period, but prior to publication of the Report, the Underwriter may adjust the Effective Gross Income ("EGI") to account for any increase or decrease in Gross Program Rents for the purposes of determining the reasonableness of the Applicant's EGI.

(iii) Contract Rents. The Underwriter will review rental assistance contracts to determine the Contract Rents currently applicable to the Development. Documentation supporting the likelihood of continued rental assistance is also reviewed. The Underwriter will take into consideration the Applicant's intent to request a Contract Rent increase. At the discretion of the Underwriter, the Applicant's proposed rents may be used as the Pro Forma Rent, with the recommendations of the Report conditioned upon receipt of final approval of such an increase.

(iv) Utility Allowances. The Utility Allowances used in underwriting must be in compliance with all applicable federal guidance, and §10.614 of Subchapter F of this Chapter relating to Utility Allowances. Utility allowances must be calculated for individually metered tenant paid utilities.

(v) Net Program Rents. Gross Program Rent less Utility Allowance.

(vi) Actual Rents for existing Developments will be reviewed as supported by a current rent roll. For Unstabilized Developments, actual rents will be based on the most recent units leased with occupancy and leasing velocity considered. Actual rents may be adjusted by the Underwriter to reflect lease-up concessions and other market considerations.

(vii) Collected Rent. Represents the monthly rent amount collected for each Unit Type. For rent-assisted units, the Contract Rent is used. In absence of a Contract Rent, the lesser of the Net Program Rent, Market Rent or actual rent is used.

(B) Miscellaneous Income. All ancillary fees and miscellaneous secondary income, including, but not limited to late fees, storage fees, laundry income, interest on deposits, carport and garage rent, washer and dryer rent, telecommunications fees, and other miscellaneous income, are anticipated to be included in a $5 to $20 per Unit per month range. Exceptions may be made at the discretion of the Underwriter and must be supported by either the normalized operating history of the Development or other existing comparable properties within the same market area.

(i) The Applicant must show that a tenant will not be required to pay the additional fee or charge as a condition of renting a Unit and must show that the tenant has a reasonable alternative.

(ii) The Applicant's operating expense schedule should reflect an itemized offsetting line-item associated with miscellaneous income derived from pass-through utility payments, pass-through water, sewer and trash payments, and cable fees.

(iii) Collection rates of exceptional fee items will generally be heavily discounted.

(iv) If an additional fee is charged for the optional use of an amenity, any cost associated with the construction, acquisition, or development of the hard assets needed to produce the additional fee for such amenity must be excluded from Eligible Basis.

(C) Vacancy and Collection Loss. The Underwriter generally uses a normalized vacancy rate of 7.5 percent (5 percent vacancy plus 2.5 percent for collection loss). The Underwriter may use other assumptions based on conditions in the immediate market area. 100 percent project-based rental subsidy developments and other well documented cases may be underwritten at a combined 5 percent at the discretion of the Underwriter if the immediate market area's historical performance reflected in the Market Analysis is consistently higher than a 95 percent occupancy rate.

(D) Effective Gross Income ("EGI"). EGI is the total of Collected Rent for all units plus Miscellaneous Income less Vacancy and Collection Loss. If the Applicant's pro forma EGI is within 5 percent of the EGI independently calculated by the Underwriter, the Applicant's EGI is characterized as reasonable in the Report; however, for purposes of calculating the underwritten DCR the Underwriter's pro forma will be used unless the Applicant's pro forma meets the requirements of paragraph (3) of this subsection.

(2) Expenses. In determining the first year stabilized operating expense pro forma, the Underwriter evaluates the reasonableness of the Applicant's expense estimate based upon the characteristics of each Development, including the location, utility structure, type, the size and number of Units, and the Applicant's management plan. Historical, stabilized and certified financial statements of an existing De-

velopment or Third Party quotes specific to a Development will reflect the strongest data points to predict future performance The Underwriter may review actual operations on the Applicant's other properties monitored by the Department, if any, or review the proposed management company's comparable properties. The Department's Database of properties located in the same market area or region as the proposed Development also provides data points; expense data from the Department's Database is available on the Department's website. Data from the Institute of Real Estate Management's ("IREM") most recent Conventional Apartments-Income/Expense Analysis book for the proposed Development's property type and specific location or region may be referenced. In some cases local or project-specific data such as PHA Utility Allowances and property tax rates are also given significant weight in determining the appropriate line item expense estimate. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(A) General and Administrative Expense ("G&A")--Accounting fees, legal fees, advertising and marketing expenses, office operation, supplies, and equipment expenses. G&A does not include partnership related expenses such as asset management, accounting or audit fees. Costs of tenant services are not included in G&A.

(B) Management Fee. Fee paid to the property management company to oversee the operation of the Property and is most often based upon a percentage of EGI as documented in an existing property management agreement or proposal. Typically, 5 percent of EGI is used, though higher percentages for rural transactions may be used. Percentages as low as 3 percent may be used if well documented.

(C) Payroll Expense. Compensation, insurance benefits, and payroll taxes for on-site office, leasing and maintenance staff. Payroll does not include Third-Party security or tenant services contracts. Staffing specific to tenant services, security or other staffing not related to customary property operations should be itemized and included in other expenses or tenant services expense.

(D) Repairs and Maintenance Expense. Materials and supplies for the repairs and maintenance of the Development including Third-Party maintenance contracts. This line-item does not include costs that are customarily capitalized that would result from major replacements or renovations.

(E) Utilities Expense. Gas and electric energy expenses paid by the Development. Estimates of utility savings from green building components, including on-site renewable energy, must be documented by an unrelated contractor or component vendor.

(F) Water, Sewer, and Trash Expense ("WST"). Includes all water, sewer and trash expenses paid by the Development.

(G) Insurance Expense. Cost of Insurance coverage for the buildings, contents, and general liability, but not health or workman's compensation insurance.

(H) Property Tax. Includes real property and personal property taxes but not payroll taxes.

(i) An assessed value will be calculated based on the capitalization rate published by the county taxing authority. If the county taxing authority does not publish a capitalization rate, a capitalization rate of 10 percent or a comparable assessed value may be used.

(ii) Other assessed values or property tax estimates may be used based on development specific factors as determined by the Underwriter.

(iii) If the Applicant proposes a property tax exemption or PILOT agreement the Applicant must provide documentation in accordance with §10.402(d). At the underwriter's discretion, such documentation may be required prior to Commitment if deemed necessary.

(I) Replacement Reserves. Periodic deposits to a reserve account to pay for the future replacement or major repair of building systems and components (generally items considered capitalized costs).The Underwriter will use a minimum reserve of $250 per Unit for New Construction and Reconstruction Developments and $300 per Unit for all other Developments. The Underwriter may require an amount above $300 for the Development based on information provided in the Property Condition Assessment ("PCA") or, for existing USDA developments, an amount approved by USDA. The Applicant's assumption for reserves may be adjusted by the Underwriter if the amount provided by the Applicant is insufficient to fund capital needs as documented by the PCA during the first fifteen (15) years of the long term pro forma. Higher reserves may be used if documented by a primary lender or syndicator.

(J) Other Operating Expenses. The Underwriter will include other reasonable, customary and documented property-level operating expenses such as audit fees, security expense, telecommunication expenses (tenant reimbursements must be reflected in EGI) and TDHCA's compliance fees. This category does not include depreciation, interest expense, lender or syndicator's asset management fees, or other ongoing partnership fees.

(K) Tenant Services. Tenant services are not included as an operating expense or included in the DCR calculation unless:

(i) There is a documented financial obligation on behalf of the Owner with a unit of state or local government to provide tenant supportive services at a specified dollar amount. The financial obligation must be identified by the permanent lender in their term sheet and the dollar amount of the financial obligation must be included in the DCR calculation on the permanent lender's 15-year pro forma at Application. At cost certification and as a minimum, the estimated expenses underwritten at Application will be included in the DCR calculation regardless if actually incurred; or,

(ii) The Applicant demonstrates a history of providing comparable supportive services and expenses at existing affiliated properties within the local area. Except for Supportive Housing Developments, the estimated expense of supportive services must be identified by the permanent lender in their term sheet and included in the DCR calculation on the 15-year pro forma. At cost certification and as a minimum, the estimated expenses underwritten at Application will be included in the DCR calculation regardless if actually incurred;

(iii) On-site staffing or pro ration of staffing for coordination of services only, not provision of services, can be included as a supportive services expense without permanent lender documentation.

(L) Total Operating Expenses. The total of expense items described above. If the Applicant's total expense estimate is within 5 percent of the final total expense figure calculated by the Underwriter, the Applicant's figure is characterized as reasonable in the Report; however, for purposes of calculating DCR, the Underwriter's independent calculation will be used unless the Applicant's first year stabilized pro forma meets the requirements of paragraph (3) of this subsection.

(3) Net Operating Income ("NOI"). The difference between the EGI and total operating expenses. If the Applicant's first year stabilized NOI figure is within 5 percent of the NOI calculated by the Underwriter, the Applicant's NOI is characterized as reasonable in the Report; however, for purposes of calculating the first year stabilized pro forma DCR, the Underwriter's calculation of NOI will be used un-

less the Applicant's first year stabilized EGI, total operating expenses, and NOI are each within 5 percent of the Underwriter's estimates. For Housing Tax Credit Developments at cost certification, actual NOI will be used as adjusted for stabilization of rents and extraordinary lease-up expenses. Permanent lender and equity partner stabilization requirements documented in the loan and partnership agreements will be considered in determining the appropriate adjustments and the NOI used by the Underwriter.

(4) Debt Coverage Ratio. DCR is calculated by dividing NOI by the sum of scheduled loan principal and interest payments for all permanent debt sources of funds. If executed loan documents do not exist, loan terms including principal and/or interest payments are calculated based on the terms indicated in the most current term sheet(s). Otherwise, actual terms indicated in the executed loan documents will be used. Term sheet(s) must indicate the DCR required by the lender for initial underwriting as well as for stabilization purposes. Unusual or non-traditional financing structures may also be considered.

(A) Interest Rate. The rate documented in the term sheet(s) or loan document(s) will be used for debt service calculations. Term sheets indicating a variable interest rate must provide a breakdown of the rate index and any component rates comprising an all-in interest rate. The term sheet(s) must state the lender's underwriting interest rate assumption, or the Applicant must submit a separate statement from the lender with an estimate of the interest rate as of the date of such statement. At initial underwriting, the Underwriter may adjust the underwritten interest rate assumption based on market data collected on similarly structured transactions or rate index history. Private Mortgage Insurance premiums and similar fees are not included in the interest rate but calculated on outstanding principal balance and added to the total debt service payment.

(B) Amortization Period. For purposes of calculating DCR, the permanent lender's amortization period will be used if not less than thirty (30) years and not more than forty (40) years. Up to fifty (50) years may be used for federally sourced or insured loans For permanent lender debt with amortization periods less than thirty (30) years, thirty (30) years will be used. For permanent lender debt with amortization periods greater than forty (40) years, forty (40) years will be used. For non-Housing Tax Credit transactions a lesser amortization period may be used if the Department's funds are fully amortized over the same period as the primary senior debt.

(C) Repayment Period. For purposes of projecting the DCR over a thirty (30) year period for developments with permanent financing structures with balloon payments in less than thirty (30) years, the Underwriter will carry forward debt service based on a full amortization at the interest rate stated in the term sheet(s).

(D) Acceptable Debt Coverage Ratio Range. Except as set forth in clauses (i) or (ii) of this subparagraph, the acceptable first year stabilized pro forma DCR for all priority or foreclosable lien financing plus the Department's proposed financing must be between a minimum of 1.15 and a maximum of 1.35 (maximum of 1.50 for Housing Tax Credit Developments at cost certification).

(i) If the DCR is less than the minimum, the recommendations of the Report may be based on a reduction to debt service and the Underwriter will make adjustments to the financing structure in the order presented in subclauses (I) - (III) of this clause subject to a Direct Loan NOFA and program rules:

(I) a reduction to the principal amount of a Direct Loan;

(II) in the case where the amount of the Direct Loan determined in (I) is insufficient to balance the sources and uses;

(-a-) a reduction to the interest rate;

(-b-) an increase in the amortization period;

(III) an assumed reduction in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet(s) as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(ii) If the DCR is greater than the maximum, the recommendations of the Report may be based on an increase to debt service and the Underwriter will make adjustments to the assumed financing structure in the order presented in subclauses (I) - (III) of this clause subject to a Direct Loan NOFA and program rules:

(I) an increase to the interest rate up to the highest interest rate on any senior debt or if no senior debt a market rate determined by the Underwriter based on current market interest rates;

(II) or a decrease in the amortization period but not less than thirty (30) years;

(III) an assumed increase in the permanent loan amount for non-Department funded loans based upon the rates and terms in the permanent loan term sheet as long as they are within the ranges in subparagraphs (A) and (B) of this paragraph.

(iii) For Housing Tax Credit Developments, a reduction in the recommended Housing Credit Allocation Amount may be made based on the Gap Method described in subsection (c)(2) of this section as a result of an increased debt assumption, if any.

(iv) For Developments financed with a Direct Loan subordinate to FHA financing, DCR on the Direct Loan will be calculated using 75% of the Surplus Cash (as defined by the applicable FHA program).

(v) The Underwriter may limit total debt service that is senior to a Direct Loan to produce an acceptable DCR on the Direct Loan.

(5) Long Term Pro forma. The Underwriter will create a 30-year operating pro forma using the following:

(A) The Underwriter's or Applicant's first year stabilized pro forma as determined by paragraph (3) of this subsection.

(B) A 2 percent annual growth factor is utilized for income and a 3 percent annual growth factor is utilized for operating expenses except for management fees that are calculated based on a percentage of each year's EGI.

(C) Adjustments may be made to the long term pro forma if satisfactory support documentation is provided by the Applicant or as independently determined by the Underwriter.

(e) Total Housing Development Costs. The Department's estimate of the Total Housing Development Cost will be based on the Applicant's development cost schedule to the extent that costs can be verified to a reasonable degree of certainty with documentation from the Applicant and tools available to the Underwriter. For New Construction Developments, the Underwriter's total cost estimate will be used unless the Applicant's Total Housing Development Cost is within 5 percent of the Underwriter's estimate. The Department's estimate of the Total Housing Development Cost for Rehabilitation Developments will be based in accordance with the estimated cost provided in the PCA for the scope of work as defined by the Applicant and §10.306(a)(5) of this chapter (relating to PCA Guidelines). If the Applicant's cost estimate is utilized and the Applicant's line item costs are inconsistent with documentation provided in the Application or program rules, the Underwriter may make adjustments to the Applicant's Total Housing Development Cost.

(1) Acquisition Costs. The underwritten acquisition cost is verified with Site Control document(s) for the Property. At Cost Certification, the underwritten acquisition cost will be the amount verified by the settlement statement. For Identify of Interest acquisitions, the cost will be limited to the underwritten acquisition cost at initial Underwriting.

(A) Excess Land Acquisition. In cases where more land is to be acquired (by the Applicant or a Related Party) than will be utilized as the Development Site and the remainder acreage is not accessible for use by tenants or dedicated as permanent and maintained green space, the value ascribed to the proposed Development Site will be prorated based on acreage from the total cost reflected in the Site Control document(s). An appraisal containing segregated values for the total acreage, the acreage for the Development Site and the remainder acreage, or tax assessment value may be used by the Underwriter in making a proration determination based on relative value; however, the Underwriter will not utilize a prorated value greater than the total amount in the Site Control document(s).

(B) Identity of Interest Acquisitions.

(i) An acquisition will be considered an identity of interest transaction when an Affiliate of the seller is an Affiliate of, a Related Party to, any owner at any level of the Development Team or a Related Party lender; and

(I) is the current owner in whole or in part of the Property; or

(II) has or had within the prior 36 months, legal or beneficial ownership of the property or any portion thereof or interest therein prior to the first day of the Application Acceptance Period.

(ii) In all identity of interest transactions the Applicant is required to provide:

(I) the original acquisition cost in the most recent non-identity of interest transaction evidenced by an executed settlement statement or, if a settlement statement is not available, the original asset value listed in the most current financial statement for the identity of interest owner; and

(II) if the original acquisition cost evidenced by subclause (I) of this clause is less than the acquisition cost stated in the application:

(-a-) an appraisal that meets the requirements of §10.304 of this chapter (relating to Appraisal Rules and Guidelines); and

(-b-) any other verifiable costs of owning, holding, or improving the Property, excluding seller financing, that when added to the value from subclause (I) of this clause justifies the Applicant's proposed acquisition amount.

(-1-) For land-only transactions, documentation of owning, holding or improving costs since the original acquisition date may include property taxes, interest expense to unrelated Third Party lender(s), capitalized costs of any physical improvements, the cost of zoning, platting, and any off-site costs to provide utilities or improve access to the Property. All allowable holding and improvement costs must directly benefit the proposed Development by a reduction to hard or soft costs. Additionally, an annual return of 10 percent may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost is incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered.

(-2-) For transactions which include existing residential or non-residential buildings that will be rehabilitated or otherwise retained as part of the Development, documentation of owning, holding, or improving costs since the original acquisition date may include capitalized costs of improvements to the Property, and in the case of USDA financed Developments the cost of exit taxes not to exceed an amount necessary to allow the sellers to be made whole in the original and subsequent investment in the Property and avoid foreclosure. Additionally, an annual return of 10 percent may be applied to the original capital investment and documented holding and improvement costs; this return will be applied from the date the applicable cost was incurred until the date of the Department's Board meeting at which the Grant, Direct Loan and/or Housing Credit Allocation will be considered. For any period of time during which the existing residential or non-residential buildings are occupied or otherwise producing revenue, holding and improvement costs will not include capitalized costs, operating expenses, property taxes, interest expense or any other cost associated with the operations of the buildings.

(C) In no instance will the acquisition cost utilized by the Underwriter exceed the lesser of the original acquisition cost evidenced by clause (ii)(I) of this subparagraph plus costs identified in clause (ii)(II)(-b-) of this subparagraph, or if applicable the "as-is" value conclusion evidenced by clause (ii)(II)(-a-) of this subparagraph or the transfer value approved by USDA. Acquisition cost is limited to appraised land value for transactions which include existing buildings that will be demolished. The resulting acquisition cost will be referred to as the "Adjusted Acquisition Cost."

(D) Eligible Basis on Acquisition of Buildings. Building acquisition cost will be included in the underwritten Eligible Basis if the Applicant provided an appraisal that meets the Department's Appraisal Rules and Guidelines as described in §10.304 of this chapter. The underwritten eligible building cost will be the lowest of the values determined based on clauses (i) - (iii) of this subparagraph:

(i) the Applicant's stated eligible building acquisition cost;

(ii) the total acquisition cost reflected in the Site Control document(s), or the Adjusted Acquisition Cost (as defined in subparagraph (B)(iii) of this paragraph), prorated using the relative land and building values indicated by the applicable appraised value;

(iii) total acquisition cost reflected in the Site Control document(s), or the Adjusted Acquisition Cost (as defined in subparagraph (B)(iii) of this paragraph), less the appraised "as-vacant" land value; or

(iv) the Underwriter will use the value that best corresponds to the circumstances presently affecting the Development that will continue to affect the Development after transfer to the new owner in determining the building value. These circumstances include but are not limited to operating subsidies, rental assistance, transfer values approved by USDA and/or property tax exemptions. Any value of existing favorable financing will be attributed prorata to the land and buildings.

(2) Off-Site Costs. The Underwriter will only consider costs of Off-Site Construction that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(3) Site Work Costs. The Underwriter will only consider costs of Site Work that are well documented and certified to by a Third Party engineer on the required Application forms with supporting documentation.

(4) Building Costs.

(A) New Construction and Reconstruction. The Underwriter will use the Marshall and Swift Residential Cost Handbook, other comparable published Third-Party cost estimating data sources, historical final cost certifications of previous Housing Tax Credit developments and other acceptable cost data available to the Underwriter to estimate Building Cost. Generally, the "Average Quality" multiple, townhouse, or single family costs, as appropriate, from the Marshall and Swift Residential Cost Handbook or other comparable published Third-Party data source, will be used based upon details provided in the Application and particularly building plans and elevations. The Underwriter will consider amenities, specifications and development types not included in the Average Quality standard. The Underwriter may consider a sales tax exemption for nonprofit General Contractors.

(B) Rehabilitation and Adaptive Reuse.

(i) The Applicant must provide a scope of work and narrative description of the work to be completed. The narrative should speak to all off-site, site work, building components including finishes and equipment, and development amenities. The narrative should be in sufficient detail so that the reader can understand the work and it should generally be arranged consistent with the line-items on the PCA Cost Schedule Supplement and must also be consistent with the development cost schedule of the Application.

(ii) The Underwriter will use cost data provided on the PCA Cost Schedule Supplement.

(5) Contingency. Total contingency, including any soft cost contingency, will be limited to a maximum of 7 percent of Building Cost plus Site Work and off-sites for New Construction and Reconstruction Developments, and 10 percent of Building Cost plus Site Work and off-sites for Rehabilitation and Adaptive Reuse Developments. For Housing Tax Credit Developments, the percentage is applied to the sum of the eligible Building Cost, eligible Site Work costs and eligible off-site costs in calculating the eligible contingency cost.

(6) General Contractor Fee. General Contractor fees include general requirements, contractor overhead, and contractor profit. General requirements include, but are not limited to, on-site supervision or construction management, off-site supervision and overhead, jobsite security, equipment rental, storage, temporary utilities, and other indirect costs. General Contractor fees are limited to a total of 14 percent on Developments with Hard Costs of $3 million or greater, the lesser of $420,000 or 16 percent on Developments with Hard Costs less than $3 million and greater than $2 million, and the lesser of $320,000 or 18 percent on Developments with Hard Costs at $2 million or less. Any contractor fees to Affiliates or Related Party subcontractors regardless of the percentage of the contract sum in the construction contract (s) will be treated collectively with the General Contractor Fee limitations. For Housing Tax Credit Developments, the percentages are applied to the sum of the Eligible Hard Costs in calculating the eligible contractor fees. For Developments also receiving financing from USDA, the combination of builder's general requirements, builder's overhead, and builder's profit should not exceed the lower of TDHCA or USDA requirements. Additional fees for ineligible costs will be limited to the same percentage of ineligible Hard Costs but will not be included in Eligible Basis.

(7) Developer Fee.

(A) For Housing Tax Credit Developments, the Developer Fee included in Eligible Basis cannot exceed 15 percent of the project's eligible costs, less Developer fees, for Developments proposing fifty (50) Units or more and 20 percent of the project's eligible costs, less Developer fees, for Developments proposing forty-nine (49) Units or less. For Public Housing Authority Developments for conversion under the HUD Rental Assistance Demonstration ("RAD") program that will be financed using tax-exempt mortgage revenue bonds, the Developer Fee cannot exceed 20 percent of the project's eligible cost less Developer Fee.

(B) Any additional Developer fee claimed for ineligible costs will be limited to the same percentage but applied only to ineligible Hard Costs (15 percent for Developments with fifty (50) or more Units, or 20 percent for Developments with forty-nine (49) or fewer Units). Any Developer fee above this limit will be excluded from Total Housing Development Costs. All fees to Affiliates and/or Related Parties for work or guarantees determined by the Underwriter to be typically completed or provided by the Developer or Principal(s) of the Developer will be considered part of Developer fee.

(C) In the case of a transaction requesting acquisition Housing Tax Credits:

(i) the allocation of eligible Developer fee in calculating Rehabilitation/New Construction Housing Tax Credits will not exceed 15 percent of the Rehabilitation/New Construction eligible costs less Developer fees for Developments proposing fifty (50) Units or more and 20 percent of the Rehabilitation/New Construction eligible costs less Developer fees for Developments proposing forty-nine (49) Units or less; and

(ii) no Developer fee attributable to an identity of interest acquisition of the Development will be included.

(D) Eligible Developer fee is multiplied by the appropriate Applicable Percentage depending whether it is attributable to acquisition or rehabilitation basis.

(E) For non-Housing Tax Credit developments, the percentage can be up to 15 percent, but is based upon Total Housing Development Cost less the sum of the fee itself, land costs, the costs of permanent financing, excessive construction period financing described in paragraph (8) of this subsection, reserves, and any identity of interest acquisition cost.

(8) Financing Costs. All fees required by the construction lender, permanent lender and equity partner must be indicated in the term sheets. Eligible construction period interest is limited to the lesser of actual eligible construction period interest, or the interest on one (1) year's fully drawn construction period loan funds at the construction period interest rate indicated in the term sheet(s). For tax-exempt bond transactions up to twenty four (24) months of interest may be included. Any excess over this amount will not be included in Eligible Basis. Construction period interest on Related Party construction loans is only included in Eligible Basis with documentation satisfactory to the Underwriter that the loan will be at a market interest rate, fees and loan terms and the Related Party lender can demonstrate that it is routinely engaged in construction financing to unrelated parties.

(9) Reserves. Except for the underwriting of a Housing Tax Credit Development at cost certification, the Underwriter will utilize the amount described in the Applicant's project cost schedule if it is within the range of two (2) to six (6) months of stabilized operating expenses plus debt service. Alternatively, the Underwriter may consider a greater amount proposed by the first lien lender or syndicator if the detail for such greater amount is found by the Underwriter to be both reasonable and well documented. Reserves do not include capitalized asset management fees, guaranty reserves, tenant services reserves or other similar costs. Lease up reserves, exclusive of initial start-up costs, funding of other reserves and interim interest, may be considered with documentation showing sizing assumptions accept-

able to the Underwriter. In no instance at initial underwriting will total reserves exceed twelve (12) months of stabilized operating expenses plus debt service (and only for USDA or HUD financed rehabilitation transactions the initial deposits to replacement reserves and transferred replacement reserves for USDA or HUD financed rehabilitation transactions). Pursuant to §10.404(c) and for the underwriting of a Housing Tax Credit Development at cost certification, operating reserves that will be maintained for a minimum period of five years and documented in the Owner's partnership agreement and/or the permanent lender's loan documents will be included as a development cost.

(10) Soft Costs. Eligible soft costs are generally costs that can be capitalized in the basis of the Development for tax purposes. The Underwriter will evaluate and apply the allocation of these soft costs in accordance with the Department's prevailing interpretation of the Code. Generally the Applicant's costs are used however the Underwriter will use comparative data to determine the reasonableness of all soft costs.

(11) Additional Tenant Amenities. For Housing Tax Credit Developments and after submission of the cost certification package, the Underwriter may consider costs of additional building and site amenities (suitable for the tenant population being served) proposed by the Owner in an amount not to exceed 1.5% of the originally underwritten Hard Costs. The additional amenities may be included in the LURA.

(12) Special Reserve Account. For Housing Tax Credit Developments at cost certification, the Underwriter may include a deposit of up to $2,500 per Unit into a Special Reserve Account as a Development Cost.

(f) Development Team Capacity and Development Plan.

(1) The Underwriter will evaluate and report on the overall capacity of the Development Team by reviewing aspects, including but not limited to those identified in subparagraphs (A) - (D) of this paragraph:

(A) personal credit reports for development sponsors, Developer fee recipients and those individuals anticipated to provide guarantee(s) in cases when warranted. The Underwriter may evaluate the credit report and identify any bankruptcy, state or federal tax liens or other relevant credit risks for compliance with eligibility and debarment requirements in this chapter;

(B) quality of construction, Rehabilitation, and ongoing maintenance of previously awarded housing developments by review of construction inspection reports, compliance on-site visits, findings of UPCS violations and other information available to the Underwriter;

(C) for Housing Tax Credit Developments, repeated or ongoing failure to timely submit cost certifications, requests for and clearance of final inspections, and timely response to deficiencies in the cost certification process;

(D) adherence to obligations on existing or prior Department funded developments with respect to program rules and documentation.

(2) While all components of the development plan may technically meet the other individual requirements of this section, a confluence of serious concerns and unmitigated risks identified during the underwriting process may result in an Application being referred to the Committee by the Director of Real Estate Analysis. The Committee will review any recommendation made under this subsection to deny an Application for a Grant, Direct Loan and/or Housing Credit Allocation prior to completion of the Report and posting to the Department's website.

(g) Other Underwriting Considerations. The Underwriter will evaluate additional feasibility elements as described in paragraphs (1) - (3) of this subsection.

(1) Floodplains. The Underwriter evaluates the site plan, floodplain map, survey and other information provided to determine if any of the buildings, drives, or parking areas reside within the 100-year floodplain. If such a determination is made by the Underwriter, the Report will include a condition that:

(A) the Applicant must pursue and receive a Letter of Map Amendment ("LOMA") or Letter of Map Revision ("LOMR-F"); or

(B) the Applicant must identify the cost of flood insurance for the buildings and for the tenant's contents for buildings within the 100-year floodplain and certify that the flood insurance will be obtained; and

(C) the Development must be proposed to be designed to comply with the QAP, Program Rules and NOFA, and applicable Federal or state requirements.

(2) Proximity to Other Developments. The Underwriter will identify in the Report any developments funded or known and anticipated to be eligible for funding within one linear mile of the subject. Distance is measured in a straight line from nearest boundary point to nearest boundary point.

(3) Supportive Housing. The unique development and operating characteristics of Supportive Housing Developments may require special consideration in these areas:

(A) Operating Income. The extremely-low-income tenant population typically targeted by a Supportive Housing Development may include deep-skewing of rents to well below the 50 percent AMGI level or other maximum rent limits established by the Department. The Underwriter should utilize the Applicant's proposed rents in the Report as long as such rents are at or below the maximum rent limit proposed for the units or equal to any project based rental subsidy rent to be utilized for the Development if higher than the maximum rent limits;

(B) Operating Expenses. A Supportive Housing Development may have significantly higher expenses for payroll, management fee, security, resident support services, or other items than typical affordable housing developments. The Underwriter will rely heavily upon the historical operating expenses of other Supportive Housing Developments affiliated with the Applicant or otherwise available to the Underwriter. Expense estimates must be categorized as outlined in subsection (d)(2) of this section;

(C) DCR and Long Term Feasibility. Supportive Housing Developments may be exempted from the DCR requirements of subsection (d)(4)(D) of this section if the Development is anticipated to operate without conventional or "must-pay" debt. Applicants must provide evidence of sufficient financial resources to offset any projected 15-year cumulative negative Cash Flow. Such evidence will be evaluated by the Underwriter on a case-by-case basis to satisfy the Department's long term feasibility requirements and may take the form of one or a combination of: executed subsidy commitment(s); set-aside of Applicant's financial resources to be substantiated by current financial statements evidencing sufficient resources; and/or proof of annual fundraising success sufficient to fill anticipated operating losses. If either a set aside of financial resources or annual fundraising are used to evidence the long term feasibility of a Supportive Housing Development, a resolution from the Applicant's governing board must be provided confirming their irrevocable commitment to the provision of these funds and activities; and/or

(D) Total Housing Development Costs. For Supportive Housing Developments designed with only Efficiency Units, the Underwriter may use "Average Quality" dormitory costs, or costs of other appropriate design styles from the Marshall & Swift Valuation Service, with adjustments for amenities and/or quality as evidenced in the Application, as a base cost in evaluating the reasonableness of the Applicant's Building Cost estimate for New Construction Developments.

(h) Work Out Development. Developments that are underwritten subsequent to Board approval in order to refinance or gain relief from restrictions may be considered infeasible based on the guidelines in this section, but may be characterized as "the best available option" or "acceptable available option" depending on the circumstances and subject to the discretion of the Underwriter as long as the option analyzed and recommended is more likely to achieve a better financial outcome for the property and the Department than the status quo.

(i) Feasibility Conclusion. An infeasible Development will not be recommended for a Grant, Direct Loan or Housing Credit Allocation unless the Underwriter can determine an alternative structure and/or conditions the recommendations of the Report upon receipt of documentation supporting an alternative structure. A Development will be characterized as infeasible if paragraph (1) or (2) of this subsection applies. The Development will be characterized as infeasible if one or more of paragraphs (3) - (5) of this subsection applies unless paragraph (6)(B) of this subsection also applies.

(1) Gross Capture Rate, AMGI Band Capture Rates, and Individual Unit Capture Rate. The method for determining capture rates for a Development is defined in §10.303of this chapter. The Underwriter will independently verify all components and conclusions of the capture rates and may, at their discretion, use independently acquired demographic data to calculate demand and may make a determination of the capture rates based upon an analysis of the Sub-market. The Development:

(A) is characterized as an Elderly Development and the Gross Capture Rate or any AMGI bad capture rate exceeds 10 percent; or

(B) is outside a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 10 percent (or 15 percent for Tax-Exempt Bond Developments located in an MSA (as defined in the HTC Site Demographics Characteristics Report) with a population greater than 1 million if the average physical occupancy is 92.5% or greater for all stabilized affordable housing developments located within a 20 minute drive time, as supported by the Market Analyst, from the subject Development); or

(C) is in a Rural Area and targets the general population, and the Gross Capture Rate or any AMGI band capture rate exceeds 30 percent; or

(D) is Supportive Housing and the Gross Capture Rate or any AMGI band capture rate exceeds 30 percent; or,

(E) has an Individual Unit Capture Rate for any Unit Type greater than 65 percent.

(F) Developments meeting the requirements of subparagraph (A), (B), (C), (D) or (E) of this paragraph may avoid being characterized as infeasible if clause (i) or (ii) of this subparagraph apply.

(i) Replacement Housing. The proposed Development is comprised of affordable housing which replaces previously existing affordable housing within the Primary Market Area as defined in §10.303 of this chapter on a Unit for Unit basis, and gives the displaced tenants of the previously existing affordable housing a leasing preference.

(ii) Existing Housing. The proposed Development is comprised of existing affordable housing, whether defined by an existing land use and rent restriction agreement or if the subject rents are at or below 50% AMI rents, which is at least 50 percent occupied and gives displaced existing tenants a leasing preference as stated in a relocation plan.

(2) Deferred Developer Fee. Applicants requesting an allocation of tax credits where the estimated deferred Developer Fee, based on the underwritten capitalization structure, is not repayable from Cash Flow within the first fifteen (15) years of the long term pro forma as described in subsection (d)(5) of this section.

(3) Pro Forma Rent. The Pro Forma Rent for Units with rents restricted at 60 percent of AMGI is less than the Net Program Rent for Units with rents restricted at or below 50 percent of AMGI unless the Applicant accepts the Underwriter's recommendation, if any, that all restricted units have rents and incomes restricted at or below the 50 percent of AMGI level.

(4) Initial Feasibility.

(A) Except when underwritten at cost certification, the first year stabilized pro forma operating expense divided by the first year stabilized pro forma Effective Gross Income is greater than 68 percent for Rural Developments 36 Units or less and 65 percent for all other Developments.

(B) The first year DCR is below 1.15 (1.00 for USDA Developments).

(5) Long Term Feasibility. The Long Term Pro forma at any time during years two through fifteen, as defined in subsection (d)(5) of this section, reflects:

(A) a Debt Coverage Ratio below 1.15; or,

(B) negative cash flow (throughout the term of a Direct Loan).

(6) Exceptions. The infeasibility conclusions may be excepted when:

(A) Waived by the Executive Director of the Department or by the Committee if documentation is submitted by the Applicant to support unique circumstances that would provide mitigation.

(B) Developments not meeting the requirements of one or more of paragraphs (3), (4)(A) or (5) of this subsection will be re-characterized as feasible if one or more of clauses (i) - (v) of this subparagraph apply. A Development financed with a Direct Loan will not be re-characterized as feasible with respect to (5)(B).

(i) The Development will receive Project-based Section 8 Rental Assistance or the HUD Rental Assistance Demonstration Program for at least 50 percent of the Units and a firm commitment, with terms including Contract Rent and number of Units, is submitted at Application.

(ii) The Development will receive rental assistance for at least 50 percent of the Units in association with USDA financing.

(iii) The Development will be characterized as public housing as defined by HUD for at least 50 percent of the Units.

(iv) The Development will be characterized as Supportive Housing for at least 50 percent of the Units and evidence of adequate financial support for the long term viability of the Development is provided.

(v) The Development has other long term project based restrictions on rents for at least 50 percent of the Units that allow rents to increase based upon expenses and the Applicant's proposed rents are at least 10 percent lower than both the Net Program Rent and Market Rent.

§10.303. Market Analysis Rules and Guidelines.

(a) General Provision. A Market Analysis prepared for the Department must evaluate the need for decent, safe, and sanitary housing at rental rates or sales prices that eligible tenants can afford. The analysis must determine the feasibility of the subject Property rental rates or sales price and state conclusions as to the impact of the Property with respect to the determined housing needs. The Market Analysis must include a statement that the report preparer has read and understood the requirements of this section. The Market Analysis must also include a statement that the person or company preparing the Market Analysis is a disinterested party and will not materially benefit from the Development in any other way than receiving a fee for performing the Market Analysis, and that the fee is in no way contingent upon the outcome of the Market Analysis.

(b) Self-Contained. A Market Analysis prepared for the Department must allow the reader to understand the market data presented, the analysis of the data, and the conclusions derived from such data. All data presented should reflect the most current information available and the report must provide a parenthetical (in-text) citation or footnote describing the data source. The analysis must clearly lead the reader to the same or similar conclusions reached by the Market Analyst. All steps leading to a calculated figure must be presented in the body of the report.

(c) Market Analyst Qualifications. A Market Analysis submitted to the Department must be prepared and certified by an approved Qualified Market Analyst. (§2306.67055) The Department will maintain an approved Market Analyst list based on the guidelines set forth in paragraphs (1) - (2) of this subsection.

(1) The approved Qualified Market Analyst list will be updated and published annually on or about November 1st. If not listed as an approved Qualified Market Analyst by the Department, a Market Analyst may request approval by submitting items in subparagraphs (A) - (F) of this paragraph at least thirty (30) calendar days prior to the first day of the competitive tax credit Application Acceptance Period or thirty (30) calendar days prior to submission of any other application for funding for which the Market Analyst must be approved.

(A) Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships).

(B) A current organization chart or list reflecting all members of the firm who may author or sign the Market Analysis. A firm with multiple offices or locations must indicate all members expected to be providing Market Analysis.

(C) Resumes for all members of the firm or subcontractors who may author or sign the Market Analysis.

(D) General information regarding the firm's experience including references, the number of previous similar assignments and timeframes in which previous assignments were completed.

(E) Certification from an authorized representative of the firm that the services to be provided will conform to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the Application Round in which each Market Analysis is submitted.

(F) A sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the sample Market Analysis is submitted. An already approved Qualified Market Analyst will remain on the list so long as at least one (1) Market Analysis has been submitted to the Department in the previous 12 months or items (A),(B),(C) and (E) are submitted prior to October 1st. Otherwise, the Market Analyst will automatically be removed from the list.

(2) During the underwriting process each Market Analysis will be reviewed and any discrepancies with the rules and guidelines set forth in this section may be identified and require timely correction. Subsequent to the completion of the Application Round and as time permits, staff or a review appraiser will re-review a sample set of submitted market analyses to ensure that the Department's Market Analysis Rules and Guidelines are met. If it is found that a Market Analyst has not conformed to the Department's Market Analysis Rules and Guidelines, as certified to, the Market Analyst will be notified of the discrepancies in the Market Analysis and will be removed from the approved Qualified Market Analyst list.

(A) In and of itself, removal from the list of approved Market Analysts will not invalidate a Market Analysis commissioned prior to the removal date and at least ninety (90) days prior to the first day of the applicable Application Acceptance Period.

(B) To be reinstated as an approved Qualified Market Analyst, the Market Analyst must amend the previous report to remove all discrepancies or submit a new sample Market Analysis that conforms to the Department's Market Analysis Rules and Guidelines, as described in this section, in effect for the year in which the updated or new sample Market Analysis is submitted.

(d) Market Analysis Contents. A Market Analysis for a rental Development prepared for the Department must be organized in a format that follows a logical progression and must include, at minimum, items addressed in paragraphs (1) - (13) of this subsection.

(1) Title Page. Include Property address or location, effective date of analysis, date report completed, name and address of person authorizing report, and name and address of Market Analyst.

(2) Letter of Transmittal. The date of the letter must be the date the report was completed. Include Property address or location, description of Property, statement as to purpose and scope of analysis, reference to accompanying Market Analysis report with effective date of analysis and summary of conclusions, date of Property inspection, name of persons inspecting subject Property, and signatures of all Market Analysts authorized to work on the assignment. Include a statement that the report preparer has read and understood the requirements of this section.

(3) Table of Contents. Number the exhibits included with the report for easy reference.

(4) Market Analysis Summary. Include the Department's Market Analysis Summary exhibit.

(5) Assumptions and Limiting Conditions. Include a description of all assumptions, both general and specific, made by the Market Analyst concerning the Property.

(6) Identification of the Property. Provide a statement to acquaint the reader with the Development. Such information includes street address, tax assessor's parcel number(s), and Development characteristics.

(7) Statement of Ownership. Disclose the current owners of record and provide a three (3) year history of ownership for the subject Property.

(8) Primary Market Area. A limited geographic area from which the Development is expected to draw most of its demand. The size and shape of the PMA should be reflective of proximity to employment centers, services and amenities and contain the most significant areas from which to draw demand. All of the Market Analyst's conclusions specific to the subject Development must be based on only one PMA definition. The Market Analyst must adhere to the methodology described in this paragraph when determining the market area. (§2306.67055)

(A) The PMA will be defined by the Market Analyst as:

(i) geographic size based on a base year population no larger than necessary to provide sufficient demand but no more than 100,000 people;

(ii) boundaries based on U.S. census tracts; and

(iii) the population of the PMA may exceed 100,000 if the amount over the limit is contained within a single census tract.

(B) The Market Analyst's definition of the PMA must include:

(i) a detailed narrative specific to the PMA explaining:

(I) how the boundaries of the PMA were determined with respect to census tracts chosen and factors for including or excluding certain census tracts in proximity to the Development;

(II) whether a more logical market area within the PMA exists but is not definable by census tracts and how this subsection of the PMA supports the rationale for the defined PMA;

(III) what are the specific attributes of the Development's location within the PMA that would draw prospective tenants from other areas of the PMA to relocate to the Development;

(IV) what are the specific attributes, if known, of the Development itself that would draw prospective tenants currently residing in other areas of the PMA to relocate to the Development;

(V) if the PMA crosses county lines, discuss the different income and rent limits in each county and how these differing amounts would affect the demand for the Development;

(VI) for rural Developments, discuss the relative draw (services, jobs, medical facilities, recreation, schools, etc.) of the Development's immediate local area (city or populous area if no city) in comparison to its neighboring local areas (cities, or populous areas if no cities), in and around the PMA. A rural PMA should not include significantly larger more populous areas unless the analyst can provide substantiation and rationale that the tenants would migrate to the Development's location from the larger cities;

(VII) discuss and quantify current and planned single-family and non-residential construction (include permit data if available); and

(VIII) other housing issues in general, if pertinent;

(ii) a complete demographic report for the defined PMA;

(iii) a scaled distance map indicating the PMA boundaries showing relevant U.S. census tracts with complete 11-digit identification numbers in numerical order with labels as well as the location of the subject Development and all comparable Developments. The map must indicate the total square miles of PMA; and,

(iv) a proximity table indicating distance from the Development to employment centers, medical facilities, schools, entertainment and any other amenities relevant to the potential residents and include drive time estimates.

(C) Comparable Units. Identify developments in the PMA with Comparable Units. In PMAs lacking sufficient rent comparables, it may be necessary for the Market Analyst to collect data from markets with similar characteristics and make quantifiable and qualitative location adjustments. Provide a data sheet for each comparable development consisting of:

(i) development name;

(ii) address;

(iii) year of construction and year of Rehabilitation, if applicable;

(iv) property condition;

(v) Target Population;

(vi) unit mix specifying number of Bedrooms, number of baths, Net Rentable Area; and

(I) monthly rent and Utility Allowance; or

(II) sales price with terms, marketing period and date of sale;

(vii) description of concessions;

(viii) list of unit amenities;

(ix) utility structure;

(x) list of common amenities;

(xi) narrative comparison of its proximity to employment centers and services relative to targeted tenant population of the subject property; and,

(xii) for rental developments only, the occupancy and turnover.

(9) Market Information.

(A) Identify the number of units for each of the categories in clauses (i) - (vi) of this subparagraph, if applicable:

(i) total housing;

(ii) all multi-family rental developments, including unrestricted and market-rate developments, whether existing, under construction or proposed;

(iii) Affordable housing;

(iv) Comparable Units;

(v) Unstabilized Comparable Units; and

(vi) proposed Comparable Units.

(B) Occupancy. The occupancy rate indicated in the Market Analysis may be used to support both the overall demand conclusion for the proposed Development and the vacancy rate assumption used in underwriting the Development described in §10.302(d)(1)(C) of this chapter (relating to Underwriting Rules and Guidelines). State the overall physical occupancy rate for the proposed housing tenure (renter or owner) within the defined market areas by:

(i) number of Bedrooms;

(ii) quality of construction (class);

(iii) Target Population; and

(iv) Comparable Units.

(C) Absorption. State the absorption trends by quality of construction (class) and absorption rates for Comparable Units.

(D) Demographic Reports.

(i) All demographic reports must include population and household data for a five (5) year period with the year of Application submission as the base year;

(ii) All demographic reports must provide sufficient data to enable calculation of income-eligible, age-, size-, and tenure-appropriate household populations;

(iii) For Elderly Developments, all demographic reports must provide a detailed breakdown of households by age and by income; and

(iv) A complete copy of all demographic reports relied upon for the demand analysis, including the reference index that indicates the census tracts on which the report is based.

(E) Demand. Provide a comprehensive evaluation of the need for the proposed housing for the Development as a whole and each Unit type by number of Bedrooms proposed and rent restriction category within the defined market areas using the most current census and demographic data available. A complete demand and capture rate analysis is required in every Market Study, regardless of the current occupancy level of an existing Development.

(i) Demographics. The Market Analyst should use demographic data specific to the characteristics of the households that will be living in the proposed Development. For example, the Market Analyst should use demographic data specific to the elderly populations (and any other qualifying residents for Elderly Developments) to be served by an Elderly Development, if available, and should avoid making adjustments from more general demographic data. If adjustment rates are used based on more general data for any of the criteria described in subclauses (I) - (V) of this clause, they should be clearly identified and documented as to their source in the report.

(I) Population. Provide population and household figures, supported by actual demographics, for a five (5) year period with the year of Application submission as the base year.

(II) Target. If applicable, adjust the household projections for the qualifying demographic characteristics such as the minimum age of the population to be served by the proposed Development.

(III) Household Size-Appropriate. Adjust the household projections or target household projections, as applicable, for the appropriate household size for the proposed Unit type by number of Bedrooms proposed and rent restriction category based on 2 persons per Bedroom or one person for Efficiency Units.

(IV) Income Eligible. Adjust the household size appropriate projections for income eligibility based on the income bands for the proposed Unit Type by number of Bedrooms proposed and rent restriction category with:

(-a-) the lower end of each income band calculated based on the lowest gross rent proposed divided by 40 percent for the general population and 50 percent for elderly households; and

(-b-) the upper end of each income band equal to the applicable gross median income limit for the largest appropriate household size based on 2 persons per Bedroom (round up) or one person for Efficiency Units.

(V) Tenure-Appropriate. Adjust the income-eligible household projections for tenure (renter or owner). If tenure appropriate income eligible target household data is available, a tenure appropriate adjustment is not necessary.

(ii) Gross Demand. Gross Demand is defined as the sum of Potential Demand from the PMA, Demand from Other Sources, and External Demand.

(iii) Potential Demand. Potential Demand is defined as the number of income-eligible, age-, size-, and tenure-appropriate target households in the designated market area at the proposed placed in service date.

(I) Maximum eligible income is equal to the applicable gross median income limit for the largest appropriate household size.

(II) For Developments targeting the general population:

(-a-) minimum eligible income is based on a 40 percent rent to income ratio;

(-b-) appropriate household size is defined as 2 persons per Bedroom (rounded up); and

(-c-) the tenure-appropriate population for a rental Development is limited to the population of renter households.

(III) For Developments consisting solely of single family residences on separate lots with all Units having three (3) or more Bedrooms:

(-a-) minimum eligible income is based on a 40 percent rent to income ratio;

(-b-) appropriate household size is defined as 2 persons per Bedroom (rounded up); and

(-c-) Gross Demand includes both renter and owner households.

(IV) Elderly Developments:

(-a-) minimum eligible income is based on a 50 percent rent to income ratio; and

(-b-) Gross Demand includes all household sizes and both renter and owner households within the age range (and any other qualifying characteristics) to be served by the Elderly Development.

(V) Supportive Housing:

(-a-) minimum eligible income is $1; and

(-b-) households meeting the occupancy qualifications of the Development (data to quantify this demand may be based on statistics beyond the defined PMA but not outside the historical service area of the Applicant).

(VI) For Developments with rent assisted units (PBV's, PHU's):

(-a-) minimum eligible income for the assisted units is $1; and

(-b-) maximum eligible income for the assisted units is the minimum eligible income of the corresponding affordable unit.

(iv) External Demand: Assume an additional 10% of Potential Demand from the PMA to represent demand coming from outside the PMA.

(v) Demand from Other Sources:

(I) the source of additional demand and the methodology used to calculate the additional demand must be clearly stated;

(II) consideration of Demand from Other Sources is at the discretion of the Underwriter;

(III) Demand from Other Sources must be limited to households that are not included in Potential Demand; and

(IV) if households with Section 8 vouchers are identified as a source of demand, the Market Study must include:

(-a-) documentation of the number of vouchers administered by the local Housing Authority; and

(-b-) a complete demographic report for the area in which the vouchers are distributed.

(F) Employment. Provide a comprehensive analysis of employment trends and forecasts in the Primary Market Area. Analysis must discuss existing or planned employment opportunities with qualifying income ranges.

(10) Conclusions. Include a comprehensive evaluation of the subject Property, separately addressing each housing type and specific population to be served by the Development in terms of items in subparagraphs (A) - (I) of this paragraph. All conclusions must be consistent with the data and analysis presented throughout the Market Analysis.

(A) Unit Mix. Provide a best possible unit mix conclusion based on the occupancy rates by Bedroom type within the PMA and target, income-eligible, size-appropriate and tenure-appropriate household demand by unit type and income type within the PMA.

(B) Rents. Provide a separate Market Rent conclusion for each proposed Unit Type by number of Bedrooms and rent restriction category. Conclusions of Market Rent below the maximum Net Program Rent limit must be well documented as the conclusions may impact the feasibility of the Development under §10.302(i) of this chapter. In support of the Market Rent conclusions, provide a separate attribute adjustment matrix for each proposed Unit Type by number of Bedrooms and rental restriction category.

(i) The Department recommends use of HUD Form 92273.

(ii) A minimum of three developments must be represented on each attribute adjustment matrix.

(iii) Adjustments for concessions must be included, if applicable.

(iv) Adjustments for proximity and drive times to employment centers and services narrated in the Comparable Unit description, and the rationale for the amount of the adjustments must be included.

(v) Total adjustments in excess of 15 percent must be supported with additional narrative.

(vi) Total adjustments in excess of 25 percent indicate the Units are not comparable for the purposes of determining Market Rent conclusions.

(C) Effective Gross Income. Provide rental income, secondary income, and vacancy and collection loss projections for the subject derived independent of the Applicant's estimates.

(D) Demand:

(i) state the Gross Demand for each Unit Type by number of Bedrooms proposed and rent restriction category (*e.g.* one-Bedroom Units restricted at 50 percent of AMGI; two-Bedroom Units restricted at 60 percent of AMGI); and

(ii) state the Gross Demand for the proposed Development as a whole. If some households are eligible for more than one Unit Type due to overlapping eligible ranges for income or household size, Gross Demand should be adjusted to avoid including households more than once.

(iii) state the Gross Demand generated from each AMGI band. If some household incomes are included in more than one AMGI band, Gross Demand should be adjusted to avoid including households more than once.

(E) Relevant Supply. The Relevant Supply of proposed and unstabilized Comparable Units includes:

(i) the proposed subject Units to be absorbed;

(ii) Comparable Units in an Application with priority over the subject pursuant to §10.201(6) of this chapter; and

(iii) Comparable Units in previously approved Developments in the PMA that have not achieved 90% occupancy for a minimum of 90 days.

(F) Gross Capture Rate. The Gross Capture Rate is defined as the Relevant Supply divided by the Gross Demand. Refer to §10.302(i) of this chapter for feasibility criteria.

(G) Individual Unit Capture Rate. For each Unit Type by number of Bedrooms and rent restriction categories, the individual unit capture rate is defined as the Relevant Supply of proposed and unstabilized Comparable Units divided by the eligible demand for that Unit. Some households are eligible for multiple Unit Types. In order to calculate individual unit capture rates, each household is included in the capture rate for only one Unit Type.

(H) Capture Rate by AMGI Band. For each AMGI band (30%, 40%, 50%, 60%), the capture rate by AMGI band is defined as Relevant Supply of proposed and unstabilized Comparable Units divided by the eligible demand from that AMGI band. Some households are qualified for multiple income bands. In order to calculate AMGI band rates, each household is included in the capture rate for only one AMGI band.

(I) Absorption. Project an absorption period for the subject Development to achieve Breakeven Occupancy. State the absorption rate.

(J) Market Impact. Provide an assessment of the impact the subject Development, as completed, will have on existing Developments supported by Housing Tax Credits in the Primary Market. (§2306.67055)

(12) Photographs. Provide labeled color photographs of the subject Property, the neighborhood, street scenes, and comparables. An aerial photograph is desirable but not mandatory.

(13) Appendices. Any Third Party reports including demographics relied upon by the Market Analyst must be provided in appendix form. A list of works cited including personal communications also must be provided, and the Modern Language Association (MLA) format is suggested.

(14) Qualifications. Current Franchise Tax Account Status from the Texas Comptroller of Public Accounts (not applicable for sole proprietorships) and any changes to items listed in §10.303(c)(1)(B) and (C) of this chapter.

(e) The Department reserves the right to require the Market Analyst to address such other issues as may be relevant to the Department's evaluation of the need for the subject Development and the provisions of the particular program guidelines.

(f) In the event that the PMA for a subject Development overlaps the PMA's of other proposed or unstabilized comparable Developments, the Underwriter may perform an extended Sub-Market analy-

sis considering the combined PMA's and all proposed and unstabilized Units in the extended Sub-Market Area; the Gross Capture Rate from such an extended Sub-Market Area analysis may be used as the basis for a feasibility conclusion.

(g) All Applicants shall acknowledge, by virtue of filing an Application, that the Department shall not be bound by any such opinion or Market Analysis, and may substitute its own analysis and underwriting conclusions for those submitted by the Market Analyst.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Department of Housing and Community Affairs
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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 24. SUBSTANTIVE RULES APPLICABLE TO WATER AND SEWER SERVICE PROVIDERS

SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

16 TAC §24.21

The Public Utility Commission of Texas (commission) adopts an amendment to §24.21, relating to form and filing of tariffs, with changes to the proposed text as published in the September 15, 2017, issue of the *Texas Register* (42 TexReg 4739). The amendments implement House Bill 1083 (HB 1083), which amended Texas Water Code §13.182 and §13.189 (West 2008 & Supp. 2017) (TWC) to allow a utility to establish reduced water utility rates funded by donations for elderly customers. The amendments also revise the minor tariff change portion of the rule to correct an example in the pass-through provision formula and clarify what constitutes an acceptable amount of line loss in the pass-through portion of the rule. The amendment is adopted under Project Number 47303.

The commission received comments on the proposed amendments from the City of Houston (Houston), the Office of Public Utility Counsel (OPUC), and joint comments from Aqua Texas, Inc.; Aqua Utilities, Inc.; Aqua Development, Inc. d/b/a Aqua Texas; SJWTX, Inc. d/b/a Canyon Lake Water Service Company; and SouthWest Water Company (collectively, the Water Companies). The commission also received reply comments from the Water Companies and Houston.

§24.21(b)(2)(B)

The Water Companies opined that the proposed rule amendments add certain requirements not included in HB 1083 that may disincentivize utilities from adopting the new program. Specifically, the Water Companies argued that the proposed rule: (1) adds an income-driven limitation even though HB 1083 only contemplates age-based criteria, which could increase administration costs; (2) seems to limit the "cost of providing the reduced rates" that donations may cover to "lost revenues due to the difference in the utility's tariffed retail water rates and the reduced rates," which would prohibit use of donations to cover program administrative costs; and (3) does not appear to contemplate how this type of program would work for sewer or flat rate utilities. The Water Companies argued that the rule should specifically allow donations to be used to cover administrative costs of the new program in order to encourage utilities to adopt this type of assistance program. The Water Companies further argued that assistance programs should be encouraged for all types of service providers, and that the commission should consider how best to incentivize utilities to provide an assistance program of the type authorized by HB 1083 while providing maximum flexibility. The Water Companies argued that the proposed rule does not appear to accomplish those goals.

As further discussed and summarized below, Houston supported and OPUC did not oppose the income limitation as a mechanism to ensure that those persons most in need of assistance receive the discount.

Commission response

The commission agrees with the Water Companies and makes a change to the rule language to reflect the Water Companies' recommendation relating to the use of donations to cover program costs. As discussed in more detail below, the commission finds that the "cost of providing the reduced rates" includes program administrative costs. However, contrary to the argument of the Water Companies, the commission declines to expand the rule to cover sewer rates; the preamble to HB 1083, section three of HB 1083, and the legislative history of HB 1083 all clearly specify that the assistance program established by HB 1083 applies only to water rates, not to sewer rates. The commission responds to the Water Companies' concern regarding adding an income-driven limitation below.

§24.21(b)(2)(B)(i)

Houston commented that the rule does not indicate whether donations are to be collected in advance or prior to calculating and implementing the rates, nor does the rule indicate the proposed timeframe for this initial period. If, on the other hand, donations are not to be collected until after implementation of the rate, Houston was unsure how a utility would determine anticipated donations to be collected in order to create a reasonable rate. Houston indicated that most of the issues it identified could be addressed as part of a proceeding related to the filing of a utility's plan for implementing an assistance program; however, Houston recommended that the commission clarify when the rate would be implemented upon filing of a plan.

The Water Companies replied that leaving the types of details discussed by Houston to consideration on a case-by-case basis for each specific plan would permit more flexibility and therefore be preferable to addressing all the details by rule. The Water Companies did request guidance as to how the commission anticipates the implementation of proposed plans and the approval process working in practice.

Commission response

The commission anticipates that a utility will propose its own plan with respect to when donations will be collected in relation to the implementation date of the rate and that this plan will address any other necessary implementation details.

§24.21(b)(2)(B)(i)(I)

OPUC recommended changing the new §24.21(b)(2)(B)(i)(I) to reflect that the collection of donations is permissive, not mandatory. The Water Companies concurred with OPUC's recommendation.

Commission response

The commission agrees with OPUC that donations are permissive. The commission acknowledges that donations may be received from the utility, customers, or outside persons. There is no need to adopt any changes to the language contained in the proposed rule.

§24.21(b)(2)(B)(i)(II)

Houston stated that the rule is unclear as to whether interest should be applied to the donations collected and held by the utility.

Commission response

The commission determines that any interest earned on donated funds will be considered a donation to the fund. The commission modifies §24.21(b)(2)(B)(i)(II) accordingly.

§24.21(b)(2)(B)(i)(III)

OPUC recommended changing the new §24.21(b)(2)(B)(i)(III) to replace the word "clause" with "program" to clarify that the subsection is referring to the reduced water rate program and not a particular clause. The Water Companies replied that the commission's proposed "clause" language presumably referred to the proposed minor tariff change language an applicant may propose in a plan to implement a reduced rate program. The Water Companies stated that the proposed effective date in a plan under the rule would likely apply to both the tariff language, including the proposed reduced rate, and the contemplated program. The Water Companies also stated that there could potentially be two different dates to allow more time for program implementation. As a result, the Water Companies recommended that the issue be addressed by adding language covering both items instead of using OPUC's proposed language replacement.

OPUC also suggested replacing the word "sample" with "example" to clarify that there may not be any donations at the time of the application. In addition, OPUC recommended inserting additional language to clarify that an accounting of lost revenues is only required if the utility is receiving donations. The Water Companies agreed with these proposed revisions, but argued that the clarification regarding the need for an accounting should be incorporated into the Water Companies' proposed modifications to the proposed rule language.

Houston opposed the Water Companies' proposed modifications to the rule language, specifically the removal of language requiring that "…utilities provide a calculation of all lost revenues and journal entries that transfer the funds from the account in this subparagraph of this clause to the utility's account." Houston argued that requiring the calculation of lost revenues is an important part of determining whether a utility has properly complied with §24.21, and stated that the Water Companies offered no explanation for the change.

Commission response

The commission agrees with OPUC's first two recommendations and changes the word "clause" to "program" and the word "sample" to "example." The commission disagrees with the assertion of OPUC and the Water Companies that an accounting for lost revenues is only necessary when funding is from donations received from other sources. The commission finds that an accounting for lost revenues is appropriate regardless of the source of the donations, and therefore, does not revise §24.21(b)(2)(B)(i)(III) based on those comments.

§24.21(b)(2)(B)(i)(IV)

OPUC recommended replacing the word "requesting" with "receiving" to maintain consistency between proposed §24.21(b)(2)(B)(i)(IV) and the statutory language. The Water Companies did not oppose OPUC's proposed revision.

Commission response

The commission agrees with OPUC's recommendation and changes the language in the rule accordingly.

§24.21(b)(2)(B)(i)(V)

Houston agreed that the rule should establish eligibility requirements for the elderly rate; however, Houston argued that the eligibility criteria should be consistent with other programs, citing the System Benefit Fund rules in 16 Texas Administrative Code §25.451 *et seq.* as an example. Houston recommended that the eligibility criteria for the elderly rate should consist of (1) a limitation of household income of not more than 125% of the federal poverty guidelines, and (2) eligibility for the assistance programs identified in proposed §24.21(b)(2)(B)(i)(V).

Likewise, OPUC recommended that proposed §24.21(b)(2)(B)(i)(V) be modified to use a limitation on household income of not more than 125% of the federal poverty guidelines. OPUC argued that this change would be consistent with other customer assistance programs, such as the commission's rate reduction program as proposed for amendment in Docket No. 47343. OPUC also proposed that, in the event the commission retains the approach originally proposed, that proposed §24.21(b)(2)(B)(i)(V)(-e-) be modified to specify any comprehensive energy assistance program instead of just Travis County's program.

The Water Companies replied that they were not opposed to Houston's and OPUC's recommendations regarding the use of income-based eligibility criteria that are consistent with criteria used in other programs outlined in the commission rules for electric utilities. However, the Water Companies recommended that the requirement be optional under this particular rule, while acknowledging that including low-income eligibility criteria language in the rule as a guide would be helpful. The Water Companies urged the commission to specifically permit low-income assistance programs by rule and extend the language from proposed §24.21(b)(2)(B)(iv) to other low-income assistance programs, rates, and tariff provisions. In its reply comments, Houston reiterated its position regarding eligibility criteria for the assistance program and stated its opposition to the Water Companies' proposed changes related to the eligibility requirements.

Commission response

The commission agrees with the Water Companies that the rule should not mandate an income-based eligibility requirement and removes the requirement from the rule. The commission de-

clines to extend proposed §24.21(b)(2)(B)(iv) to other programs, as proposed §24.21(b)(2)(B)(iv) is designed to implement section two of HB 1083.

Community Outreach

Houston suggested plans submitted by utilities should include outreach programs to ensure that the people in need of the discount are aware of its existence and have the resources needed to apply for it. The Water Companies were not opposed to the idea of requesting applicants to address community outreach within their plans. The Water Companies stated that community outreach will likely be needed regardless of whether it is addressed in the plan, and argued that costs for community outreach and education efforts should be considered "costs of providing the reduced rates" eligible to be recovered from donated program funds along with other program related administrative costs.

Commission response

Due to the potential cost of the community outreach programs, the commission declines to adopt Houston's suggestion to require community outreach programs regarding the discount program. The commission agrees with Houston that cost for community outreach and education efforts should be considered administrative costs. The commission leaves the decision to the utility to determine outreach activities.

§24.21(b)(2)(B)(ii)

Houston recommended that the costs of providing the reduced rates should not include administrative costs and other costs that might fall under the proposed rule language. Houston proposed that this concern be addressed by removing the term "lost revenue" from the rule language. Houston argued that, to the extent the commission intends to allow utilities to recover administrative and other costs, the rule should expressly address limitations on the type and amount of administrative and other costs to be recovered and that parties should have an opportunity to comment on any such limitations.

The Water Companies opposed Houston's suggested revision related to the "cost of providing the reduced rates." The Water Companies argued that the rule should specifically permit administrative costs to be recovered by donated program funds as part of the "cost of providing the reduced rates." The Water Companies did not agree that the rule should expressly address limitations on the recovery of administrative costs, arguing that placing arbitrary limitations on these costs when they would likely vary on a case-by-case basis didn't appear to incentivize the adoption of rate assistance plans. Instead, the Water Companies recommended that the proposed plan required by the rule should address the anticipated types and amounts of these costs.

In its reply comments, Houston reiterated its position that the rule should place express limitations on the type and amount of administrative costs eligible to be recovered as part of the assistance program. Houston further reiterated its position that parties should have the opportunity to comment on these limitations. Houston argued that under the Water Companies' approach, unlimited administrative costs could be eligible for recovery, which would be contrary to the spirit of the assistance program. Houston commented with respect to electric energy efficiency programs, which apply to many more customers and are more complex in terms of research and development requirements particularly, utilities are allowed to recover up to 20% of their total program cost (cumulative cost of administration and research and development).

Commission response

The commission agrees with the Water Companies that administrative costs may be recovered through donated program funds as part of the "cost of providing the reduced rates." The commission disagrees with Houston and declines to adopt a limit on what portion of donated funds may be used for administrative costs. HB 1083 did not provide for a disallowance of administrative costs for the program; therefore, the commission retains the proposed language.

The commission disagrees with Houston that the term "lost revenues" is broad and should not be included. The commission determines that the donations to the program should cover the difference in rate revenue due to the reduced rate (lost revenue) and also administrative costs; therefore the commission retains the language. HB 1083 anticipates a reduced rate rather than a credit to customer bills and the calculation of lost revenues accounts for the difference in rates.

The commission also adds language to clarify that all expenses (administrative and any other expense) related to the program must be identified in the annual accounting and excluded from the utility's cost of service in order to comply with HB 1083, which states that "A utility may not recover those costs through charges to the utility's other customer classes."

§24.21(b)(2)(E)

The Water Companies agreed with the commission's correction to the example pass-through formula included in 16 TAC §24.21(b)(2)(E). However, the Water Companies are opposed to the additional language proposed to that subsection of "*Unless good cause is shown, L (line loss) shall be limited to the lesser of the actual line loss experienced or 15%."* The Water Companies believe there is no basis for presuming that a reasonable amount of line loss should be capped at 15%.

Commission response

The commission agrees with the Water Companies. The commission retains the right to analyze water loss on a case-by-case issue and makes a change to the rule language to reflect the Water Companies' recommendation and the case-by-case analysis of line loss.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

The amendment is adopted under TWC §13.041, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. Additionally, the amendment is adopted under HB 1083, which amended TWC §13.182 and §13.189 to allow a utility to establish reduced water utility rates funded by donations for elderly customers and established a deadline of December 31, 2017 for the commission to adopt rules to implement HB 1083

Cross reference to statutes: TWC §§13.041, 13.182, and 13.189.

§24.21. Form and Filing of Tariffs.

(a) Approved tariff. A utility may not directly or indirectly demand, charge, or collect any rate or charge, or impose any classifications, practices, rules, or regulations different from those prescribed in

its approved tariff filed with the commission or with the municipality exercising original jurisdiction over the utility, except as follows:

(1) A utility may charge the rates proposed under the Texas Water Code (TWC) §13.187 or §13.1871 on or after the proposed effective date, unless the proposed effective date of the proposed rates is suspended or the regulatory authority sets interim rates.

(2) The regulatory assessment fee required in TWC §5.701(n) does not have to be listed on the utility's approved tariff to be charged and collected but must be included in the tariff at the earliest opportunity.

(3) A person who possesses facilities used to provide retail water utility service or a utility that holds a certificate of public convenience and necessity (CCN) to provide retail water service that enters into an agreement in accordance with TWC §13.250(b)(2), may collect charges for sewer services on behalf of another retail public utility on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(4) A utility may enter into a contract with a county to collect solid waste disposal fees and include those fees on the same bill with its water charges and shall at the earliest opportunity include a notation on its tariff that it has entered into such an agreement.

(b) Requirements as to size, form, identification, minor changes, and filing of tariffs.

(1) Tariffs filed with applications for CCNs.

(A) When applying to obtain or amend a CCN, or to add a new water or sewer system or subdivision to its certificated service area, every utility shall file its proposed tariff with the commission and any regulatory authority with original rate jurisdiction over the utility.

(i) For a utility that is under the original rate jurisdiction of the commission, the tariff shall contain schedules of all the utility's rates, tolls, charges, rules, and regulations pertaining to all of its utility service(s) when it applies for a CCN to operate as a utility. The tariff must be on the form prescribed by the commission or another form acceptable to the commission.

(ii) For a utility under the original rate jurisdiction of a municipality, the utility must file with the commission a copy of its tariff as approved by the municipality.

(B) If a person applying for a CCN is not a retail public utility and would be under the original rate jurisdiction of the commission if the CCN application were approved, the person shall file a proposed tariff with the commission. The person filing the proposed tariff shall also:

(i) provide a rate study supporting the proposed rates, which may include the costs of existing invested capital or estimates of future invested capital;

(ii) provide all calculations supporting the proposed rates;

(iii) provide all assumptions for any projections included in the rate study;

(iv) provide an estimated completion date(s) for the physical plant(s);

(v) provide an estimate of the date(s) service will begin for all phases of construction; and

(vi) provide notice to the commission once billing for service begins.

(C) A person who has obtained an approved tariff for the first time and is under the original rate jurisdiction of the commission shall file a rate change application within 18 months from the date service begins in order to revise its tariff to adjust the rates to a historic test year and to true up the new tariff rates to the historic test year. Any dollar amount collected under the rates charged during the test year in excess of the revenue requirement established by the commission during the rate change proceeding shall be reflected as customer contributed capital going forward as an offset to rate base for ratemaking purposes. An application for a price index rate adjustment under TWC §13.1872 does not satisfy the requirements of this subparagraph.

(D) Every water supply or sewer service corporation shall file with the commission a complete tariff containing schedules of all its rates, tolls, charges, rules, and regulations pertaining to all of its utility services when it applies to operate as a retail public utility and to obtain or amend a CCN.

(2) Minor tariff changes. Except for an affected county or a utility under the original rate jurisdiction of a municipality, a utility's approved tariff may not be changed or amended without commission approval. Minor tariff changes shall not be allowed for any fees charged by affiliates. The addition of a new extension policy to a tariff or modification of an existing extension policy is not a minor tariff change. An affected county may change rates for retail water or sewer service without commission approval, but shall file a copy of the revised tariff with the commission within 30 days after the effective date of the rate change.

(A) The commission, or regulatory authority, as appropriate, may approve the following minor changes to utility tariffs:

(i) service rules and policies;

(ii) changes in fees for customer deposits, meter tests, return check charges, and late charges, provided they do not exceed the maximum allowed by commission rules;

(iii) addition of the regulatory assessment fee payable to the TCEQ as a separate item or to be included in the currently authorized rate;

(iv) addition of a provision allowing a utility to collect retail sewer service charges in accordance with TWC §13.250(b)(2) or §13.147(d);

(v) rate adjustments to implement commission-authorized phased or multi-step rates or downward rate adjustments to reconcile rates with actual costs;

(vi) implementation of an energy cost adjustment clause under subsection (n) of this section;

(vii) implementation or modification of a pass-through provision calculation in a tariff, as provided in subparagraphs (B)-(E) of this paragraph, which is necessary for the correct recovery of the actual charges from pass-through entities, including line loss;

(viii) some surcharges as provided in subparagraph (F) of this paragraph;

(ix) modifications, updates, or corrections that do not affect a rate may be made to the following information contained in the tariff:

(I) the list of the cities, counties, and subdivisions in which service is provided;

(II) the public water system name(s) and corresponding identification number(s) issued by the TCEQ; and

(III) the sewer system names and corresponding discharge permit number(s) issued by the TCEQ.

(B) The commission, or other regulatory authority, as appropriate, may approve a minor tariff change for a utility to establish reduced rates for a minimal level of retail water service to be provided solely to a class of elderly customers 65 years of age or older to ensure that those customers receive that level of retail water service at more affordable rates. The regulatory authority shall allow a utility to establish a fund to receive donations to recover the costs of providing the reduced rates. A utility may not recover those costs through charges to its other customer classes.

(i) To request a rate as defined in this subparagraph, the utility must file a proposed plan for review by the commission. The plan shall include:

(I) A proposed plan for collection of donations to establish a fund to recover the costs of providing the reduced rates.

(II) The National Association of Regulatory Utility Commissioners (NARUC) account or subaccount name and number in which the donations will be accounted for, and a clear definition of how the administrative costs of operation of the program are accounted for and removed from the cost of service for rate making purposes. Any interest earned on donated funds will be considered a donation to the fund.

(III) An effective date of the program and an example of an annual accounting for donations received and a calculation of all lost revenues and the journal entries that transfer the funds from the account in this subparagraph of this clause to the utility's revenue account. The annual accounting shall be available to audit by the commission upon request.

(IV) An example bill with the contribution line item, if receiving contributions from customers.

(ii) For the purpose of clause (i) of this subparagraph, recovery of lost revenues from donations shall only include the lost revenues due to the difference in the utility's tariffed retail water rates and the reduced rates established by this subparagraph.

(iii) The minimal level of retail water service requested by the utility shall be no more than 3,000 gallons per month per connection. Additional gallons used shall be billed at the utility's tariffed rates.

(iv) For purposes of the provision in this subparagraph, a reduced rate authorized under this section does not:

(I) Make or grant an unreasonable preference or advantage to any corporation or person;

(II) Subject a corporation or person to an unreasonable prejudice or disadvantage; or

(III) Constitute an unreasonable difference as to retail water rates between classes of service.

(C) If a utility has provided proper notice as required in subparagraph (F) of this paragraph, the commission may approve a pass-through provision as a minor tariff change, even if the utility has never had an approved pass-through provision in its tariff. A pass-through provision may not be approved for a charge already included in the utility's cost of service used to calculate the rates approved by the commission in the utility's most recently approved rate change under TWC §13.187 or TWC §13.1871. A pass-through provision may only include passing through of the actual costs charged to the utility. Only the commission staff or the utility may request a hearing on a proposed pass-through provision or a proposed revision or change to a pass-through provision. A pass-through provision may be approved in the following situation(s):

(i) A utility that purchases water or sewage treatment and whose rates are under the original jurisdiction of the commission may include a provision in its tariff to pass through to its customers changes in such costs. The provision must specify how it is calculated.

(ii) A utility may pass through a temporary water rate provision implemented in response to mandatory reductions in water use imposed by a court, government agency, or other authority. The provision must specify how the temporary water rate provision is calculated.

(iii) A utility may include the addition of a production fee charged by a groundwater conservation district, including a production fee charged in accordance with a groundwater reduction plan entered in to by a utility in response to a groundwater conservation district production order or rule, as a separate line item in the tariff.

(iv) A utility may pass through the costs of changing its source of water if the source change is required by a governmental entity. The pass-through provision may not be effective prior to the date the conversion begins. The pass-through provision must be calculated using an annual true-up provision.

(v) A utility subject to more than one pass-through cost allowable in this section may request approval of an overall combined pass-through provision that includes all allowed pass-through costs to be recovered in one provision under subparagraph (D) of this paragraph. The twelve calendar months (true-up period) for inclusion in the true-up must remain constant, *e.g.,* January through December.

(vi) A utility that has a combined pass-through provision in its approved tariff may request to amend its tariff to replace the combined pass-through provision with individual pass-through provisions if all revenues and expenses have been properly trued up in a true-up report and all over-collections have been credited back to the customers. A utility that has replaced its previously approved combined pass-through provision with individual provisions may not request another combined pass-through until three years after the replacement has been approved unless good cause is shown.

(D) A change in the combined pass-through provision may only be implemented once per year. The utility must file a true-up report within one month after the end of the true-up period. The report must reconcile both expenses and revenues related to the combined pass-through charge for the true-up period. If the true-up report reflects an over-collection from customers, the utility must change its combined pass-through rate using the confirmed rate changes to charges being passed through and the over-collection from customers reflected in the true-up report. If the true-up report does not reflect an over-collection from the customers, the implementation of a change to the pass-through rate is optional. The change may be effective in a billing cycle within three months after the end of the true-up period as long as the true-up clearly shows the reconciliation between charges by pass-through entities and collections from the customers, and charges from previous years are reconciled. Only expenses charged by the pass-through provider(s) shall be included in the provision. The true-up report shall include:

(i) a list of all entities charging fees included in the combined pass-through provision, specifying any new entities added to the combined pass-through provision;

(ii) a summary of each charge passed through in the report year, along with documentation verifying the charge assessed and showing the amount the utility paid;

(iii) a comparison between annual amounts billed by all entities charging fees included in the pass-through provision with amounts billed for the usage by the utility to its customers in the pass-through period;

(iv) all calculations and supporting documentation;

(v) a summary report, by year, for the lesser of all years prior or five years prior to the pass-through period showing the same information as in clause (iii) of this subparagraph with a reconciliation to the utility's booked numbers, if there is a difference in any year; and

(vi) any other documentation or information requested by the commission.

(E) For any pass-through provision granted under this section, all charges approved for recovery of pass-through costs shall be stated separately from all charges by the utility to recover the revenue requirement. Except for a combined pass-through provision, the calculation for a pass-through gallonage rate for a utility with one source of water may be made using the following equation, which is provided as an example: R=G /(1-L), where R is the utility's new proposed pass-through rate, G equals the new gallonage charge by source supplier or conservation district, and L equals the actual line loss reflected as a percentage expressed in decimal format (for example, 8.5% would be expressed as 0.085). Line loss will be considered on a case-by-case basis.

(F) A utility that wishes to revise or implement an approved pass-through provision shall take the following actions prior to the beginning of the billing period in which the revision takes effect:

(i) file a written notice with the commission that must include:

(I) the affected CCN number(s);

(II) a list of the affected subdivision(s), public water system name(s) and corresponding number(s) issued by the TCEQ, and the water quality system name(s) and corresponding number(s) issued by the TCEQ, if applicable;

(III) a copy of the notice to the customers;

(IV) documentation supporting the stated amounts of any new or modified pass-through costs;

(V) historical documentation of line loss for one year;

(VI) all calculations and assumptions for any true-up of pass-through costs;

(VII) the calculations and assumptions used to determine the new rates; and

(VIII) a copy of the pages of the utility's tariff that contain the rates that will change if the utility's application is approved; and

(ii) e-mail (if the customer has agreed to receive communications electronically), mail, or hand-deliver notice to the utility's customers. Notice may be in the form of a billing insert and must contain:

(I) the effective date of the change;

(II) the present calculation of customer billings;

(III) the new calculation of customer billings;

(IV) an explanation of any corrections to the pass-through formula, if applicable;

(V) the change in charges to the utility for purchased water or sewer treatment or ground water reduction fee or subsidence, if applicable; and

(VI) the following language: "This tariff change is being implemented in accordance with the minor tariff changes allowed by 16 Texas Administrative Code §24.21. The cost to you as a result of this change will not exceed the costs charged to your utility."

(G) The following provisions apply to surcharges:

(i) A surcharge is an authorized rate to collect revenues over and above the usual cost of service.

(ii) If authorized by the commission or the municipality exercising original jurisdiction over the utility, a surcharge to recover the actual increase in costs to the utility may be collected over a specifically authorized time period without being listed on the approved tariff for:

(I) sampling fees not already recovered by rates;

(II) inspection fees not already recovered by rates;

(III) production fees or connection fees not already recovered by rates charged by a groundwater conservation district; or

(IV) other governmental requirements beyond the control of the utility.

(iii) A utility shall use the revenues collected through a surcharge approved by the commission only for the purposes noted in the order approving the surcharge. A utility shall handle the funds in the manner specified in the order approving the surcharge. The utility may redirect or use the revenues for other purposes only after first obtaining the approval of the commission.

(iv) The commission may require a utility to file periodic and/or final accounting information to show the collection and disbursement of funds collected through an approved surcharge.

(3) Tariff revisions and tariffs filed with rate changes.

(A) If the commission is the regulatory authority, the utility shall file its revisions with the commission. If a proposed tariff revision constitutes an increase in existing rates of a particular customer class or classes, then the commission may require that notice be given.

(B) Each revision must be accompanied by a copy of the original tariff and a red-lined copy of the proposed tariff revisions clearly showing the proposed changes.

(4) Rate schedule. Each rate schedule must clearly state the public water system name(s) and the corresponding identification number(s) issued by the TCEQ or the sewer system name(s) and the corresponding identification number(s) issued by the TCEQ for each discharge permit, subdivision, city, and county in which the schedule is applicable.

(5) Tariff pages. Tariff pages must be numbered consecutively. Each page must show section number, page number, name of the utility, and title of the section in a consistent manner.

(c) Composition of tariffs. A utility's tariff, including those utilities operating within the corporate limits of a municipality, must contain sections setting forth:

(1) a table of contents;

(2) a list of the cities, counties, and subdivision(s) in which service is provided, along with the public water system name(s) and

corresponding identification number(s) issued by the TCEQ and sewer system names and corresponding discharge permit number(s) issued by the TCEQ to which the tariff applies;

(3) the CCN number(s) under which service is provided;

(4) the rate schedules;

(5) the service rules and regulations, including forms of the service agreements, if any, and customer service inspection forms to be completed as required by the TCEQ;

(6) the extension policy;

(7) an approved drought contingency plan as required by the TCEQ; and

(8) the forms of payment to be accepted for utility services.

(d) Tariff filings in response to commission orders. Tariff filings made in response to an order issued by the commission must include a transmittal letter stating that the tariff attached is in compliance with the order, giving the docket number, date of the order, a list of tariff pages filed, and any other necessary information. Any service rules proposed in addition to those listed on the commission's tariff form or any modifications of a rule in the tariff must be clearly noted. All tariff pages must comply with all other sections in this chapter and must include only changes ordered. The effective date and/or wording of the tariff must comply with the provisions of the order.

(e) Availability of tariffs. Each utility shall make available to the public at each of its business offices and designated sales offices within Texas all of its tariffs currently on file with the commission or regulatory authority, and its employees shall lend assistance to persons requesting information and afford these persons an opportunity to examine any such tariffs upon request. The utility also shall provide copies of any portion of the tariffs at a reasonable cost to a requesting party.

(f) Rejection. Any tariff filed with the commission and found not to be in compliance with this section shall be returned to the utility with a brief explanation of the reasons for rejection.

(g) Change by other regulatory authorities. Each utility operating within the corporate limits of a municipality exercising original jurisdiction shall file with the commission its current tariff that has been authorized by the municipality. If changes are made to the utility's tariff for one or more service areas under the jurisdiction of the municipality, the utility shall file its tariff reflecting the changes along with the ordinance, resolution or order issued by the municipality to authorize the change.

(h) Effective date. The effective date of a tariff change is the date of approval by the regulatory authority, unless otherwise specified by the regulatory authority, in a commission order, or by rule. The effective date of a proposed rate increase under TWC §13.187 or §13.1871 is the proposed date on the notice to customers and the regulatory authority, unless suspended by the regulatory authority.

(i) Tariffs filed by water supply or sewer service corporations. Every water supply or sewer service corporation shall file, for informational purposes only, its tariff showing all rates that are subject to the appellate jurisdiction of the commission and that are in force for any utility service, product, or commodity offered. The tariff must include all rates, rules, and regulations relating to utility service or extension of service, the CCN number(s), and all affected counties or cities. If changes are made to the water supply or sewer service corporation's tariff, the water supply or sewer service corporation shall file the tariff reflecting the changes, along with a cover letter with the effective date of the change. Tariffs filed under this subsection shall be filed in conformance with §22.71 of this title (relating to Filing of Pleadings, Documents, and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission).

(j) Temporary water rate provision for mandatory water use reduction.

(1) A utility's tariff may include a temporary water rate provision that will allow the utility to increase its retail customer rates during periods when a court, government agency, or other authority orders mandatory water use reduction measures that affect the utility customers' use of water service and the utility's water revenues. Implementation of the temporary water rate provision will allow the utility to recover revenues that the utility would otherwise have lost due to mandatory water use reductions. If a utility obtains an alternate water source to replace the required mandatory reduction during the time the temporary water rate provision is in effect, the temporary water rate provision must be adjusted to prevent over-recovery of revenues from customers. A temporary water rate provision may not be implemented if an alternative water supply is immediately available without additional cost.

(2) The temporary water rate provision must be approved by the regulatory authority having original jurisdiction in a rate proceeding before it may be included in the utility's approved tariff or implemented as provided in this subsection. A proposed change in the temporary water rate provision must be approved in a rate proceeding. A utility that has filed a rate change within the last 12 months may file a request for the limited purpose of obtaining a temporary water rate provision.

(3) A utility may request a temporary water rate provision for mandatory water use reduction using the formula in this paragraph to recover 50% or less of the revenues that would otherwise have been lost due to mandatory water use reductions. The formula for a temporary water rate provision for mandatory water use reduction under this paragraph is:
Figure: 16 TAC §24.21(j)(3) (No change.)

(A) The utility shall file a temporary water rate provision for mandatory water use reduction request and provide customer notice as required by the regulatory authority, but is not required to provide complete financial data to support its existing rates. Notice must include a statement of when the temporary water rate provision would be implemented, the customer class(es) affected, the rates affected, information on how to protest and/or intervene in the rate change, the address of the regulatory authority, the time frame for protests, and any other information that is required by the regulatory authority. The utility's existing rates are not subject to review in this proceeding and the utility is only required to support the need for the temporary rate. A request for a temporary water rate provision for mandatory water use reduction under this paragraph is not considered a statement of intent to increase rates subject to the 12-month limitation in §24.23 of this title (relating to Time Between Filings).

(B) The utility shall establish that the projected revenues that will be generated by the temporary water rate provision are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect.

(4) A utility may request a temporary water rate provision for mandatory water use reduction using the formula in paragraph (3) of this subsection or any other method acceptable to the regulatory authority to recover up to 100% of the revenues that would otherwise have been lost due to mandatory water use reductions.

(A) If the utility requests authorization to recover more than 50% of lost revenues, it shall submit financial data to support its existing rates as well as the temporary water rate provision for mandatory water use reduction even if no other rates are proposed to be changed. The utility's existing rates are subject to review in addition to the temporary water rate provision for mandatory water use reduction.

(B) The utility shall establish that the projected revenues that will be generated by the temporary water rate provision for mandatory water use reduction are required by the utility to pay reasonable and necessary expenses that will be incurred by the utility during the time mandatory water use reductions are in effect; that the rate of return granted by the regulatory authority in the utility's last rate case does not adequately compensate the utility for the foreseeable risk that mandatory water use reductions will be ordered; and that revenues generated by existing rates do not exceed reasonable cost of service.

(5) The utility may place the temporary water rate provision into effect only after:

(A) it has been approved by the regulatory authority and included in the utility's approved tariff in a prior rate proceeding;

(B) there is an action by a court, government agency, or other authority requiring mandatory water use reduction measures that affect the utility's customers' use of utility services; and

(C) issuing notice as required by paragraph (7) of this subsection.

(6) The utility may readjust its temporary water rate provision to respond to modifications or changes to the original required water use reductions by reissuing notice as required by paragraph (7) of this subsection. If the commission is the regulatory authority, only the commission or the utility may request a hearing on the proposed implementation.

(7) A utility implementing a temporary water rate for mandatory water use reduction shall take the following actions prior to the beginning of the billing period in which the temporary water rate provision takes effect:

(A) submit a written notice, including a copy of the notice received from the court, government agency, or other authority requiring the reduction in water use, to the regulatory authority; and

(B) e-mail, if the customer has agreed to receive communications electronically, or mail notice to the utility's customers. Notice may be in the form of a billing insert and must contain the effective date of the implementation and the new rate the customers will pay after the temporary water rate provision is implemented. If the commission is the regulatory authority, the notice must include the following language: "This rate change is being implemented in accordance with the temporary water rate provision approved by the Public Utility Commission of Texas to recognize the loss of revenues due to mandatory water use reduction ordered by (name of entity issuing order). The new rates will be effective on (date) and will remain in effect until the mandatory water use reductions are lifted or expired. The purpose of the rate is to ensure the financial integrity of the utility. The utility will recover through the rate (the percentage authorized by the temporary rate) % of the revenues the utility would otherwise have lost due to mandatory water use reduction by increasing the volume charge from ($ per 1,000 gallons to $ per 1,000 gallons)."

(8) A utility shall stop charging a temporary water rate provision as soon as is practicable after the order that required mandatory water use reduction is ended, but in no case later than the end of the billing period that was in effect when the order was ended. The utility shall notify its customers of the date that the temporary water rate provision ends and that its rates will return to the level authorized before the temporary water rate provision was implemented. The notice provided to customers regarding the end of the temporary water rate provision shall be filed with the commission.

(9) If the regulatory authority initiates an inquiry into the appropriateness or the continuation of a temporary water rate provision, it may establish the effective date of its decision on or after the date the inquiry is filed.

(k) Multiple system consolidation. Except as otherwise provided in subsection (m) of this section, a utility may consolidate its tariff and rate design for more than one system if:

(1) the systems included in the tariff are substantially similar in terms of facilities, quality of service, and cost of service; and

(2) the tariff provides for rates that promote water conservation for single-family residences and landscape irrigation.

(l) Regional rates. The regulatory authority, where practicable, shall consolidate the rates by region for applications submitted under TWC §13.187 or §13.1871 with a consolidated tariff and rate design for more than one system.

(m) Exemption. Subsection (k) of this section does not apply to a utility that provided service in only 24 counties on January 1, 2003.

(n) Energy cost adjustment clause.

(1) A utility that purchases energy (electricity or natural gas) that is necessary for the provision of retail water or sewer service may request the inclusion of an energy cost adjustment clause in its tariff to allow the utility to adjust its rates to reflect increases and decreases in documented energy costs.

(2) A utility that requests the inclusion of an energy cost adjustment clause in its tariff shall file a request with the commission. The utility shall also give notice of the proposed energy cost adjustment clause by mail, either separately or accompanying customer billings, e-mail or by hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Proof of notice in the form of an affidavit stating that proper notice was delivered to affected customers and stating the date(s) of such delivery shall be filed with the commission by the utility as part of the request. Notice must be provided on the form prescribed by the commission for a rate application package filed under TWC §13.187 or §13.1871 and must contain the following information:

(A) the utility name and address, a description of how the increase or decrease in energy costs will be calculated, the effective date of the proposed change, and the class(es) of utility customers affected. The effective date of the proposed energy cost adjustment clause must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the clause may not apply to service received before the effective date of the clause;

(B) information on how to submit comments regarding the energy cost adjustment clause, the address of the commission, and the time frame for comments; and

(C) any other information that is required by the commission.

(3) The commission's review of the utility's request is an uncontested matter not subject to a contested case hearing. However, the commission shall hold an uncontested public meeting if requested by a member of the legislature who represents an area served by the

utility or if the commission determines that there is substantial public interest in the matter.

(4) Once an energy cost adjustment clause has been approved, documented changes in energy costs must be passed through to the utility's customers within a reasonable time. The pass-through, whether an increase or decrease, shall be implemented on at least an annual basis, unless the commission determines a special circumstance applies. Anytime changes are being made using this provision, notice shall be provided as required by paragraph (5) of this subsection. Copies of notices to customers shall be filed with the commission,

(5) Before a utility implements a change in its energy cost adjustment clause as required by paragraph (4) of this subsection, the utility shall take the following actions prior to the beginning of the billing period in which the implementation takes effect:

(A) submit written notice to the commission, which must include a copy of the notice sent to the customers, proof that the documented energy costs have changed by the stated amount; and

(B) e-mail, if the customer has agreed to receive communications electronically, mail, either separately or accompanying customer billings, or hand deliver notice to the utility's affected customers. Notice must contain the effective date of change and the increase or decrease in charges to the utility for documented energy costs. The notice must include the following language: "This tariff change is being implemented in accordance with the utility's approved energy cost adjustment clause to recognize (increases) (decreases) in the documented energy costs. The cost of these charges to customers will not exceed the (increase) (decrease) in documented energy costs."

(6) The commission may suspend the adoption or implementation of an energy cost adjustment clause if the utility has failed to properly file the request or has failed to comply with the notice requirements or proof of notice requirements. If the utility cannot clearly demonstrate how the clause is calculated, the increase or decrease in documented energy costs or how the increase or decrease in documented energy costs will affect rates, the commission may suspend the adoption or implementation of the clause until the utility provides additional documentation requested by the commission. If the commission suspends the adoption or implementation of the clause, the adoption or implementation will be effective on the date specified by the commission.

(7) Energy cost adjustment clauses may not apply to contracts or transactions between affiliated interests.

(8) A proceeding under this subsection is not a rate case under TWC §§13.187, 13.1871, or 13.1872.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 18, 2017.

TRD-201705246
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: January 7, 2018
Proposal publication date: September 15, 2017
For further information, please call: (512) 936-7223

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 64. TEMPORARY COMMON WORKER EMPLOYERS

16 TAC §§64.1, 64.10, 64.20, 64.70, 64.72, 64.80

The Texas Commission of Licensing and Regulation (Commission) adopts the repeal of existing rules at 16 Texas Administrative Code (TAC), Chapter 64, §§64.1, 64.10, 64.20, 64.70, 64.72, and 64.80, regarding the Temporary Common Worker Employers program, without changes to the proposed text as published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5305). The rules will not be republished.

The adoption repeals the existing rules of the Commission, the governing body of the Texas Department of Licensing and Regulation (Department), regarding the licensing and regulation of temporary common worker employers by the Department. The existing rules under 16 TAC Chapter 64 implemented Texas Labor Code, Chapter 92.

The repeal of the existing rules is necessary to implement Senate Bill (S.B.) 2065, 85th Legislature, Regular Session, 2017. This bill, in part, repealed the state licensing requirements for temporary common worker employers under Texas Labor Code, Chapter 92, Temporary Common Worker Employers. S.B. 2065 preserved the provisions in Chapter 92 regarding the standards of conduct and practice for temporary common worker employers and the provision allowing municipalities over 1 million people to impose stricter standards of conduct and practice. As amended by S.B. 2065, unless prohibited by a governmental subdivision, a temporary common worker employer is authorized to operate in the state if it meets the requirements of Chapter 92. A governmental subdivision may enforce Chapter 92 within the boundaries of the governmental subdivision. These statutory changes were effective September 1, 2017.

The adoption repeals the existing rules for the Temporary Common Worker Employers Program under 16 TAC Chapter 64, §§64.1, 64.10, 64.20, 64.70, 64.72, and 64.80. As of September 1, 2017, the Department no longer licenses or regulates temporary common worker employers.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5305). The deadline for public comments was November 6, 2017. The Department did not receive any comments during the 30-day public comment period.

At its meeting on December 15, 2017, the Commission adopted the proposed repeal without changes.

The repeal is adopted under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Texas Labor Code, Chapter 92. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2017.

TRD-201705312
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 15, 2018
Proposal publication date: October 6, 2017
For further information, please call: (512) 463-8179

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CHAPTER 65. BOILERS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 65, Subchapter A, §65.1 and §65.2; Subchapter C, §§65.13 - 65.15; Subchapter D §65.25; Subchapter E, §65.30; Subchapter G, §65.45; Subchapter J, §65.72; Subchapter N, §65.217; Subchapter O, §65.300; Subchapter R, §§65.601, 65.603, 65.606 - 65.609; the repeal of current Subchapter I, §65.63; and new Subchapter I, §65.63 and §65.64, regarding the Boilers program, without changes to the proposed text as published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5307). The rules will not be republished.

The Commission also adopts amendments to existing rules at 16 TAC, Chapter 65, Subchapter C, §65.12, with changes to the proposed text as published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5307). The rule will be republished.

The Texas Legislature enacted House Bill 3257 (HB 3257), 85th Legislature, Regular Session (2017), which set the periodicity of portable boiler inspections. Editorial corrections and clarifications are also being adopted. The adopted amendments, repeal and new rules are necessary to implement HB 3257.

The adopted amendments to §65.1 correct the statutory authority.

The adopted amendments to §65.2 remove the definitions for "existing installations" and "new installations" since the terms are not used in this program. Editorial changes are also made to renumber the section accordingly.

The adopted amendments to §65.12 clarify that the current certificate of operation is to be displayed under glass in a conspicuous place on or near the boiler.

The adopted amendments to §65.13 clarify the process to test-fire and operate a newly installed boiler and the Temporary Operating Permit.

The adopted amendments to §65.14 correct the name of the National Board Commission and require the applicant to demonstrate they meet eligibility requirements.

The adopted amendments to §65.15 change the title of the section to correctly name boiler certification requirements and clarify when inspection reports and written authorization are needed.

The adopted amendments to §65.25 change the title of the section to correctly name authorized inspector requirements.

The adopted amendments to §65.30 clarify the requirement for the applicant to demonstrate they meet eligibility requirements.

The adopted amendments to §65.45 remove "portable boiler" language in the title and section to be placed in a new section.

The adopted repeal of current §65.63 is to renumber it to adopted new §65.64.

The adopted new §65.63 establishes the requirements of HB 3257.

The adopted amendments to §65.72 further identify which stamped tag designates the boiler as condemned and clarify the decal which shall be altered/defaced.

The adopted amendments to §65.217 add a reference and makes an editorial change.

The adopted amendments to §65.300 correct the title to reflect all fees and specify who is required to pay each fee.

The adopted amendments to §65.601 clarify existing language to reflect practice and make editorial changes.

The adopted amendments to §65.603 clarify where the record of calibration must be placed.

The adopted amendments to §65.606 correct the title of the section to reflect practice.

The adopted amendments to §65.607 make editorial changes.

The adopted amendments to §65.608 make editorial changes.

The adopted amendments to §65.609 make editorial changes.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5307). The deadline for public comments was November 6, 2017. The Department did not receive any comments on the proposed rules during the 30-day public comment period.

The Board of Boiler Rules (Board) met on November 14, 2017, and recommended adopting the proposed rules with changes to §65.12(2) conforming that subsection to Health and Safety Code §755.029(c). At its meeting on December 15, 2017, the Commission adopted the proposed rules with changes as recommended by the Board.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §65.1, §65.2

The amendments are adopted under Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2017.

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Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-8179

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SUBCHAPTER C. BOILER REGISTRATION AND CERTIFICATE OF OPERATION--REQUIREMENTS

16 TAC §§65.12 - 65.15

The amendments are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

§65.12. Boiler Registration and Certificate of Operation Required.

Except as provided by this chapter, each boiler operated in this state must:

(1) be registered with the department; and

(2) have qualified for a current certificate of operation with the current certificate of operation posted under glass in a conspicuous place on or near the boiler for which it is issued.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. AUTHORIZED INSPECTOR

16 TAC §65.25

The amendments are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. EXAMINATIONS AND WAIVER OF EXAMINATION

16 TAC §65.30

The amendments are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER G. APPLICATION TO OPERATE PORTABLE AND STATIONARY NONSTANDARD BOILERS IN THE STATE

16 TAC §65.45

The amendments are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER I. INSPECTION OF BOILERS

16 TAC §65.63

The repeal is adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and other law establishing a program regulated by the Department.

The statutory provisions affected by the repeal are those set forth in the Texas Occupations code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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16 TAC §65.63, §65.64

The new rules are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-8179

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SUBCHAPTER J. TEXAS BOILER NUMBERS

16 TAC §65.72

The amendments are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 463-8179

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SUBCHAPTER N. RESPONSIBILITIES OF THE OWNER AND OPERATOR

16 TAC §65.217

The amendments are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the proposal.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 463-8179

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SUBCHAPTER O. FEES

16 TAC §65.300

The amendments are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER R. TECHNICAL REQUIREMENTS

16 TAC §§65.601, 65.603, 65.606 - 65.609

The amendments are adopted under Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 71. WARRANTORS OF VEHICLE PROTECTION PRODUCTS

16 TAC §§71.1, 71.10, 71.20, 71.22, 71.70, 71.80, 71.90

The Texas Commission of Licensing and Regulation (Commission) adopts the repeal of existing rules at 16 Texas Administrative Code (TAC), Chapter 71, §§71.1, 71.10, 71.20, 71.22, 71.70, 71.80, and 71.90, regarding the Vehicle Protection Product Warrantors program, without changes to the proposed text as published in the September 29, 2017, issue of the *Texas Register* (42 TexReg 5199). The rules will not be republished.

The adoption repeals the existing rules of the Commission, the governing body of the Texas Department of Licensing and Regulation (Department), regarding the licensing and regulation of vehicle protection product warrantors by the Department. The existing rules under 16 TAC Chapter 71 implemented the former Texas Occupations Code, Chapter 2306.

The repeal of the existing rules is necessary to implement Senate Bill (S.B.) 2065, 85th Legislature, Regular Session, 2017. This bill, in part, repealed Texas Occupations Code, Chapter 2306, Vehicle Protection Product Warrantors, and relocated the regulation of vehicle protection products and warrantors to Texas Business and Commerce Code, Chapter 17, Subchapter E, the Deceptive Trade Practices-Consumer Protection Act. These statutory changes were effective September 1, 2017.

The adoption repeals the existing rules for the Vehicle Protection Product Warrantors Program under 16 TAC Chapter 71, §§71.1, 71.10, 71.20, 71.22, 71.70, 71.80, and 71.90. As of September 1, 2017, the Department no longer regulates or licenses vehicle protection products or warrantors.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the September 29, 2017, issue of the *Texas Register* (42 TexReg 5199). The deadline for public comments was October 30, 2017. The Department did not receive any comments during the 30-day public comment period.

At its meeting on December 15, 2017, the Commission adopted the proposed repeal without changes.

The repeal is adopted under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51 and former Chapter 2306, and Texas Business and Commerce Code, Chapter 17. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 15, 2018
Proposal publication date: September 29, 2017
For further information, please call: (512) 463-3671

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CHAPTER 73. ELECTRICIANS

16 TAC §73.26

The Texas Commission of Licensing and Regulation (Commission) adopts the amendment of an existing rule at 16 Texas Administrative Code (TAC), Chapter 73, §73.26, regarding the Electricians program, without changes to the proposed text as published in the August 18, 2017, issue of the *Texas Register* (42 TexReg 4081). The rules will not be republished.

The adopted amendment of the existing rule is necessary to §73.26 to simplify the language of the existing rule and add one substantive provision. Section 73.26(b) currently requires electrical licensees to "provide verifiable documentation of the on-the-job training hours of an applicant they have supervised upon the request of the department." However, the rule does not provide a date by which the licensee must provide the necessary verification. The adopted amendment to subsection (b) creates a deadline of 30 days for a licensee to verify an applicant's on-the-job experience. The adopted amendments are necessary to make §73.26 more reader-friendly and to provide clearer guidance to applicants and licensees regarding verification of on-the-job experience.

The adopted amendments to §73.26 simplify the rule's language and impose a deadline of 30 days for a licensee to verify an applicant's on-the-job experience

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the August 18, 2017, issue of the *Texas Register* (42 TexReg 4081). The deadline for public comments was September 18, 2017. The Department received nine comments during the 30-day public comment period. The public comments received are summarized below.

Comment--Three commenters agreed with the Department's rule proposal.

Department Response--The Department appreciates these comments. The Department did not make any changes to the rules in response to these comments.

Comment--One commenter inquired about a continuing education course for his license.

Department Response--This comment was forwarded to the Education and Examination Division for a response. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter voiced concern regarding the lack of reciprocity for the master electrician license.

Department Response--The Department appreciates the comment, but it is outside the scope of this rulemaking. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter inquired about the renewal process for an expired license.

Department Response--This comment was forwarded to the Licensing Division for a response. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter asked whether, under the proposed rule, an applicant may verify his or her own on-the-job experience.

Department Response--The proposed rule, like the current rule, requires a person authorized by Chapter 1305 of the Texas Occupations Code to verify on-the-job training. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter expressed disagreement with the proposed rule, claiming that the Department will not be able to enforce the rule. The commenter recommended the rule remain as is.

Department Response--The Department understands the commenter's concerns, but disagrees with the commenter's conclusion regarding its ability to enforce the rule. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter referred to his test score.

Department Response--This comment is outside the scope of this rulemaking. The Department did not make any changes to the rules in response to this comment.

The Electrical Safety and Licensing Advisory Board met on November 2, 2017, to discuss the proposed amendments and the public comments received. The Board recommended adopting the proposed amendments without changes.

At its meeting on December 15, 2017, the Commission adopted the proposed amendments with changes.

The amendment is adopted under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1305. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-3671

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CHAPTER 82. BARBERS

The Texas Commission of Licensing and Regulation (Commission) adopts the amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 82, §§82.10, 82.20, 82.22, 82.23, 82.29, 82.40, 82.50, 82.52, 82.54, 82.70 - 82.72, 82.78, 82.80, 82.102, and 82.108; and the repeal of current §82.53, regarding the Barbers program, without changes to the proposed text as published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5315). The rules will not be republished.

The Texas Legislature enacted Senate Bill 1503, Senate Bill 2065, House Bill 2738, House Bill 2739, 85th Legislature, Regular Session (2017). The adopted amendments and repeal include removing the requirement for a shampoo apprentice permit or shampoo specialty certificate; eliminating risk-based inspections; clarifying the definition of barbering to exclude threading; authorizing licensed schools to account for hours on the basis of clock or credit; allowing standards to be established for equivalency and conversion of clock to credit hours and vice versa; removing square footage, chair, and sink requirements for barber schools; and distinguishing between larger and specialty school requirements. The adopted amendments and repeal are necessary to implement the legislative changes.

The adopted amendments to §82.10 corrects a reference.

The adopted amendments to §82.20 adds the word "specialty" to match current statutory language.

The adopted amendments to §82.22 adds a reference regarding specialty shop permits.

The adopted amendments to §82.23 removes specific requirements for barber schools.

The adopted amendments to §82.29 clarifies the current requirements for an establishment relocation or change of ownership.

The adopted amendments to §82.40 increases the amount per claim that a student may receive in the event of a school closure.

The adopted amendments to §82.50 removes the reference to risk-based inspections.

The adopted amendments to §82.52 removes risk-based inspections as part of periodic inspections.

The adopted repeal of §82.53 removes risk-based inspections and the classifications.

The adopted amendments to §82.54 allows individuals a full ten days to complete the necessary modification after an inspection.

The adopted amendments to §82.70 corrects language to make it consistent throughout the chapter.

The adopted amendments to §82.71 remove shampoo permit requirements, make language consistent, and correct a reference.

The adopted amendments to §82.72 remove shampoo requirements and outdated language and establish equivalency and conversion standards between credit and clock hours.

The adopted amendments to §82.78 clarifies language and updates a reference.

The adopted amendments to §82.80 removes fees relating to risk-based inspections and renumbers the section accordingly.

The adopted amendments to §82.102 streamlines language for clarity and quick reference.

The adopted amendments to §82.108 makes an editorial change.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5315). The deadline for public comments was November 6, 2017. The Department received sixteen comments during the 30-day public comment period. The public comments received are summarized below.

Comment--Twelve commenters would like to see the restriction removed from rule that prevents a cosmetology school from operating on the same premises as a barber school.

Department Response--This comment does not address any current proposed rule. The purpose of the proposed rules is to implement changes as a result of legislation passed during the 85th Texas Legislative Session. These comments have been forwarded to the appropriate division for review. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter would like to know how to obtain a license in Texas.

Department Response--This comment does not address any current proposed rule. The purpose of the proposed rules is to implement changes as a result of legislation passed during the 85th Texas Legislative Session. This comment has been forwarded to the appropriate division for review. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter raised several issues regarding the Barber Program. First, the commenter states that the Department lacks follow-up with barber school students. The commenter believes that there should always be a mandate over the number of sinks within an establishment and consumer protection should be the sole purpose of governance. The commenter raises general concerns about the need for better sanitary regulations and Department follow-up. The commenter believes that there needs to be mandates on braiding and does not agree with the Commission choosing to deregulate or lift regulations due to lack of enforcement. The commenter believes that proposed amendments in §§82.23, 82.52, 82.54 82.71, 82.72, and 82.80 need to be reconsidered because the removal of these rules will result in more lawsuits.

Department Response--The purpose of the proposed rules is to implement changes as a result of legislation passed during the 85th Texas Legislative Session. The commenter's remarks regarding Department processes and "follow up" with students may be addressed with the Department through our current complaint process. These comments have been forwarded to the correct division for review. The Department is the primary state agency responsible for the oversight of businesses, industries, general trades, and occupations that are regulated by the state and assigned to the department by the legislature. During the 85th Texas Legislative Session, the legislature passed Senate Bill 2065 and House Bill 2739, removing the Commission's ability to establish building and facility standards that are not related to health and safety and removes square footage, chair, and sink requirements. The legislature also chose to deregulate hair braiding during the 84th Texas Legislative Session (House Bill 2717). Furthermore, the proposed rule changes to §§82.23, 82.52, 82.71, 82.72, and 82.80 are a result of legislative measure passed during the 85th Legislative Session. The proposed change to §82.54 provides more flexibility to the owner and department to ensure corrective modifications are made following

an inspection. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter asks if any changes were made relating to enforcement provisions for obtaining a barber license if the applicant has a felony charge.

Department Response--This comment does not address any current proposed rule. No changes have been made relating to enforcement provisions. However, existing Chapter 51, Section 51.4012 and Chapter 53, Subchapter D, of the Texas Occupations Code, allow a person to request a criminal history evaluation letter from the Department, prior to actually applying for a license. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter would like to know what the new square footage requirements will be for opening a school.

Department Response--Senate Bill 2065 and House Bill 2739 passed during the 85th Legislative Session removing the Commission's ability to establish building and facility standards that are not related to health and safety and removes square footage, chair, and sink requirements. The Department is in the process of developing procedures to implement all changes as a result of Senate Bill 2065 and HB2739. This comment has been forwarded to the appropriate division for review. The Department did not make any changes to the rules in response to this comment.

The Advisory Board on Barbering (Board) met on November 13, 2017, to discuss the proposed rules and the public comments received. The Board recommended adopting the rules without changes.

At its meeting on December 15, 2017, the Commission adopted the rules without changes.

16 TAC §§82.10, 82.20, 82.22, 82.23, 82.29, 82.40, 82.50, 82.52, 82.54, 82.70 - 82.72, 82.78, 82.80, 82.102, 82.108

The amendments are adopted under Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 1601, and 1603. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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16 TAC §82.53

The repeal is adopted under Texas Occupations Code, Chapters 51, 1601, and 1603, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, 1601, and 1603. No other statutes, articles, or codes are affected by the proposal.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 83. COSMETOLOGISTS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 83, §§83.10, 83.22 - 83.25, 83.29, 83.31, 83.40, 83.50 - 83.52, 83.54, 83.70 - 83.73, 83.78, 83.80, 83.102 and 83.105; and the repeal of current §83.53, regarding the Cosmetologists program, without changes to the proposed text as published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5319). The rules will not be republished.

The Texas Legislature enacted Senate Bill 1503, Senate Bill 2065, House Bill 2552, House Bill 2738, and House Bill 2739, 85th Legislature, Regular Session (2017). The adopted amendments and repeal include removing the requirement for a shampoo apprentice permit or shampoo specialty certificate; eliminating risk-based inspections; clarifying the definition of cosmetology to exclude threading; authorizing licensed schools to account for hours on the basis of clock or credit; allowing standards to be established for equivalency and conversion of clock to credit hours and vice versa; requiring continuing education hours to include information on human trafficking; removing square footage, chair, and sink requirements for cosmetology schools; and distinguishing between larger and specialty school requirements. The adopted amendments and repeal are necessary to implement the legislative changes.

The adopted amendments to §83.10 correct references, remove outdated language, and add "specialty shop" to be consistent with statutory language.

The adopted amendments to §83.22 remove redundant language for clarity.

The adopted amendments to §83.23 remove specific requirements for beauty culture schools.

The adopted amendments to §83.24 remove language regarding inactive license status to reflect current practice.

The adopted amendments to §83.25 correct a reference and add human trafficking to continuing education requirements.

The adopted amendments to §83.29 clarify the current requirements for establishment relocation and change of ownership.

The adopted amendments to §83.31 remove shampoo specialty certificates.

The adopted amendments to §83.40 reduce the maximum amount per claim per student to assist more students in the event of a school closure.

The adopted amendments to §83.50 remove a reference to risk-based inspections.

The adopted amendments to §83.51 update language to be consistent with statutory language.

The adopted amendments to §83.52 remove risk-based inspections from periodic inspections.

The adopted repeal of §83.53 removes risk-based inspections and classifications.

The adopted amendments to §83.54 allow individuals a full 10 days to complete the necessary modification after an inspection.

The adopted amendments to §83.70 update language to be consistent throughout chapter.

The adopted amendments to §83.71 remove shampoo permit requirements, add facility license posting requirements, and update language for consistency.

The adopted amendments to §83.72 require human trafficking information to be posted, remove outdated language, and establish equivalency and conversion standards between credit and clock hours.

The adopted amendments to §83.73 remove the shampoo apprentice permits and shampoo specialty certificates.

The adopted amendments to §83.78 update language for clarity.

The adopted amendments to §83.80 remove fees relating to shampoo certificates and risk-based inspections and renumber the section accordingly.

The adopted amendments to §83.102 streamline language for clarity and quick reference.

The adopted amendments to §83.105 remove threading language for clarity.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 6, 2017, issue of the *Texas Register* (42 TexReg 5319). The deadline for public comments was November 6, 2017. The Department received comments from 16 interested parties during the 30-day public comment period. The public comments received are summarized below.

Comment--One commenter raised several issues with the Cosmetology Program. First, the commenter would like to see an optional "refresher course" offered for licensed cosmetologists and those on inactive status. The commenter would like the board to issue a professional designation to all Texas cosmetologists who are licensed. The commenter states that a cosmetology operator should be allowed to instruct others using DVDs, tapes, or other mechanical means. The commenter believes that the fee for cosmetologists over the age of 60 should be lowered. Finally, the commenter states that cosmetologists should be given blanket authority to practice their profession wherever the need arises and/or exists.

Department Response--These comments do not address any current proposed rule change. The purpose of the proposed rules is to implement changes as a result of legislation passed during the 85th Texas Legislative Session. Cosmetologists are required to complete at least four hours of continuing education. Three of the hours must cover any topic under §83.120 (Technical Requirements--Curriculum). To be a Department-approved education provider, a course must be dedicated to instruction in one or more of the topics: (1) Sanitation required under the Act and this chapter; (2) the Act and this chapter, addressing topics other than Sanitation; and (3) the curriculum subjects listed in §83.120. At this time, education course providers have the ability to create "refresher courses" as the commenter suggests. A person may not perform or attempt to perform a practice of cosmetology unless the person holds a license or certification to perform that practice. There is no current prohibition on a licensed cosmetologist stating or designating that they are a "licensed cosmetologist." Section 1602.251 of Chapter 1602, Texas Occupations Code states that only licensed cosmetology instructors are allowed to instruct. Additionally, portions of cosmetology instruction can already be done through different types of mediums, including DVDs and tapes. Texas Occupations Code, Chapter 51, requires the Texas Commission of Licensing and Regulation to set fees in amounts reasonable and necessary to cover the costs of administering the program. Finally, where a licensed cosmetologist is able to provide services is established in law by Texas Occupations Code Chapter 1602, §1602.251(c) and would require a statutory change. The Department did not make any changes to the rules in response to these comments.

Comment--Two commenters would like to see the period for renewing an expired license extended from three years to five or eight years. The commenters would like to make the process of reapplying more convenient and states that it is too difficult to take the exam, both written and practical, again for licensing.

Department Response--This comment does not address any current proposed rule change. The law states that a person who has a license that has been expired for more than three years may not renew the license. Texas Occupations Code, Chapter 51, §51.401 requires a person whose license that has been expired for more than three years must obtain a new license and the requirements and procedures, including the examination requirements, for which obtaining an original license must be complied. The Department did not make any changes to the proposed rules in response to these comments.

Comment--The commenter believes that the clock to credit, credit to clock, hour conversion chosen was not designed to be used to measure learning and that the calculation may violate other parts of the rules. The commenter is concerned that the number chosen represents an outdated method that is no longer fully supported by its creators.

Department Response--The purpose of the proposed rule changes is to implement changes as a result of legislation passed during the 85th Texas Legislative Session. During the 85th Texas Legislative Session, the legislature passed Senate Bill 2065 and House Bill 2738 instructing the commission to establish standards for determining the equivalency and conversion of clock hours to credit hours and credit hours to clock and authorizing a school to account for any hours of instruction completed under Chapters 1601 or 1602 based on clock or credit. The Department established a clock to credit and credit to clock conversion formula with the help and advice of the Cosmetology Advisory Board Education Workgroup.

Furthermore, the formula of 37.5 clock hours to 1 credit ensure schools comply with the federal student aid requirements. The Department did not make any changes to the rules in response to this comment.

Comment--Seven commenters do not agree with human trafficking information being included in their continuing education requirements.

Department Response--The purpose of the proposed rule changes is to implement changes as a result of legislation passed during the 85th Texas Legislative Session. House Bill 2552 requires the commission to adopt rules to require all cosmetology continuing education programs to include information on human trafficking. The proposed rule change implements the statutory requirements. The Department did not make any changes to the proposed rules in response to this comment.

Comment--One commenter raised concerns about the safety of their workplace.

Department Response--This comment does not address any current proposed rule. The comment has been referred to the appropriate division for review. The Department did not make any changes to the proposed rules in response to this comment.

Comment--One commenter raised several issues with the proposed rules. First, the commenter believes that the reference for §83.10(21) is incorrect. The commenter believes that the wording of §83.25(l) is confusing because it is drafted as two separate lines. Finally, the commenter raises concerns with the inspections process.

Department Response--The purpose of the proposed rules is to implement changes as a result of legislation passed during the 85th Texas Legislative Session. Senate Bill 1503 removed shampooing and conditioning from the definition of cosmetology and renumbered the section accordingly. The rule change reflects the statutory change and corrects the reference. The comments on the wording of §83.25 and concerning inspections were not about a currently proposed rule change and have been referred to the appropriate divisions for review. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter would like to know how to pay for their renewal.

Department Response--This comment does not address any current proposed rule change. However, it has been referred to the appropriate division for review and response. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter raises concern with salons employing unlicensed individuals using borrowed or rented licenses.

Department Response--This comment does not address any current proposed rule change. However, it has been referred to the appropriate division for review. The Department did not make any changes to the rules in response to this comment.

Comment--One commenter was unable to view the rule proposal because the link did not work.

Department Response--This comment does not address any current proposed rule change. The link to the proposed rules was resent to the commenter. The Department did not make any changes to the rules in response to this comment.

The Advisory Board on Cosmetology met on November 13, 2017, but lacked a quorum to recommend adopting the proposed rules. However, the Board members present agreed with the Department to send the rules to the Commission. At its meeting on December 15, 2017, the Commission adopted the proposed rules without changes.

16 TAC §§83.10, 83.22 - 83.25, 83.29, 83.31, 83.40, 83.50 - 83.52, 83.54, 83.70 - 83.73, 83.78, 83.80, 83.102, 83.105

The amendments are adopted under Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 1602, and 1603. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Brian E. Francis
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Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-8179

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16 TAC §83.53

The repeal is adopted under Texas Occupations Code, Chapters 51, 1602, and 1603, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 1602, and 1603. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 85. VEHICLE STORAGE FACILITIES

The Texas Commission of Licensing and Regulation (Commission) adopts the repeal of current rules at rules at 16 Texas Administrative Code (TAC), §85.205 and §85.452, regarding the Vehicle Storage Facilities Program without changes to proposed text as published in the October 13, 2017, issue of the *Texas Register* (42 TexReg 5617). The rules will not be republished.

The Commission also adopts amendments to existing rules at 16 Texas Administrative Code (TAC), §§85.201, 85.204, 85.206, 85.450, 85.451, 85.650, 85.703, 85.704, 85.722, 85.800 and 85.1003, regarding the Vehicle Storage Facilities Program with changes to proposed text as published in the October 13, 2017 issue of the *Texas Register* (42 TexReg 5617). The rules will be republished.

The adopted amendments and repeals are necessary to implement Senate Bill 1501, Senate Bill 2065, House Bill 1247 and House Bill 2615, 85th Legislature, Regular Session (2017). Collectively these bills remove fencing requirements during the initial licensure application process; eliminate dual licensure and associated fees; eliminate periodic and risk-based inspections and associated fees; relax certain signage requirements; as well as clarify required notices and databases; and update the advisory board composition.

The adopted amendments to §85.201 removes fencing requirements during the initial licensure application process.

The adopted amendments to §85.204 eliminate dual licensure and allow a person to work at a Vehicle Storage Facility if they hold a license under Chapter 85 or Chapter 86.

The adopted repeal of §85.205 eliminates dual licensure requirements.

The adopted amendments to §85.206 removes references to dual licensure.

The adopted amendments to §85.450 removes risk based inspections from general inspection rules.

The adopted amendments to §85.451 removes periodic inspections.

The adopted repeal of §85.452 removes language relating to risk based inspections.

The adopted amendments to §85.650 changes the composition of the advisory board.

The adopted amendments to §85.703 relates to notice requirements and databases that must be used to find vehicle owners and lien holders.

The adopted amendments to §85.704 relates to the second notice requirements.

The adopted amendments to §85.722 cleans up the language to bring it in line with other rules.

The adopted amendments to §85.800 eliminates fees related to dual licensure and risk-based inspections.

The adopted amendments to §85.1003 relaxes some signage requirements.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 13, 2017 issue of the *Texas Register* (42 TexReg 5617). The Department received a total of 11 comments from the public regarding this program and the proposed amendments. All comments are summarized below.

Comment: The Department received one general comment related to signage. The commenter asked if the rules could reflect an exemption on signage requirements for repo companies who hold a VSF license, but only use it occasionally to obtain storage liens. There was no reference to a specific rule.

Department Response--The Department maintains that anyone seeking and obtaining a VSF license must adhere to all licensing requirements, including those relating to signage.

The Department did not make any changes to the proposed rules based on this public comment.

Comment: The Department received one comment related to §85.704 which alleges a conflict between the proposed rule and the Texas Department of Motor Vehicle (DMV) notice requirements for disposition of an abandoned vehicle.

Department Response--The Department maintains that there is no conflict between this proposed rule and the Texas DMV notice requirements. The rule relating to disposition of an abandoned nuisance vehicle is found in §85.724, not proposed §85.704. General Counsel staff forwarded the comment to Compliance staff and requested contact with the commenter to clarify the confusion.

The Department did not make any changes to the proposed rules based on this public comment.

Comment: The Department received two comments relating to §85.703(e)(2). Both assert that the proposed rule would cause undue financial burden on VSF's because they would be unable to charge storage for the first 24 hours that a vehicle is on a storage lot.

Department Response--The Department believes that the commenters are misinterpreting the proposed rule.

The rule reflects a change in statute stating that if a VSF does not timely send its first notice, it cannot charge a fee until 24 hours after it has sent the required notice. If a VSF timely sends its notice as required by statute and the proposed rule, a VSF may charge the daily storage fee permissible under Tex. Occ. Code §2303.155(b)(3) beginning when the vehicle enters its lot.

The change in statute and in the proposed rule only penalizes VSF's that do not timely send notice as required by §85.703 (b)(1) and (b)(2).

The Department did not make any changes to the proposed rules based on this public comment.

Comment: The Department received one comment related to §85.703(c). The commenter disagrees with the proposed removal of this rule section. The section contains language relating to an affirmative defense for license holders who are cited and prosecuted for failing to timely send first notice to vehicle owners or lien holders.

Department Response--The availability of the affirmative defense still exists in statute. It is unnecessary, and quite unusual, to state an affirmative defense in a companion rule. The proposed removal of this section does not affect licensees or any defenses to prosecution which are available to them in statute.

The Department did not make any changes to the proposed rules based on this public comment.

Comment: The Department received one comment related to §85.703(f). The commenter states that the language relating to a return receipt requested for certified and electronic certified mail is incorrect.

Department Response--The commenter is correct and the Department acknowledges a drafting error.

The Department corrected the drafting error so that the proposed rule now mirrors the statutory language.

Comment: The Department received one general comment relating to §85.703. The comment asserts that there is an inconsistency in notice requirements between vehicle and lien holder information obtained directly from the state and information obtained from a third-party provider.

The commenter states that if there is a change in owner between the time that a first notice is issued and the time that a title application is submitted by a VSF, the VSF cannot obtain the title without starting the notice process over if it originally utilized a third-party provider to obtain locating information for the first notice.

Department Response--There is nothing in statute or in the proposed Department rule that requires a VSF owner to start the notice process over if it uses a third-party provider to obtain locating information for the vehicle or lien holder and there is a subsequent sale of the vehicle after that information is obtained, but before the VSF secures title.

If the DMV or local governments require a VSF to start the notice process over under this circumstance, that is an issue for those agencies to address. The Department's proposed rule does not contain such a provision.

The Department did not make any changes to the proposed rule based on this public comment. It will, however, address the issue in an FAQ.

Comment: The Department received one comment related to §85.204(b). However, the comment was actually a question relating to service workers that a VSF might periodically hire to perform landscaping work for their business.

Department Response--This question does not pertain to the proposed rule. General Counsel staff forwarded the question to Compliance staff for further handling.

The Department did not make any changes to the proposed rule based on this public comment.

Comment: The Department received one comment related to §85.450(a). The commenter suggested adding language to the first sentence of the rule so that it reads: "A towing company shall be inspected periodically *to warn a towing company of a violation if found* or as a result of a complaint." (italicized words represent the suggested addition).

Department Response--The rule at §85.450(a) relates to inspections. The Department conducts inspections at towing companies to provide notification of any violations. Accordingly, the Department determined that the suggested language is redundant and does not substantively add to, or clarify, any portion of the rule.

The Department did not make any changes to the proposed rules based on this public comment.

Comment: The Department received one comment related to §85.650 (a)(7) with regards to the change in reference to a board member as a "representative" instead of an "owner". The commenter suggests that the board members be referred to as "representative or owner".

Department Response--The Department's proposed amendment updates the rule to mirror language used in the statutory change to Tex. Occ. Code 2308.051(a). The updated language in rule is not discretionary and must replicate the language in statute. In statute, certain board members are now referred to as "representative" in lieu of "owner".

Comment: The Department received one comment related to §85.722. The comment was a question about the amount of the fee authorized for this section.

Department Response--This question does not pertain to the proposed rule. General Counsel staff forwarded the question to Compliance staff for further handling.

The Department did not make any changes to the proposed rule based on this public comment.

16 TAC §§85.201, 85.204, 85.206, 85.450, 85.451, 85.650, 85.703, 85.704, 85.722, 85.800, 85.1003

The amendments are adopted under Texas Occupations Code, Chapters 51 and 2303, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 2303. No other statutes, articles, or codes are affected by the adoption.

§85.201. License Requirements--Vehicle Storage Facility License.

To be eligible for a VSF license, an applicant must:

(1) submit a completed application on a department approved form;

(2) pay the fee required under §85.800;

(3) provide proof of insurance required under §85.400;

(4) successfully pass a criminal background check;

(5) provide the name, and address of each partner if the applicant is a partnership;

(6) provide the name, and address of each corporate officer, including the president, secretary, and treasurer, if the applicant is a corporation;

(7) provide the name, and address of each owner of the VSF and the percentage of ownership interest each holds in the facility;

(8) provide the name, and address of the operator or manager of the VSF if it is not operated or managed by one of the owners;

(9) provide the facility's physical address, mailing address, and telephone number;

(10) state the VSF's storage capacity; and

(11) include a statement indicating whether the facility has an all weather surface, signs posted in the proper locations, and lighting, as required by these rules; and

(12) adopt the model drug testing policy provided in these rules or file an alternate drug testing policy for approval under these rules.

§85.204. License Requirements-Vehicle Storage Facility Employee License.

(a) To be eligible for a VSF employee license, an applicant must:

(1) submit a completed application on a department-approved form;

(2) pay the fee required under §85.800;

(3) successfully pass a criminal background check; and

(4) if the applicant for renewal has within the preceding 12-month period tested positive for drugs under §85.725, the applicant must submit a negative drug test to the department.

(b) A person may not work at a VSF unless the individual holds:

(1) a license issued under this chapter;

(2) an incident management towing operator's license under Section 2308.153;

(3) a private property towing operator's license under Section 2308.154; or

(4) a consent towing operator's license under Section 2308.155.

(c) A VSF may not employ a person to work at the VSF unless the person holds a license issued under this chapter or under Chapter 86.

(d) For purposes of this chapter, persons operating or managing a VSF as a sole proprietor or other unincorporated business organization are employees of the VSF and required to obtain a VSF employee license or otherwise be licensed under this chapter or under Chapter 86.

§85.206. License Requirements--Vehicle Storage Facility Employee License Renewal.

(a) To renew a VSF employee license an applicant must:

(1) submit a completed application on a department-approved form;

(2) pay the applicable fee required under §85.800;

(3) successfully pass a criminal background check; and

(4) if the applicant for renewal has within the preceding 12-month period tested positive for drugs under §85.725, the applicant must submit a negative drug test to the department.

(b) To renew and maintain continuous licensure, the renewal requirements under this section must be completed prior to the expiration of the license. A late renewal means the licensee will have an unlicensed period from the expiration date of the expired license to the issuance date of the renewed license. During the unlicensed period, a person may not perform any duties of a VSF employee that requires a license under this chapter.

(c) Non-receipt of a license renewal notice from the department does not exempt a person from any requirements of this chapter.

§85.450. Inspections--General.

(a) All VSFs shall be inspected periodically or as a result of a complaint. These inspections will be performed to determine compliance with the requirements of the Act and these rules. In addition, the department may make information available to VSF owners and managers on best practices for risk-reduction techniques.

(b) Inspections shall be performed during the normal operating hours of the VSF. The department may conduct inspections under the Act and these rules with or without advance notice.

(c) The department inspector will contact the VSF owner, manager, or representative upon arrival at the VSF, and before proceeding with the inspection.

(d) The VSF owner, manager, or representative shall cooperate with the inspector in the performance of the inspection.

§85.451. Periodic Inspections.

(a) Each VSF shall be inspected at least once every two years.

(b) The VSF owner, manager, or representative must, upon request, make available to the inspector all records, notices and other documents required by these rules.

(c) On completion of the inspection, the VSF shall be advised in writing of the inspection results.

(d) The inspection report will identify violations that must be corrected by the licensee. The report will also indicate the corrective actions required to address the violations, in accordance with §85.453. Additionally, the department may assess administrative penalties and/or administrative sanctions for violations.

§85.650. Towing and Storage Advisory Board.

(a) The advisory board consists of the nine members appointed by the chairman of the commission with the approval of the commission. The nine members include:

(1) one representative of a towing company operating in a county with a population of less than one-million;

(2) one representative of a towing company operating in a county with a population of one-million or more;

(3) one representative of a vehicle storage facility located in a county with a population of less than one-million;

(4) one representative of a vehicle storage facility located in a county with a population of one-million or more;

(5) one peace officer from a county with a population of less than one-million;

(6) one peace officer from a county with a population of one-million or more;

(7) one parking facility representative;

(8) one representative of a member insurer, as defined by Section 462.004, Insurance Code, of the Texas Property and Casualty Insurance Guaranty Association who automobile insurance in this state; and

(9) one person who operates both a towing company and a vehicle storage facility.

(b) The advisory board shall include representation for each classification of towing.

(c) Advisory board members serve terms of six years, with the terms of two or three members, expiring on February 1 of each odd-numbered year.

(1) A member may not serve more than two full consecutive terms.

(2) If a vacancy occurs during a term, the chairman of the commission will appoint a replacement who meets the qualifications of the open position to serve for the balance of the term.

(d) The chairman of the commission appoints one of the advisory board members to serve as the presiding officer of the advisory board for one year. The presiding officer of the advisory board may vote on any matter before the advisory board.

(e) Advisory board members do not receive compensation. They are, subject to the General Appropriations Act, reimbursed for actual and necessary expenses incurred in performing the duties of the advisory board.

(f) The advisory board meets twice yearly and may meet at other times at the call of the chairman of the commission or the executive director.

(g) The advisory board provides advice and recommendations to the department on technical matters relevant to the administration and enforcement of this chapter, including examination content, licensing standards, continuing education requirements, and maximum amounts that may be charged for fees related to private property tows.

§85.703. Responsibilities of Licensee--Notice to Vehicle Owner or Lienholder.

(a) If a vehicle is removed by the vehicle owner or authorized representative within 24 hours after the VSF receives the vehicle, notification as described in subsections (b) - (j) does not apply.

(b) The registered owners and lien holders of a vehicle accepted at a VSF shall be notified in the following manner.

(1) If a vehicle is registered in Texas, the VSF shall notify the vehicle's registered owner and primary lien holder by certified mail, return receipt requested, registered, or electronic certified mail, within five days, but no sooner than within 24 hours of receipt of the vehicle.

(2) If a vehicle is not registered in Texas, the VSF shall notify the vehicle's registered owner and all recorded lien holders within 14 days, but no sooner than within 24 hours of receipt of the vehicle.

(c) The operator of a VSF shall send the notice required by subsections (b)(1) and (b)(2) to an address obtained by mail or electronically from:

(1) The governmental entity responsible for maintaining the motor vehicle title and registration database for the state in which the vehicle is registered; or

(2) A private entity authorized by the governmental entity to obtain title, registration, and lienholder information using a single vehicle identification number search obtained through a secure access portal to the government entity's motor vehicle records.

(d) Notification has occurred when the United States Postal Service places its postmark and is timely if:

(1) the postmark indicates that the notice was mailed within the period described by subsection (b); or

(2) the notice was published as provided by subsection (f).

(e) If a VSF sends a notice required under this section after the time mandated by subsections (b)(1) or (b)(2):

(1) The deadline for sending any subsequent notice is based on the date that notice was actually sent to the vehicle owner and any lien holders;

(2) A VSF may not charge the daily storage fee permissible under Tex. Occ. Code §2303.155(b)(3) until 24 hours after it has sent the notice required under this section.

(f) Notice required under this section may be completed by publication in a newspaper of general circulation in the county in which the vehicle is stored if:

(1) the vehicle is registered in another state;

(2) the VSF submits to the governmental entity that is responsible for maintaining the motor vehicle title and registration database for the state in which the vehicle is registered, or to a private entity that is authorized by the governmental entity to access title, registration, or lienholder information, a written or electronic request for information relating to the identity of the registered owner and any lienholder of record.

(3) If mailed, such requests shall be correctly addressed, with sufficient postage, and sent by certified mail, return receipt requested or electronic certified mail, to the governmental entity with which the vehicle is registered requesting information relating to the identity of the last known registered owner and any lienholder of record.

(4) the identity of the registered owner cannot be determined;

(5) the registration does not contain an address for the registered owner; or

(6) the operator of the storage facility cannot reasonably determine the identity and address of each lienholder.

(g) Notice by publication is not required if each notice sent in accordance with this Section is returned because:

(1) the notice was unclaimed or refused; or

(2) the person to whom the notice was sent moved without leaving a forwarding address.

(h) Only one notice is required to be published for an abandoned nuisance vehicle.

(i) All mailed notifications must be correctly addressed; mailed with sufficient postage; and sent by certified mail, return receipt requested, registered, or electronic certified mail.

(1) All mailed notifications shall state:

(A) the full licensed name of the VSF where the motor vehicle is located, its street address and telephone number, and the hours the vehicle can be released to the vehicle owner;

(B) the daily storage rate, the type and amount of all other charges assessed, and the statement, "Total storage charges cannot be computed until vehicle is claimed. The storage charge will accrue daily until vehicle is released";

(C) the first date for which a storage fee is assessed;

(D) the date the vehicle will be transferred from the VSF and the address to which the vehicle will be transferred if the operator will be transferring a vehicle to a second lot because the vehicle has not been claimed within a certain time;

(E) the date the vehicle was accepted for storage and from where, when, and by whom the vehicle was towed;

(F) the VSF license number preceded by the words "Texas Department of Licensing and Regulation Vehicle Storage Facility License Number" or "TDLR VSF Lic. No.";

(G) a notice of the towed vehicle owner's right under the Texas Occupations Code, Chapter 2308, to challenge the legality of the tow involved; and

(H) the name, mailing address, and toll-free telephone number of the department for purposes of directing questions or complaints.

(2) All published notifications shall state:

(A) the full name, street address, telephone number, and VSF license number, and the Department's internet address;

(B) a description of the vehicle; and

(C) the total amount of charges assessed against the vehicle.

(3) Notices published in a newspaper may contain information for more than one towed vehicle.

(j) If authorized, a notification fee may not be charged unless actual notice has been given as required under this section.

§85.704. Responsibilities of licensee--Second Notice; Consent to Sale.

(a) If a vehicle is not claimed by a person permitted to claim the vehicle before the 10th day after the date notice is mailed or published under §85.703, the operator of the VSF shall consider the vehicle to be abandoned and, if required by the law enforcement agency with jurisdiction where the vehicle is located, must report the abandonment to the law enforcement agency. If the law enforcement agency notifies the VSF that the agency will send notices and dispose of the abandoned vehicle under Subchapter B, Chapter 683, Transportation Code, the VSF shall pay the fee required under Section 683.031, Transportation Code.

(b) If the vehicle is not claimed, the second notice shall be sent no earlier than the 15th day, and no later than the 21st day, after the date the first notice is mailed or published under §85.703. The operator of a VSF shall send a second notice to the registered owner and each recorded lienholder of the vehicle if the facility:

(1) was not required to make a report under Subsection (a); or

(2) has made a required report under Subsection (a) and the law enforcement agency:

(A) has notified the facility that the law enforcement agency will take custody of the vehicle;

(B) has not taken custody of the vehicle; or

(C) has not responded to the report.

(c) If the VSF sends a second notice after the 21st day on which the first notice was mailed or published, it may not charge a daily storage fee authorized under §85.722(d) until 24 hours after the second notice is mailed or published.

(d) Notice under this section must include:

(1) the information listed in §85.703(h)(1)(A) - (H);

(2) a statement of the right of the facility to dispose of the vehicle under subsections (a) and (b);

(3) a statement that the failure of the owner or lienholder to claim the vehicle and personal property before the 30th day after the date the notice if provided is:

(A) a waiver by that person of all right, title, or interest in the vehicle and personal property; and

(B) a consent to the sale of the vehicle at a public sale.

(e) Notwithstanding subsection (a), if publication is required for notice under this section, the notice must include:

(1) the information listed in §85.703(i)(2); and

(2) a statement that the failure of the owner or lienholder to claim the vehicle before the date of the sale is:

(A) a waiver of all right, title, and interest in the vehicle;

(B) and a consent to the sale of the vehicle at a public sale.

(f) The operator shall pay any excess proceeds to the person entitled to those proceeds.

§85.722. Responsibilities of Licensee--Storage Fees and Other Charges.

(a) For the purposes of this section, "VSF" includes a garage, parking lot, or other facility that is:

(1) owned by a governmental entity; and

(2) used to store or park at least 10 vehicles each year.

(b) The fees outlined in this section have precedence over any conflicting municipal ordinance or charter provision.

(c) Notification fee.

(1) A VSF may not charge a vehicle owner or authorized representative more than $50 for notification under these rules. If a notification must be published, and the actual cost of publication exceeds 50% of the notification fee, the VSF may recover the additional amount of the cost of publication. The publication fee is in addition to the notification fee.

(2) If a vehicle is removed by the vehicle owner or authorized representative within 24 hours after the date the VSF receives the vehicle, notification is not required by these rules.

(3) If a vehicle is removed by the vehicle owner or authorized representative before notification is sent or within 24 hours from the time VSF receives the vehicle, the VSF may not charge a notification fee to the vehicle owner.

(d) Daily storage fee. A VSF may not charge less than $5.00 or more than $20 for each day or part of a day for storage of a vehicle that is 25 feet or less in length. A VSF shall charge a fee of $35 for each day or part of a day for storage of a vehicle that exceeds 25 feet in length.

(1) A daily storage fee may be charged for any part of the day, except that a daily storage fee may not be charged for more than one day if the vehicle remains at the VSF less than 12 hours. In this paragraph a day is considered to begin and end at midnight.

(2) A VSF that has accepted into storage a vehicle registered in this state shall not charge for more than five days of storage fees until a notice, as prescribed in §85.703 of these rules, is mailed or published.

(3) A VSF that has accepted into storage a vehicle not registered in Texas shall not charge for more than five days of storage before the date the request for owner information is sent to the appropriate governmental entity or to the private entity authorized by that governmental entity to obtain title, registration, and lienholder information using a single vehicle identification number inquiry.

(4) A VSF shall charge a daily storage fee after notice, as prescribed in §85.703, is mailed or published for each day or portion of a day the vehicle is in storage until the vehicle is removed and all accrued charges are paid.

(e) Impoundment fee. A VSF may charge a vehicle owner or authorized representative an impoundment fee not to exceed $20. If the VSF charges a fee for impoundment, the written bill for services must

specify the exact services performed for that fee and the dates those services were performed.

(f) Governmental or law enforcement fees. A VSF may collect from a vehicle owner or authorized representative any fee that must be paid to a law enforcement agency, the agency's authorized agent, or a governmental entity.

(g) Environmental hazard fee. A VSF may collect from a vehicle owner or authorized representative a fee in an amount set by the commission for the remediation, recovery, or capture of an environmental or biological hazard.

(h) Additional fees. A VSF may not charge additional fees related to the storage of a vehicle other than fees authorized by these rules or a nonconsent-towing fee authorized by Texas Occupations Code, §2308.2065.

§85.800. Fees.

(a) Application fees.

(1) Vehicle Storage Facility License

(A) Original Application--$250

(B) Renewal--$250

(2) Vehicle Storage Facility Employee License

(A) Original Application--$75

(B) Renewal--$75

(b) Revised/Duplicate License/Certificate/Permit/Registration--$25

(c) Late renewals fees for licenses under this chapter are provided under §60.83 of this title (relating to Late Renewal Fees).

(d) All fees are nonrefundable.

§85.1003. Technical Requirements--Storage Lot Signs.

(a) Facility information. All VSFs shall have a clearly visible and readable sign located at the main entrance. The sign shall have letters at least 2 inches in height, with a contrasting background, be readable at 10 feet, and contain the following information:

(1) the registered name of the storage lot, as it appears on the VSF license;

(2) street address;

(3) the telephone number for the owner to contact in order to obtain release of the vehicle;

(4) the facility's hours, within one hour of which vehicles will be released to vehicle owners; and

(5) the storage lot's state license number preceded by the phrase "VSF License Number."

(b) All VSFs shall have a sign in view of the person who claims the vehicle setting out the charge for storage and all other fees, which may be charged by the storage lot, including notification and impoundment fees. The sign may be affixed to the payment window and shall include all forms of payments the VSF accepts for any charge associated with delivery or storage of a vehicle. If the sign is affixed to the payment window, it must be located so it is clearly visible to a vehicle owner at the place of payment and meet the following font sizes and fonts to produce text not smaller than 24 points Helvetica or Arial Black for headers and 14 points Helvetica or Arial Condensed for all body text.

(c) Nonconsent towing fees schedule. All VSFs shall place a clearly visible and readable sign where payment to the VSF is made which states:

(1) "Nonconsent tow fees schedules available on request." The VSF shall provide a copy of a nonconsent towing fees schedule on request; and

(2) The nonconsent towing fees provided for viewing and to the vehicle owner or representative must match the nonconsent towing fees authorized by this chapter or Texas Occupations Code §2308.2065.

(d) Instruments accepted for release of vehicle. VSFs shall have a sign describing the documents that may be presented by the vehicle owner or his/her authorized representative to obtain possession of the vehicle. This sign shall list all instruments as described in §85.710(a)(3)(A) - (I), and shall also state: "Affidavit of Right of Possession Furnished Upon Request." The sign may be affixed to the payment window.

(e) A VSF must conspicuously post a sign that states: "This vehicle storage facility must accept payment by cash, debit cards and credit cards for any fee or charge associated with delivery or storage of a vehicle."

(f) Combination signs. A VSF may combine the signs described in subsections (b), (c), (d), and (e), if the combination sign meets the requirements of each of the separate signs.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2017.

TRD-201705322
Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 15, 2018
Proposal publication date: October 13, 2017
For further information, please call: (512) 463-8179

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16 TAC §85.205, §85.452

The repeals are adopted under Texas Occupations Code, Chapters 51 and 2308, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 2308. No other statutes, articles, or codes are affected by the proposal.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2017.

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Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-8179

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CHAPTER 86. VEHICLE TOWING AND BOOTING

The Texas Commission of Licensing and Regulation (Commission) adopts the repeal of current rules at rules at 16 Texas Administrative Code (TAC), Chapter 86, §86.212 and §86.452, regarding the Vehicle Towing and Booting program without changes to proposed text as published in the October 13, 2017, issue of the *Texas Register* (42 TexReg 5622). The rules will not be republished.

The Commission also adopts amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 86, §§86.10, 86.450, 86.451, 86.650, and 86.800, with changes to the proposed text as published October 13, 2017, issue of the *Texas Register* (42 TexReg 5622). The rules will be republished.

The repeal of existing rules is necessary to implement Senate Bill 1501, Senate Bill 2065, and House Bill 2615 during the 85th Legislature, Regular Session (2017). These bills eliminated dual licensure, the towing operator training licenses as well as the associated fees, and risk-based inspections. The repeals are necessary to implement the legislative changes mandated by these statutes.

The amendments to existing rules are necessary is necessary to implement Senate Bill 1501, Senate Bill 2065, and House Bill 2615 during the 85th Legislature, Regular Session (2017). These bills establish guidelines for nonconsent tows in an apartment complex and to update the advisory board composition. The amendments are necessary to implement the legislative changes mandated by these statutes.

The adopted amendments to §86.10 updates the name of the advisory board, removes the definition of Property Owner's Association and renumbers the section accordingly.

The adopted repeal of §86.212 eliminates dual licensure and its associated requirements.

The adopted amendments to §86.450 removes references to the risk-based inspection schedule.

The adopted amendments to §86.451 removes reference to risk-based inspections.

The adopted repeal of §86.452 eliminates risk-based inspections.

The adopted amendments to §86.650 updates the composition of the advisory board.

The adopted amendments to §86.800 removes dual licensure.

The Department also withdraws §86.213 and §86.705.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 13, 2017, issue of the *Texas Register* (42 TexReg 5622). The Department received a total of 16 comments from the public regarding this program and the proposed amendments. All comments are summarized below.

Comment--The Department received two comments from the same individual inquiring about his license.

Department Response--These comments do not pertain to the proposed rules. General Counsel staff forwarded the inquiries to Licensing for handling.

The Department did not make any changes to the proposed rules based on these public comments.

Comment--The Department received one comment from a consumer complaining about an alleged wrongful tow.

Department Response--The comment does not pertain to the proposed rules. General Counsel staff forwarded the complaint to Enforcement for handling.

The Department did not make any changes to the proposed rules based on this public comment.

Comment--The Department received one comment expressing agreement with all proposed changes.

Department Response--The Department did not make any changes to the proposed rules based on this public comment.

Comment--The Department received one comment related to §86.450(a). The commenter suggested adding language to the first sentence of the rule so that it reads: "A towing company shall be inspected periodically to warn a towing company of a violation if found or as a result of a complaint. (italicized words represent the suggested addition).

Department Response--The rule at §86.450(a) relates to inspections. TDLR conducts inspections at towing companies to provide notification of any violations. Accordingly, the Department determined that the suggested language is redundant and does not substantively add to, or clarify, any portion of the rule.

The Department did not make any changes to the proposed rules based on this public comment.

Comment--The Department received one comment related to §86.650(a) with three parts.

Two parts of the comment concern §86.650(a)(1)-(4) and (9) with regards to the change in reference to certain board members as a "representative" instead of an "owner". The commenter suggested that the board members referenced in (a)(1)-(4) and (9) be referred to as "representative or owner".

The third part of the comment asks why the Department added a member of the insurance industry to the Advisory Board.

Department Response--The Department's proposed amendment updates the rule to mirror language used in the statutory change to Tex. Occ. Code §2308.051(a). The updated language in rule is not discretionary and must replicate the language in statute. In statute, certain board members are now referred to as "representative" in lieu of "owner".

The addition of an insurance industry professional to the Advisory Board was made by the State Legislature in SB 1501 and not by the Department. This addition is also not discretionary.

The Department did not make any changes to the proposed rules based on this public comment.

Comment--The Department received nine comments related to §86.705. Section 86.705 responds to a statutory change to add

Tex. Occ. Code §2308.205(a)(1) - (2)(A) - (B) and (a-1)(1) - (3) that mandates the Commission to adopt rules authorizing a tow company that makes a nonconsent tow from a parking facility to tow the vehicle to another location on the same parking facility under the direction of a parking facility owner, authorized agent, or peace officer. The Texas Apartment Association commented specifically on §86.705(o).

The comments are as follows:

i) One comment relating to §86.705(n) with three subparts asking:

a) whether a tow truck driver is obligated to comply with a consumer request to move a vehicle to a location different than the one to which a driver might otherwise be required to take it to;

b) how charges for towing a vehicle upon customer request to a location different than the one to which the driver might otherwise be required to take it to would be assessed; and

c) how tow tickets would need to be written.

ii) Two comments related to §86.705 (o)(1) - (2) and its proposed rule restriction on non-consent tows contemplated by the statute to apartment complexes that are moving vehicles from one location on their parking facility to another in furtherance of repairs or renovation. The comments collectively expressed that the statute does not contain such restrictions and should not be limited to solely those circumstances.

iii) Two comments related to §86.705 (o)(3) and its proposed obligation on an apartment complex to provide 10 days notice of its intent to move vehicles in its parking facility. The commenters stated that a 10-day notice is too long and unreasonable.

iv) One comment related to §86.705(o)(3) stating that there should be a clarification that initial notice is sufficient even if the event that necessitated the notification is delayed.

v) one comment related to §86.705(o)(2) expressing that a clarification should be added to state that "written notice" includes electronic notice if such a notice provision is present in a lease.

vi) one comment that §86.705 should allow parking facilities to post signs like those allowed for the relocation of vehicles at universities.

vii) One comment related to §86.705(o)(3)(E) to allow a parking facility that does not know the exact location to which vehicles will be moved to tell residents how they will be informed of the exact location at a later date.

Department Response--The Department reviewed the new statutory provision of §2308(a)(1)-(2) and (a-1)(1) - (3) and determined that there is merit to the comments relating to the restrictive nature of the proposed rules. The Department acknowledges that the applicable statute is broad in nature and does not limit its application to apartment complexes moving cars from one location on its parking facility to another in furtherance of repairs or renovations.

The Department also finds merit to the comments relating to notice and believes that further discussion regarding the timing of notice, the form of notice, the ability to use freestanding signs to provide notice, and the need for flexibility regarding notification of specific re-locations is warranted.

Accordingly, the Department recommended to the Advisory Board during its November 16, 2017, meeting that it withdraw the entire proposed rule additions of §86.705(o)(1) - (8) and form a workgroup in order to facilitate a re-drafting of the rule and its subparts. The Department believes that withdrawal is warranted and required in order to draft rule provisions that more closely reflect the broad nature of the statutory change and to accommodate industry input.

Comment--The Department received one comment related to §86.800(4) asking how to get a refund on dual-license fees.

Department Response--This question does not pertain to the proposed rule.

The Department did not make any changes to the proposed rule based on this public comment.

The Towing and Storage Advisory Board (Board) met on November 16, 2017, to discuss proposed amendments and the public comments received. The board recommended adopting the proposed repeal and amendments with changes. At its meeting on December 15, 2017, the Commission adopted the proposed repeal without changes and adopted the proposed amendments with changes as recommended by the Board.

16 TAC §§86.10, 86.450, 86.451, 86.650, 86.800

The amendments are adopted under Texas Occupations Code, Chapters 51 and 2308, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 2308. No other statutes articles or codes are affected by the proposal.

§86.10. Definitions.

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

(1) Advisory board--The Towing and Storage Advisory Board.

(2) Applicant--The person or entity submitting an application for a permit or license issued by the department.

(3) Certificate of insurance--A certificate prescribed by and filed with the department in which an insurance carrier or surety company, approved in this state, warrants that a towing company for whom the certificate is filed has the minimum coverage as required by §86.400.

(4) Commission--The Texas Commission of Licensing and Regulation.

(5) Consent tow--Any tow of a motor vehicle in which the tow truck is summoned by the owner or operator of the vehicle or by a person who has possession, custody, or control of the vehicle. The term does not include an incident management tow or a private property tow.

(6) Conspicuous--Written in a size, color, and contrast so as to be readily noticed and understood.

(7) Contested case--A proceeding, including a licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing.

(8) Department--The Texas Department of Licensing and Regulation.

(9) Driver's License--Has the meaning assigned by 521.001, Transportation Code.

(10) Incident--an unplanned randomly occurring traffic event that adversely affects normal traffic operations.

(11) Incident management tow--Any tow of a vehicle in which the tow truck is summoned to the scene of a traffic accident or to an incident, including the removal of a vehicle, commercial cargo, and commercial debris from an accident or incident scene.

(12) License holder or Licensee--The person to which the department issued a license.

(13) Nonconsent tow--Any tow of a motor vehicle that is not a consent tow, including:

(A) an incident management tow; and

(B) a private property tow.

(14) Parking facility--Public or private property used, wholly or partly, for restricted or paid vehicle parking. The term includes:

(A) a restricted space on a portion of an otherwise unrestricted parking facility; and

(B) a commercial parking lot, a parking garage, and a parking area serving or adjacent to a business, church, school, home, apartment complex, property governed by a property owners' association, or government-owned property leased to a private person, including:

(i) a portion of the right-of-way of a public roadway that is leased by a governmental entity to the parking facility owner; and

(ii) the area between the facility's property line abutting a county or municipal public roadway and the center line of the roadway's drainage way or the curb of the roadway, whichever is farther from the facility's property line.

(15) Parking facility authorized agent--An employee or agent of a parking facility owner with the authority to:

(A) authorize the removal of a vehicle from the parking facility on behalf of the parking facility owner; and

(B) accept service on behalf of the parking facility owner of a notice of hearing requested under this chapter.

(16) Parking facility owner--

(A) an individual, corporation, partnership, limited partnership, limited liability company, association, trust, or other legal entity owning or operating a parking facility;

(B) a property owners' association having control under a dedicatory instrument, as that term is defined in §202.001, Property Code, over assigned or unassigned parking areas; or

(C) a property owner having an exclusive right under a dedicatory instrument, as that term is defined in §202.001, Property Code, to use a parking space.

(17) Permit holder--The person to which the department issued a permit.

(18) Private property tow--Any tow of a vehicle authorized by a parking facility owner without the consent of the owner or operator of the vehicle.

(19) Public roadway--A public street, alley, road, right-of-way, or other public way, including paved and unpaved portions of the right-of-way.

(20) Tow truck--A motor vehicle, including a wrecker, equipped with a mechanical device used to tow, winch, or otherwise move another motor vehicle. The term does not include:

(A) a motor vehicle owned and operated by a governmental entity, including a public school district;

(B) a motor vehicle towing:

(i) a race car;

(ii) a motor vehicle for exhibition; or

(iii) an antique motor vehicle;

(C) a recreational vehicle towing another vehicle;

(D) a motor vehicle used in combination with a tow bar, tow dolly, or other mechanical device if the vehicle is not operated in the furtherance of a commercial enterprise;

(E) a motor vehicle that is controlled or operated by a farmer or rancher and used for towing a farm vehicle; or

(F) a motor vehicle that:

(i) is owned or operated by an entity the primary business of which is the rental of motor vehicles; and

(ii) only tows vehicles rented by the entity.

(21) Towing company--An individual, association, corporation, or other legal entity that controls, operates, or directs the operation of one or more tow trucks over a public roadway in this state but does not include a political subdivision of the state.

(22) Towing operator--The person to which the department issued a towing operator license.

(23) Unauthorized vehicle--A vehicle parked, stored, or located on a parking facility without the consent of the parking facility owner.

(24) Vehicle--A device in, on, or by which a person or property may be transported on a public roadway. The term includes an operable or inoperable automobile, truck, motorcycle, recreational vehicle, or trailer but does not include a device moved by human power or used exclusively on a stationary rail or track.

(25) Vehicle owner--A person:

(A) named as the purchaser or transferee in the certificate of title issued for the vehicle under Chapter 501, Transportation Code;

(B) in whose name the vehicle is registered under Chapter 502, Transportation Code, or a member of the person's immediate family;

(C) who holds the vehicle through a lease agreement;

(D) who is an unrecorded lienholder entitled to possess the vehicle under the terms of a chattel mortgage; or

(E) who is a lienholder holding an affidavit of repossession and entitled to repossess the vehicle.

(26) Vehicle storage facility--A vehicle storage facility, as defined by Texas Occupations Code, §2303.002 that is operated by a person who holds a license issued under Texas Occupations Code, Chapter 2303 to operate the facility.

§86.450. Inspections--General.

(a) A towing company shall be inspected periodically or as a result of a complaint. These inspections are performed to determine compliance with the requirements of the Act and these rules. In addi-

tion, the department may make information available to licensees and managers on best practices for risk-reduction techniques.

(b) The towing company owner, manager, or their representative must, upon request, make available to the inspector all records, notices and other documents required by these rules.

(c) Upon completion of the inspection, the owner manager, or representative shall be advised in writing of the results of the inspection. The inspection report will indicate whether the inspection was approved or not approved, and will describe any violations identified during the inspection.

(d) For inspections that are not approved, the inspection report will identify violations that must be corrected by the owner. The report will also indicate the corrective actions required to address the violations, in accordance with §86.453. Additionally, the department may assess administrative penalties and/or administrative sanctions for violations.

§86.451. Periodic Inspections.

(a) Each towing company shall be inspected at least once every two years.

(b) The towing company owner, manager, or their representative must, upon request, make available to the inspector all records, notices and other documents required by these rules.

(c) Upon completion of the inspection, the owner manager, or representative shall be advised in writing of the results of the inspection. The inspection report will indicate whether the inspection was approved or not approved, and will describe any violations identified during the inspection.

(d) For inspections that are not approved, the inspection report will identify violations that must be corrected by the owner. The report will also indicate the corrective actions required to address the violations, in accordance with §86.453. Additionally, the department may assess administrative penalties and/or administrative sanctions for violations.

§86.650. Towing and Storage Advisory Board.

(a) The advisory board consists of the nine members appointed by the chairman of the commission with the approval of the commission. The nine members include:

(1) one representative of a towing company operating in a county with a population of less than one-million;

(2) one representative of a towing company operating in a county with a population of one-million or more;

(3) one representative of a vehicle storage facility located in a county with a population of less than one-million;

(4) one representative of a vehicle storage facility located in a county with a population of one-million or more;

(5) one peace officer from a county with a population of less than one-million;

(6) one peace officer from a county with a population of one-million or more;

(7) one parking facility representative;

(8) one representative of a member insurer, as defined by Section 462.004, Insurance Code, of the Texas Property and Casualty Insurance Guaranty Association who writes automobile insurance in this state; and

(9) one person who operates both a towing company and a vehicle storage facility.

(b) The advisory board shall include representation for each classification of towing.

(c) Advisory board members serve terms of six years, with the terms of two or three members, expiring on February 1 of each odd-numbered year.

(1) A member may not serve more than two full consecutive terms.

(2) If a vacancy occurs during a term, the chairman of the commission will appoint a replacement who meets the qualifications of the open position to serve for the balance of the term.

(d) The chairman of the commission appoints one of the advisory board members to serve as the presiding officer of the advisory board for one year. The presiding officer of the advisory board may vote on any matter before the advisory board.

(e) Advisory board members do not receive compensation. They are, subject to the General Appropriations Act, reimbursed for actual and necessary expenses incurred in performing the duties of the advisory board.

(f) The advisory board meets twice yearly and may meet at other times at the call of the chairman of the commission or the executive director.

(g) The advisory board provides advice and recommendations to the department on technical matters relevant to the administration and enforcement of this chapter, including examination content, licensing standards, continuing education requirements, and maximum amounts that may be charged for fees related to private property tows.

§86.800. Fees.

(a) Application Fees

(1) Permit Tow Truck

(A) Original Application--$75

(B) Renewal--$75

(C) Duplicate Permit--No charge

(D) Permit Amendment--$25

(2) Tow Company License

(A) Original Application--$350

(B) Renewal--$350

(C) Duplicate License--$25

(D) Permit Amendment--$25

(3) Operator License

(A) Original Application--$100

(B) Renewal--$100

(C) Duplicate License--$25

(D) Operator License Amendment--$25

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2017.

TRD-201705327

Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 15, 2018
Proposal publication date: October 13, 2017
For further information, please call: (512) 463-8179

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16 TAC §86.212, §86.452

The repeals are adopted under Texas Occupations Code, Chapters 51 and 2308, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 2308. No other statutes, articles, or codes are affected by the proposal.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2017.

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Brian E. Francis
Executive Director
Texas Department of Licensing and Regulation
Effective date: January 15, 2018
Proposal publication date: October 13, 2017
For further information, please call: (512) 463-8179

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 103. HEALTH AND SAFETY SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SAFE SCHOOLS

19 TAC §103.1205

The Texas Education Agency (TEA) adopts new §103.1205, concerning school safety and discipline. The new section is adopted without changes to the proposed text as published in the October 20, 2017 issue of the *Texas Register* (42 TexReg 5834) and will not be republished. The adopted new rule establishes criteria for participation in a pilot program for alternative disciplinary placement in accordance with House Bill (HB) 156, 85th Texas Legislature, Regular Session, 2017.

REASONED JUSTIFICATION. The Texas Education Code (TEC), §37.031, as added by HB 156, 85th Texas Legislature, Regular Session, 2017, establishes a pilot program for placement of high school students in Junior Reserve Officers Training Corps (JROTC) programs as an alternative to placement in disciplinary alternative education programs (DAEPs) or juvenile justice alternative education programs (JJAEPs). The statute requires the TEA to designate not more than two high schools that meet certain criteria, as specified in the TEC, §37.031(b), to participate in the pilot program. The statute also requires the commissioner to adopt by rule additional criteria that promote positive student educational outcomes for the agency to use in making designations for participation in the pilot program.

Adopted new §103.1205 implements the TEC, §37.031, by adopting in rule additional criteria that the TEA will use in making designations for the JROTC pilot program. The rule also specifies that schools participating in the pilot program must follow the minimum standards and best practices for truancy prevention measures as outlined in the TEC, §25.0915, and comply with the data reporting required under the TEC, §37.020(d).

SUMMARY OF COMMENTS AND AGENCY RESPONSES. The public comment period on the proposal began October 20, 2017, and ended November 20, 2017. No public comments were received.

STATUTORY AUTHORITY. The new rule is adopted under the Texas Education Code (TEC), §37.031(c), as added by House Bill (HB) 156, 85th Texas Legislature, Regular Session, 2017, which requires the commissioner to adopt additional criteria that promote positive student educational outcomes for use in making designations of not more than two high schools for the Junior Reserve Officers Training Corps (JROTC) pilot program; TEC, §37.020(d), as amended by HB 156, 85th Texas Legislature, Regular Session, 2017, which requires districts who place students in a JROTC program to report information on each placement; and TEC, §25.0915, which establishes truancy prevention measures for districts to implement to address student conduct related to truancy.

CROSS REFERENCE TO STATUTE. The new rule implements the Texas Education Code, §§37.031(c), as added by House Bill (HB) 156, 85th Texas Legislature, Regular Session, 2017; 37.020(d), as amended by HB 156, 85th Texas Legislature, Regular Session, 2017; and 25.0915.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 19, 2017.

TRD-201705257
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: January 8, 2018
Proposal publication date: October 20, 2017
For further information, please call: (512) 475-1497

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TITLE 34. PUBLIC FINANCE

PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 105. CREDITABLE SERVICE

34 TAC §105.9

The Board of Trustees for the Texas County and District Retirement System ("TCDRS") adopts new rule, §105.9, concerning notice by a participating subdivision of certain felony convictions of elected or appointed officers. The new rule is adopted without

changes to the proposed text as published in the October 20, 2017, issue of the *Texas Register* (42 TexReg 5838). The text of the new rule will not be republished.

The new rule implements Senate Bill 500, 85th Legislature, 2017. The new rule prescribes the content of the written notice, which is required to be filed by the participating subdivision, concerning certain felony convictions of certain participating members and which will ensure compliance with the pension forfeiture provisions required under Government Code, §810.002 enacted by the 85th Legislature, 2017.

The Board received no comments, written or otherwise, regarding the proposed new rule.

The new rule is adopted under the Government Code, §845.102, which authorizes the TCDRS Board of Trustees to adopt rules for the efficient administration of the system and under Government Code, §810.002(j), which requires a public retirement system to adopt rules to implement §810.002.

No other statutes, articles, or codes are affected by the adopted new rule.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 21, 2017.

TRD-201705328
Ann McGeehan
General Counsel
Texas County and District Retirement System
Effective date: January 10, 2018
Proposal publication date: October 20, 2017
For further information, please call: (512) 637-3247

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety (the department) adopts amendments to §4.1, concerning Transportation of Hazardous Materials. This section is adopted without changes to the proposed text as published in the November 17, 2017, issue of the *Texas Register* (42 TexReg 6483) and will not be republished.

These amendments are necessary to harmonize updates to Title 49, Code of Federal Regulations with those laws adopted by Texas.

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2017.

TRD-201705269
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: January 9, 2018
Proposal publication date: November 17, 2017
For further information, please call: (512) 424-5848

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SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY

37 TAC §4.11

The Texas Department of Public Safety (the department) adopts amendments to §4.11, concerning General Applicability and Definitions. This section is adopted without changes to the proposed text as published in the November 17, 2017, issue of the *Texas Register* (42 TexReg 6484) and will not be republished.

These amendments are necessary to harmonize updates to Title 49, Code of Federal Regulations with those laws adopted by Texas.

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2017.

TRD-201705270
D. Phillip Adkins
General Counsel
Texas Department of Public Safety
Effective date: January 9, 2018
Proposal publication date: November 17, 2017
For further information, please call: (512) 424-5848

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37 TAC §4.13

The Texas Department of Public Safety (the department) adopts amendments to §4.13, concerning authority to Enforce, Training and Certificate Requirements. This section is adopted without changes to the proposed text as published in the November 17, 2017, issue of the *Texas Register* (42 TexReg 6485) and will not be republished.

The proposed amendments are necessary to ensure this section is consistent with the Texas Transportation Code, §644.101, which establishes which peace officers are eligible to enforce Chapter 644 of the Texas Transportation Code.

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 20, 2017.

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Proposal publication date: November 17, 2017
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