

# PROPOSED RULES

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

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

## TITLE 4. AGRICULTURE

### PART 2. TEXAS ANIMAL HEALTH COMMISSION

#### CHAPTER 35. BRUCELLOSIS SUBCHAPTER A. ERADICATION OF BRUCELLOSIS IN CATTLE

##### 4 TAC §35.4

The Texas Animal Health Commission (commission) proposes amendments to §35.4, concerning Entry, Movement, and Change of Ownership, in Chapter 35, which is entitled "Brucellosis". The purpose of the amendments is to remove the current permanent official identification requirement for sexually intact adult cattle changing ownership and to change the entry requirements for sexually intact cattle entering Texas from the states of Idaho, Montana, and Wyoming due to the risk of brucellosis, which is prevalent in the Greater Yellowstone Area (GYA) of those states.

The commission recently adopted identification requirements that all sexually intact cattle that are parturient or post parturient or 18 months of age and older, changing ownership, shall be officially identified with commission-approved permanent identification. The commission is proposing to remove the identification requirements for cattle and move any identification requirements to a new chapter for the purpose of establishing the standards for livestock under the federal animal disease traceability program.

The commission is also proposing to change the brucellosis regulations to require an entry permit and a post entry test for all breeding cattle from the states of Idaho, Montana, and Wyoming. In view of the continued occurrence of brucellosis infection disclosed in domestic cattle, elk, and bison in the states of Wyoming, Montana, and Idaho that border Yellowstone National Park, otherwise known as the GYA, the commission is proposing bovine brucellosis entry regulations for breeding cattle from these three states. Analysis of the United States Department of Agriculture Veterinary Services (USDA-VS) October 2012 review of the GYA states disclosed various weaknesses in the biosecurity plans for cattle movements from the Designated Surveillance Area (DSA), even though all three states are considered "Free" of brucellosis by USDA. Test-eligible cattle (sex/age requirements vary between the states) within the DSA of all three states are allowed movement out of the DSA with one negative test within 30 days, which appears to qualify these animals for interstate shipment without restrictions. Information gathered during the USDA-VS review and more recent information on elk population dynamics raises

great concern about the ability of the GYA states' brucellosis management plans to adjust quickly enough to prevent spread of disease. The cessation of comprehensive national and state brucellosis surveillance puts Texas at risk of not being able to quickly detect brucellosis if introduced from these states.

The commission is proposing that all sexually intact females and breeding bulls over 18 months of age entering Texas from Idaho, Montana, and Wyoming be held under restriction until tested negative for bovine brucellosis no less than 60 days and no more than 120 days after entry. Female cattle under 18 months of age (heifers) or adult females that have not calved (pre-parturient) must test negative no less than 30 days nor more than 90 days after calving (post parturient). All testing will be at the owner's expense. All cattle described above requiring a post entry test must also receive an entry permit issued in advance by the commission.

##### FISCAL NOTE

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

##### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rule is in effect, the public benefit will be to protect the Texas cattle industry from any undue risk of exposure to brucellosis.

##### LOCAL EMPLOYMENT IMPACT STATEMENT

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

##### TAKINGS ASSESSMENT

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

## REQUEST FOR COMMENT

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

## STATUTORY AUTHORITY

The amendments are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. The commission is vested by statute, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The commission is authorized by §161.041(b) to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. That subsection also provides that the commission also is authorized to adopt any rules necessary to carry out the purposes of this subsection, including rules concerning testing, movement, inspection, and treatment.

Section 161.056 provides that in order to provide for to control disease and enhance the ability to trace disease-infected animals or animals that have been exposed to disease, the commission may develop and implement an animal identification program that is consistent with the USDA's National Animal Identification System. Also, subsection (c) provides that the commission may require the use of official identification numbers assigned as part of the animal identification program for animal disease control, animal emergency management, and other commission programs.

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

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

Chapter 163 has statutory authority for brucellosis control. Section 163.002, entitled "Cooperative Program", provides that "In order to bring about effective control of bovine brucellosis, to allow Texas cattle to move in interstate and international commerce with the fewest possible restrictions, and to accomplish those purposes in the most effective, practical, and expeditious manner, the commission may enforce this chapter and enter into cooperative agreements with the United States Department of Agriculture."

Also, §163.066 provides "As a control measure, the commission by rule may regulate the movement of cattle. The commission may restrict the intrastate movement of cattle even though the movement of the cattle is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another procedure that is epidemiologically sound before or following the movement of cattle."

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

### §35.4. *Entry, Movement, and Change of Ownership.*

(a) Requirements for cattle from foreign countries without comparable brucellosis status that enter and remain in Texas. (Note: Cattle from foreign countries with comparable brucellosis status would enter by meeting the requirements for a state with similar status.)

(1) Permit requirement. Sexually intact cattle must obtain an "E" permit from the Texas Animal Health Commission prior to moving to a destination in Texas other than direct to slaughter, quarantined feedlot or designated pens. The permit number must be entered on the Importation Certificate (VS Form 17-30) and a copy of that certificate forwarded to the Commission's office in Austin immediately following issuance.

(2) Branding requirements.

(A) Sexually intact cattle destined for a quarantined feedlot or designated pen must be "S"-branded prior to or upon arrival at the quarantined feedlot or designated pen.

(B) Spayed heifers shall be identified by branding prior to entry as specified in §35.1 of this title (relating to Definitions).

(3) Vaccination requirement. Nonvaccinated sexually intact female cattle between four and 12 months of age entering for purposes other than immediate slaughter or feeding for slaughter in a quarantined feedlot or designated pen shall be placed under quarantine on arrival and officially brucellosis vaccinated as outlined in §35.2(m) of this title (relating to General Requirements). The quarantine may be released after meeting test requirements.

(4) Testing requirements for bulls entering for purposes other than immediate slaughter or feeding in a quarantined feedlot or designated pen. Bulls entering for purposes other than immediate slaughter or feeding in a quarantined feedlot or designated pen shall be tested at the port of entry into Texas under the supervision of the port veterinarian, and placed under quarantine and retested 120 to 180 days after arrival. The quarantine will be released following a negative brucellosis test.

(5) Testing requirements for females entering for purposes other than immediate slaughter or feeding in a quarantined feedlot or designated pen. All sexually intact female cattle entering for purposes other than immediate slaughter or feeding for slaughter in a quarantined feedlot or designated pen shall be tested at the port of entry into Texas under the supervision of the port veterinarian, and placed under quarantine on arrival and retested for brucellosis in no less than 120 days nor more than 180 days after arrival for release of the quarantine; however, if the sexually intact female cattle have not had their first calf prior to the 120 to 180 day post entry test, the quarantine will not be released until a second negative test for brucellosis is conducted no sooner than 30 days after the animal has had its first calf and the second negative test has been confirmed.

(6) Testing requirements for sexually intact cattle moving directly to a quarantined feedlot or designated pen. All sexually intact cattle destined for feeding for slaughter in a quarantined feedlot or designated pen must be tested at the port of entry into Texas under the supervision of the port veterinarian. These cattle must be "S"-branded

prior to or upon arrival at the quarantined feedlot or designated pen, and may move to the quarantined feedlot or designated pen only in sealed trucks with a VS 1-27 permit issued by a representative of TAHC or USDA.

(7) Responsibility for costs. All costs of calfhood vaccination, testing, and retesting shall be borne by the owner.

(b) Requirements for cattle entering Texas from other states.

(1) Vaccination. All nonvaccinated female cattle between four and 12 months of age shall be officially vaccinated prior to entry. Exceptions to these vaccination requirements are:

(A) Female cattle entering for purposes of shows, fairs and exhibitions and returning to their original location.

(B) Female cattle moving within commuter herds.

(C) Spayed heifers.

(D) Female cattle from free states.

(E) Female cattle from other than free states shall be vaccinated as follows:

(i) Entering from an out-of-state farm of origin will be accompanied by a waybill to a Texas market, a feedlot for feeding for slaughter, or direct to slaughter. These cattle may be vaccinated at the market at no expense to the state prior to leaving the market and be moved freely. If these cattle are not vaccinated at the market, then they shall be consigned from the market only to a feedlot for feeding for slaughter or direct to slaughter, accompanied by an "S" permit. If consigned to a feedlot, they shall also be "F" branded high on the tail-head prior to or upon entering the feedlot.

(ii) Entering from an out-of-state livestock market to a Texas livestock market, a feedlot for feeding for slaughter or direct to slaughter will be accompanied by an "S" brand permit or certificate of veterinary inspection. Individual identification is not required. These cattle may be vaccinated at no expense to the state prior to leaving the market, then they shall be consigned from the market only to a feedlot for feeding for slaughter, or direct to slaughter, and accompanied by an "S" permit. If consigned to a feedlot, they shall also be "F" branded high on the tail-head prior to or upon entering the feedlot.

(iii) Entering from any out-of-state location and destined for a Texas premise may enter on a calfhood vaccination permit and must be vaccinated at no expense to the state within 14 days after arriving at the premise of destination.

(2) Testing. All non-quarantined cattle that are parturient or post parturient or that are 18 months of age and over (as evidenced by the loss of the first pair of temporary incisor teeth), except steers and spayed heifers entering Texas:

(A) shall be moved directly from:

(i) a class free state or area; or

(ii) a certified free herd; or

(iii) a commuter herd as defined in these sections; or

(B) Cattle not from class free states or areas, certified brucellosis free herds, or commuter herds shall be "S"-branded and moved directly to a quarantined feedlot, to designated pens, or to slaughter, accompanied with an "S" permit, or moved directly from a farm of origin to a USDA specifically approved livestock market to be "S"-branded and moved directly to a quarantined feedlot, to designated pens, or to slaughter accompanied with an "S" permit; or

(C) shall be tested negative one or more times as described in this subparagraph:

(i) cattle from a Class "A" state or area shall:

(I) be tested negative within 30 days prior to entry; or

(II) be moved directly from a farm of origin to a USDA specifically approved livestock market for a negative test prior to sale;

(ii) cattle from a class "B" state or area shall:

(I) be tested negative within 30 days prior to entry, accompanied with an "E" permit, and held under quarantine for a negative retest 45-120 days at a farm, ranch, or feedlot; or

(II) be moved directly from a farm of origin to a USDA specifically approved livestock market for a negative test and held under quarantine for a negative retest 45-120 days after sale to a farm, ranch, or feedlot.

(3) Requirements for cattle entering Texas from Idaho, Wyoming, and Montana.

(A) All breeding bulls and sexually intact female cattle entering Texas for purposes other than immediate slaughter or feeding for slaughter in a feedlot shall be tested for brucellosis 60 to 120 day post entry.

(B) Sexually intact female cattle entering Texas that have not calved must be held until tested negative 30 to 90 days after calving (post parturient).

(C) Nonvaccinated sexually intact female cattle between four and 12 months of age entering Texas for purposes other than immediate slaughter or feeding for slaughter shall be officially brucellosis vaccinated prior to entry as provided in paragraph (1) of this subsection. The vaccination exception in paragraph (1)(D) of this subsection does not apply to cattle entering Texas from Idaho, Wyoming, and Montana.

(D) All cattle must also meet the applicable requirements contained in Chapter 51 of this title (relating to Entry Requirements). All breeding bulls and sexually intact female cattle shall obtain an entry permit from the commission as provided for in §51.2 of this title (relating to General Requirements).

(c) Change of ownership within Texas.

~~[(1) Vaccination.] It is recommended that all female cattle between four and 12 months of age being purchased or sold for use in grazing, breeding, or dairy operations be officially vaccinated.~~

~~[(2) Identification. All cattle that are parturient or post parturient or 18 months of age and older except steers and spayed heifers changing ownership within Texas shall be officially identified with an official ear tag or other form of official permanent identification as approved by the Commission except:]~~

~~[(A) Commission personnel may exempt from the permanent identification requirement beef cattle presented for sale at a livestock market if, upon consultation with market ownership or management, it is determined that the animal's physical condition makes the handling required to apply permanent identification unsafe or injurious in nature.]~~

~~[(B) Beef cattle exempted from the permanent identification requirement under this subsection must be sold and consigned to a state or federally approved slaughter establishment and movement permitted by Commission representatives; or]~~

(d) Movement to Mexico. All cattle 18 months of age and older except steers and spayed heifers must be tested negative within 120 days prior to export to Mexico for slaughter. Steers, spayed heifers, and feedlot finished bulls and heifers are not required to be tested prior to export. Test results must be recorded on the Certificate of Veterinary Inspection.

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

Filed with the Office of the Secretary of State on May 28, 2013.

TRD-201302162

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: July 14, 2013

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



## CHAPTER 39. SCABIES

### 4 TAC §39.9

The Texas Animal Health Commission (commission) proposes amendments to §39.9, concerning Chorioptic Mange, in Chapter 39, which is entitled "Scabies". The purpose of the amendments is to include new types of acceptable treatment for Chorioptic Mange.

Scabies (from Latin: *scabere*, "to scratch") is a contagious skin infection. The infection in animals is caused by a different but related mite species, and is called sarcoptic mange. Scabies may occur in a number of domestic and wild animals; the mites that cause these infestations are of different scabies subspecies. Scabies-infected animals suffer severe itching and secondary skin infections. They often lose weight and become frail. The most frequently diagnosed form of scabies in domestic animals is sarcoptic mange, which is found on dogs. The scab mite *Psoroptes* is the mite responsible for mange.

#### FISCAL NOTE

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

#### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be to protect our livestock industry from exposure to Scabies by use of some newer treatment products.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

employment impact statement with the Texas Workforce Commission.

#### TAKINGS ASSESSMENT

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

#### REQUEST FOR COMMENT

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

#### STATUTORY AUTHORITY

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

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

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

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

#### §39.9. *Chorioptic Mange.*

(a) All livestock infested with or exposed to chorioptic mange will be dipped, [or] sprayed, injected or topically treated pursuant to the procedures for treatment of exposure to psoroptic scabies or as otherwise directed by the commission. [The executive director may authorize the use of a spray for the eradication of chorioptic mange if dipping facilities are not available.]

(b) When dipping is the selected treatment, the following procedures shall apply:

(1) All infested or exposed livestock must be dipped twice with Co-Ral (Coumaphos) or GX-118 (Prolate), ten to 14 days apart. They must be kept in the dipping vat at least one minute. The heads of all animals must be submerged and wet before the animals leave the vat.

(2) At the first dipping, all animals will be counted and paint-branded on the left hip or side. At the second dipping, a similar brand will be placed on the right hip or side.

(c) When Avermectins are the selected treatment, the following procedures shall apply:

(1) All infested or exposed livestock must be treated with Ivermectin, Doramectin, Eprinomectin, Moxidectin or Cydectin.

(2) All infested or exposed livestock must be treated in accordance with the label directions under the supervision of the commission; the United States Department of Agriculture, Veterinary Services; or an accredited veterinarian.

(3) Treated livestock may be released from quarantine not less than 14 days from date of treatment provided they have been kept physically separated for 14 days from all untreated livestock.

(4) Dairy cattle of breeding age must not be treated with Ivermectin, Doramectin or Moxidectin.

(5) Livestock treated with Avermectins must be withheld from slaughter according to label directions.

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

Filed with the Office of the Secretary of State on May 28, 2013.

TRD-201302163

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: July 14, 2013

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



## CHAPTER 40. CHRONIC WASTING DISEASE

### 4 TAC §§40.1 - 40.3

The Texas Animal Health Commission (commission) proposes amendments to §40.1, concerning Definitions, §40.2, concerning General Requirements, and §40.3, concerning Herd Status Plans for Cervidae, in Chapter 40, which is entitled "Chronic Wasting Disease" (CWD). The proposed amendments are for the purpose of revising some of the recently adopted requirements to address some changes in interpretation of the federal CWD program.

The commission provides a voluntary herd monitored status program for species that are susceptible to CWD. The U.S. Department of Agriculture's Animal and Plant Health Inspection Service recently adopted an interim final rule to establish a national CWD Herd Certification Program with minimum requirements for interstate movement of deer, elk, and moose, or cervids in the United States. Participation in the program will be voluntary. The federal CWD Herd Certification Program is found in 9 CFR Subchapter B, Part 55. The commission recently adopted changes to the state's CWD Herd Certification Program to meet the federal program standards. However, based on modifications in in-

terpretation of the federal requirements, the commission is making some amendments. The first change is to the definition of "Physical Herd Inventory" to remove the requirement that all animals in the herd must be restrained in order to have the identification validated by the person performing the inventory verification. The second modification is the fencing requirement found in §40.3(a) which provides that a herd premises must have perimeter fencing of a minimum of eight feet in height and adequate to prevent ingress or egress of cervids. That standard is found in the Uniform Method and Rules for CWD, but under the federal regulations the standard provides merely that the fencing must be adequate to prevent ingress or egress of cervids, and the commission is modifying agency requirements to meet that standard by removing the eight-foot requirement.

#### FISCAL NOTE

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

#### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be that the commission has a herd monitored program that can meet the new federal interstate movement requirements, but with flexibility to represent some modifications in federal interpretation.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### TAKINGS ASSESSMENT

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

#### REQUEST FOR COMMENT

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

#### STATUTORY AUTHORITY

The amendments are proposed under the following statutory authority as found in Chapter 161 of the Texas Agriculture Code. Section 161.0541, entitled Elk Disease Surveillance Program, provides that the commission by rule may establish a disease surveillance program for elk. Rules adopted under this section

must: (1) require each person who moves elk in this state to have elk tested for chronic wasting disease or other diseases as determined by the commission; (2) be designed to protect the health of the elk population in this state; and (3) include provisions for testing, identification, transportation, and inspection under the disease surveillance program.

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

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That authority is found in §161.054. An agent of the commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

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

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

#### §40.1. Definitions.

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

(1) Approved Laboratory--A diagnostic laboratory approved by the APHIS Administrator to conduct official tests for CWD in accordance with 9 CFR §55.8.

(2) Certified CWD Sample Collector--An individual who has completed appropriate training recognized by his or her State on the collection and preservation of samples for CWD testing and on proper

recordkeeping, and who has been certified to perform these activities by the Commission.

(3) Chronic Wasting Disease (CWD)--A transmissible spongiform encephalopathy (TSE) of susceptible species.

(4) Commingled/Commingling--Farmed cervids are commingled if they are housed or penned together having direct physical contact with each other, have less than 10 feet of physical separation (except in cases of "limited contact"; see definition) or any activity where uninhibited contact occurs such as sharing an enclosure, a section of a transport vehicle, or sharing equipment, pens or stalls, pasture, or water sources/watershed (i.e., housed in a pen that receives runoff or shares a natural or manmade body of water with another pen). Commingling includes contact with bodily fluids or excrement from other farmed animals. Farmed cervids commingled with other farmed cervids assume the status of the lowest program status animal in the group.

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

(6) CWD Exposed Animal--An animal that is part of a CWD-positive herd, or that has been commingled with a CWD-positive animal or resided on contaminated premises within the five years before diagnosis.

(7) CWD Profile--A cervid 12 months of age or older that is emaciated and exhibits some combination of clinical signs including abnormal behavior, increased salivation, tremors, stumbling, incoordination, difficulty in swallowing, excessive thirst, and excessive urination.

(8) CWD Susceptible Species--All species in the cervidae family determined to be susceptible to CWD, which means any species that has had a diagnosis of CWD confirmed by means of an official test conducted by a laboratory approved by USDA/APHIS. This includes white-tailed deer (*Odocoileus virginianus*), mule deer (*Odocoileus hemionus*), black-tailed deer (*Odocoileus hemionus columbianus*), North American elk or wapiti (*Cervus Canadensis*), red deer (*Cervus elaphus*), Sika deer (*Cervus Nippon*), moose (*Alces alces*), and any associated subspecies and hybrids.

(9) CWD Test Eligible--Unless otherwise specifically provided in these rules, all cervidae 12 months of age and over.

(10) Farmed or Captive--Privately or publicly maintained or held for economic or other purposes within a perimeter fence or confined area, or temporarily captured from a wild population for interstate movement and release.

(11) Herd--An animal or group of animals that are:

(A) Under common ownership, control, or supervision and are grouped on one or more parts of any single premises (lot, farm, or ranch) where commingling of animals occurs; or

(B) A single herd also is considered to be all animals under common ownership, control, or supervision on two or more premises which are geographically separated but on which animals have been commingled or had direct contact with one another. If an owner wishes to maintain separate herds, he or she must maintain separate herd inventories, records, working facilities, water sources, equipment, and land use. Herds must be separated by a distance of 30 feet or more. No commingling of animals may occur. If movement of animals does occur between herds, this movement must be recorded as it would if they were separately owned herds.

(12) Limited Contact--Any brief contact with a farmed animal such as in sale or show rings and alleyways at fairs, livestock auctions, sales, shows, and exhibitions. Limited contact does not include

penned animals having less than ten feet of physical separation or contact through a fence, or any activity where uninhibited contact occurs such as sharing an enclosure, a section of a transport vehicle, sharing equipment, food, or water sources, or contact with bodily fluids or excrement. Pens at fairs, livestock auctions, sales, shows, and exhibitions must be thoroughly cleaned and all organic material removed after use and before holding another animal.

(13) Official Animal Identification--A device or means of animal identification approved by APHIS for use in the Certification Program to uniquely identify individual animals. The official animal identification must include a nationally unique animal identification number that adheres to one of the following numbering systems:

(A) National Uniform Eartagging System;

(B) Animal Identification Number (AIN);

(C) Premises-based number system using a Premises Identification Number (PIN) in conjunction with a livestock production numbering system; or

(D) Any other numbering system approved by the Commission for the identification of animals in commerce.

(14) Complete [Physical] Herd Inventory--One in which all animals in the herd must be [restrained and individual identification recorded must be] validated by the person officially performing the inventory verification.

(15) Positive Herd--A herd in which a CWD-positive animal resided at the time it was diagnosed.

(16) Suspicious Animal--A cervid which has clinical signs that resemble the CWD profile.

(17) Suspicious Herd--A herd in which one or more animals are observed with clinical signs that resemble the CWD profile.

(18) Trace Herd--The term includes both trace-back and trace-forward herds. A trace-back herd is any herd where an affected animal has resided during a 60 month period prior to death. A trace-forward herd is any herd which has received animals from a positive herd during a 60 month period prior to death of the affected animal.

#### §40.2. General Requirements.

(a) Procedures for issuing hold orders and quarantines.

(1) All herds suspicious of CWD, in which one or more animals are observed with signs which resemble the CWD profile, shall be reported to a representative of the Commission. The herd shall be restricted by hold order until the investigation and diagnosis have been completed.

(2) Trace herds shall be restricted by hold order until an epidemiologic investigation has been completed and the herd has met all requirements specified in a herd plan.

(3) CWD positive herds shall be restricted by quarantine until the herd has met all requirements specified in a herd plan.

(4) All suspicious, trace, and positive herds not complying with the requirements of an investigation or herd plan shall be restricted by quarantine.

(b) Procedures in suspicious, trace, and positive herds.

(1) CWD suspicious animals shall be presented to a representative of the Commission for the purpose of collection and submission of appropriate samples to an official laboratory for diagnosis.

(2) Disposition of a positive herd without evidence of transmission within the herd as determined by a TAHC or USDA

epidemiologist following completion of the investigation. A herd plan will be developed by a TAHC or USDA epidemiologist in consultation with the herd owner, and their veterinarian (if requested by the owner). The herd plan shall include the following requirements for a period of five years:

(A) Routine visual inspection of all animals in the herd by a TAHC or USDA veterinarian for the purpose of early detection of CWD suspicious animals.

(B) Annual verification of herd inventory by a TAHC or USDA veterinarian.

(C) Mandatory reporting of all CWD suspicious animals and all death losses. Mortality in animals [~~12 months~~] of any age [~~or older~~] shall be immediately reported to a TAHC or USDA veterinarian for the purpose of collection of appropriate samples for submission to an official laboratory for CWD surveillance.

(D) CWD exposed animals must be removed from the herd and:

(i) Humanely destroyed, tested for CWD, and disposed of as specified in subsection (c) of this section; or

(ii) Maintained under hold order for 60 months from the last case of CWD.

(3) Disposition of a positive herd with evidence of transmission within the herd as determined by a TAHC or USDA epidemiologist following completion of the investigation. A herd plan will be developed by a TAHC or USDA epidemiologist in consultation with the owner, and their veterinarian (if requested by the owner). The herd plan shall include the following requirements for a period of five years:

(A) Routine visual inspection of all animals in the herd by a TAHC or USDA veterinarian for the purpose of early detection of CWD suspicious animals.

(B) Annual verification of herd inventory by a TAHC or USDA veterinarian.

(C) Mandatory reporting of all CWD suspicious animals and all death losses. Mortality in animals [~~12 months~~] of any age [~~or older~~] shall be immediately reported to a TAHC or USDA veterinarian for the purpose of collection of appropriate samples for submission to an official laboratory for CWD surveillance.

(D) CWD exposed animals must be removed from the herd and:

(i) Humanely destroyed, tested for CWD, and disposed of as specified in subsection (c) of this section; or

(ii) Maintained under hold order for 60 months from the last case of CWD.

(E) The herd shall remain under quarantine for 60 months from the last case of CWD.

(4) Disposition of trace herds. A herd plan will be developed by a TAHC or USDA epidemiologist in consultation with the owner, and their veterinarian (if requested by the owner). The herd plan shall include the following requirements for a period of five [~~three~~] years:

(A) Routine visual inspection of all animals in the herd by a TAHC or USDA veterinarian for the purpose of early detection of CWD suspicious animals.

(B) Annual verification of herd inventory by a TAHC or USDA veterinarian.

(C) Mandatory reporting of all CWD suspicious animals and all death losses. Mortality in animals [~~12 months~~] of any age [~~or older~~] shall be immediately reported to a TAHC or USDA veterinarian for the purpose of collection of appropriate samples for submission to an official laboratory for CWD surveillance.

(D) CWD exposed animals must be removed from the herd and:

(i) Humanely destroyed, tested for CWD, and disposed of as specified in subsection (c) of this section; or

(ii) Maintained under hold order for 60 months from the last potential exposure.

(c) Destruction of suspicious and CWD exposed animals. Animals destroyed due to a presumptive diagnosis of CWD, including CWD exposed animals in positive and trace herds, shall be humanely euthanized, appropriate samples collected to confirm the diagnosis, and disposed of by deep burial or incineration, including all animal products, by-products, and contaminated materials:

(1) on the premises where disclosed; or

(2) at a facility approved by the executive director.

(d) Payment of indemnity. The Commission may participate in paying indemnity to purchase and destroy CWD positive animals, CWD exposed animals, and CWD suspect animals. Subject to available funding, the amount of the state payment for any such animals will be five percent of the appraised value established in accordance with 9 CFR §55.3. This payment is in participation with any Federal payments made in accordance with 9 CFR §55.2.

#### §40.3. Herd Status Plans for Cervidae.

(a) Enrollment Requirements. Herd owners who enroll must agree to maintain their herds in accordance with the following conditions:

(1) Each animal must be identified before reaching 12 months of age. All animals less than one year of age shall be officially identified on a change of ownership or when moved from the premise of origin.

(2) Herd premises must have perimeter fencing [~~of a minimum of eight feet in height and~~] adequate to prevent ingress or egress of cervids.

(3) The herd owner shall:

(A) Report, within five business days, all animals that *escape or disappear*, and all wild cervids that enter the facility; and

(B) Test all deaths (including animals killed on premises maintained for hunting and animals sent to slaughter) aged 12 months or older, in accordance with subsection (b) of this section.

(4) An annual inventory:

(A) An annual inventory shall be verified by TAHC personnel, USDA personnel or an accredited veterinarian. If requested by a producer to verify the inventory, the Commission will assess a fee of \$100.00 per hour.

(B) The herd owner shall maintain herd records that include a complete inventory of animals with documents showing all escaped or disappeared animals and all test results for those animals that died.

(C) For animals seeking to qualify for movement in interstate commerce, a complete [~~physical~~] herd inventory must be performed [~~on~~] at the time a herd is enrolled and a complete [~~physical~~]

herd inventory must be performed for all herds enrolled in the CWD Herd Certification Program no more than three years after the last complete [~~physical~~] herd inventory for the herd.

(D) The herd owner is responsible for assembling, handling, and restraining the animals and for all costs incurred to present the animals for inspection.

(5) To maintain separate herds, a herd owner shall:

(A) Maintain separate herd inventories and records;

(B) Separate working facilities;

(C) Separate water sources;

(D) Separate equipment or cleaned and maintained in accordance with Appendix V of the CWD Program Standards; and

(E) There shall be at least 30 feet between the perimeter fencing around separate herds, and no commingling of animals may occur. Movement of animals between herds must be recorded as if they were separately owned herds.

(6) New animals may be introduced into the herd only from other herds enrolled in the CWD Herd Certification Program. Addition of animals from a lesser status herd will result in the receiving herd's status being lowered to that of the contributing herd.

(b) Testing Requirements. CWD test samples shall be collected and submitted to an official laboratory for CWD diagnosis using a United States Department of Agriculture (USDA) validated test. Test reporting shall be directed to the appropriate TAHC Regional Office. The samples may be collected by a state or federal animal health official, an accredited veterinarian, or a Certified CWD Sample Collector. Tissue samples submitted must include the obex and at least one retropharyngeal lymph node from each animal being tested. If samples are missed, or poor quality samples are submitted, the state epidemiologist or his designee will review the circumstances and determine if the herd status will be advanced, held, reduced, or removed.

(c) Herd Status. Herd status designation shall be assigned on the basis of the number of years of participation provided that CWD is not confirmed in the herd:

(1) First Year - starts on enrollment when the herd is in compliance with the requirements of the CWD Herd Certification Program.

(2) Second Year - starts on the anniversary date of the first year after full completion of the requirements for first year status.

(3) Third Year - starts on the anniversary date of the second year after full completion of the requirements for second year status.

(4) Fourth Year - starts on the anniversary date of the third year after full completion of the requirements for third year status.

(5) Fifth Year - starts on the anniversary date of the fourth year after full completion of the requirements for fourth year status.

(6) Certified Status - achieved after five years participation in the program and in compliance with all the program requirements.

(7) Additions to enrolled herds.

(A) Additions may originate from herds of equal or higher status with no change in the status of the receiving herd.

(B) Additions may originate from herds of lower status with the receiving herd acquiring the lower status of the herd(s) involved.



(d) Identification Requirements. Each animal required to be identified by this section must have at least two forms of animal identification attached to the animal.

(1) One of the animal identifications must be a nationally unique animal identification number that is linked to that animal in the CWD National Database.

(2) Second identification must be unique for the individual animal within the herd and linked to the CWD National Database.

(e) Record Keeping. The herd owner shall maintain records for animals including any movements and for a transfer of ownership, and provide those to Commission personnel upon request. Records required to be kept under the provisions of this section shall be maintained for not less than five years. The records shall include the following information:

(1) All identifications (tags, tattoos, electronic implants, etc.);

(2) Birth date;

(3) Species;

(4) Sex;

(5) Date of acquisition and source of each animal that was not born into the herd (owner name, city, state);

(6) Date of removal and destination of any animal removed from herd (owner name, city, state);

(7) Date and cause of death for animals dying within the herd (if cause is known); and

(8) Date of CWD sample submission, submitter, owner, premises, animal information, and official CWD test results from approved laboratory.

(f) Inspection. A premise where a herd is located may be inspected by the Commission to determine compliance with the requirements.

(g) Fees. Participation in a Commission CWD Herd Status Program for Cervidae requires that a fee be paid as provided for in §33.5 of this title (relating to Herd Status/Certification Fees). An annual inventory verified by Commission personnel is assessed a fee of \$100.00 per hour.

(h) Cancellation or suspension of enrollment by the Executive Director. The Executive Director may cancel or suspend enrollment after determining that the herd owner failed to comply with any requirements of this chapter. Before enrollment is canceled or suspended, notification will be provided which will inform the herd owner of the reasons for the action.

(1) The herd owner may appeal the cancellation of enrollment of a herd, or loss or suspension of herd status, by writing to the Executive Director within 15 days after receipt of the action. The appeal must include all of the facts and reasons upon which the herd owner relies to show that the reasons for the action are incorrect or do not support the action.

(2) The herd owner may request a meeting, in writing, with the Executive Director of the Commission within 15 days of receipt of the action and set forth a short, plain statement of the issues that shall be the subject of the meeting, after which:

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

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

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

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

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

(5) If the Executive Director determines, based on epidemiological principles, that other action is necessary, the Executive Director shall provide the herd owner with written notice of the action.

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

Filed with the Office of the Secretary of State on May 28, 2013.

TRD-201302164

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: July 14, 2013

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



## CHAPTER 43. TUBERCULOSIS

### SUBCHAPTER C. ERADICATION OF TUBERCULOSIS IN CERVIDAE

#### 4 TAC §43.20, §43.21

The Texas Animal Health Commission (commission) proposes amendments to §43.20, concerning Definitions, and §43.21, concerning General Requirements, in Chapter 43, Subchapter C, which is entitled "Eradication of Tuberculosis in Cervidae". The purpose of the amendments is to include new types of tuberculosis tests for captive cervids.

Historically, the single cervical tuberculin skin test (SCT) and the comparative cervical tuberculin skin test (CCT) have been the only approved official tests for *Mycobacterium bovis* in captive cervids. Recently, the United States Department of Agriculture, Veterinary Services, approved the Stat-Pak as a primary test and the DPP test as a secondary test for official program testing to diagnose tuberculosis in captive elk, red deer, white-tailed deer, fallow deer, and reindeer when the test is conducted at an approved laboratory. Both of these tests offer the advantage of decreased handling of animals when compared to skin testing.

#### FISCAL NOTE

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

tation of these rules poses no significant fiscal impact on small or micro-businesses.

#### PUBLIC BENEFIT NOTE

Ms. Schmidt has also determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be that the state requirements will conform to the federal standard.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### TAKINGS ASSESSMENT

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

#### REQUEST FOR COMMENT

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

#### STATUTORY AUTHORITY

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

As a control measure, the commission by rule may regulate the movement of animals. The commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. An agent of the Commission is entitled to stop and inspect a shipment of animals or animal products being transported in this state in order to determine if the shipment originated from a quarantined area or herd; or determine if the shipment presents a danger to the public health or livestock industry through insect infestation or through a communicable or noncommunicable disease. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

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

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

#### §43.20. Definitions.

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

(1) Accredited Herd--A herd that has passed at least two consecutive official tuberculosis tests of all eligible animals conducted at nine to 15 month intervals, has no evidence of bovine tuberculosis, and meets the requirements of the UM&R.

(2) Affected herd--A herd that contains or has recently contained one or more animals infected with *Mycobacterium bovis* and has not passed the required tests for release from quarantine.

(3) Approved laboratory--A State/Federal Veterinary Diagnostic laboratory. The primary laboratory for tuberculosis histopathology and bacteriology culture and Cervid TB Stat-Pak Antibody Testing shall be the National Veterinary Services Laboratory, Ames, Iowa. Food Safety Inspection Service, Field Service Laboratories, may be utilized for histopathology.

(4) Cervid TB Stat-Pak Antibody Test--A primary supplemental serologic test used to screen for bovine tuberculosis in elk, red deer, white-tailed deer, fallow deer, and reindeer only. Samples for this test shall only be collected by state and federal animal health officials or designated accredited veterinarians.

~~[(4) Blood Tuberculosis Test (BTB)--The BTB test is a supplemental test for bovine tuberculosis in Cervidae. The BTB test may be used, at no expense to the Commission, as a supplemental test to establish the disease status of a herd or to retest suspects. Samples for this test shall only be collected by state, federal, or accredited veterinarians.]~~

(5) Cervidae--All species of deer, elk, and moose raised under agricultural conditions for the production of meat, the production of other agricultural products, sport, or exhibition.

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

(7) Comparative Cervical Tuberculin (CCT) Test--The intradermal injection of biologically balanced bovine Purified Protein Derivative (PPD) [PPD] tuberculin and avian PPD tuberculin at separate sites in the mid-cervical area to determine the probable presence of bovine tuberculosis (*Mycobacterium bovis*) by comparing the response of the two tuberculins 72 hours (plus or minus six hours) following injection. This test may be used for retesting Single Cervical Tuberculin Test suspects and shall be administered only by an approved state or federal veterinarian.

(8) Designated Accredited Veterinarian (DAV)--An accredited veterinarian trained and approved to conduct the Single Cervical Test for tuberculosis on Cervids and the Cervid TB Stat-Pak

Antibody Test for tuberculosis on elk, red deer, white-tailed deer, fallow deer, and reindeer.

(9) Designated Tuberculosis Epidemiologist (DTE)--An epidemiologist who has demonstrated the knowledge and ability to perform the functions specified by the Bovine Tuberculosis Eradication Uniform Methods and Rules. The DTE must be selected jointly by the cooperating State Animal Health Official, the Area Veterinarian in Charge, and the Regional Epidemiologist. The National Animal Health Programs staff must concur in the appointment. The DTE has the responsibility to determine the scope of epidemiological investigations, assist in development of individual herd plans, and to coordinate disease surveillance and eradication programs within their geographic area of responsibility. The DTE has authority to make independent decisions concerning the use and interpretation of diagnostic tests and management of affected herds when those actions are supported by sound disease eradication principles.

(10) Direct shipment to slaughter--The shipment of tuberculosis reactors and suspects and tuberculosis-exposed cervids from the premises of origin, by permit, directly to a slaughtering establishment operating under state or federal inspection, without diversion to assembly points of any type.

(11) Dual-Path Platform Test (DPP)--A secondary more specific serologic test used when animals have non-negative results on the Stat-Pak test. The initial DPP is run on the non-negative blood submitted for the Stat-Pak test.

~~{(11) ELISA Test--The enzyme linked immunosorbant assay component of the BTB Test is recognized as a presumptive test for Bovine Tuberculosis in Cervidae. The ELISA test may be used to meet intrastate change of ownership test requirements.}~~

(12) Herd--A group of cervids and other hoof stock maintained on common ground or two or more groups of cervids and other hoof stock under common ownership or supervision that are geographically separated but can have an interchange or movement without regard to health status. (A group is construed to mean one or more animals.)

(13) Individual Herd Plan--A written disease management plan that is designed by the herd owner and/or other herd representative and a State or Federal veterinarian to eradicate tuberculosis from an affected herd while reducing human exposure to the disease. The herd plan will include appropriate herd test frequencies, tests to be employed, and any additional disease or herd management practices deemed necessary to eradicate tuberculosis from the herd in an efficient and effective manner. The plan must be approved by the State Animal Health Official and the Area Veterinarian in Charge, and have the concurrence of the Regional or Designated Tuberculosis Epidemiologist.

(14) Monitored Herd--A herd on which identification records are maintained on animals over one year of age slaughtered and inspected for tuberculosis at an approved State/Federal slaughter facility or an approved laboratory, and animals tested negative for tuberculosis in accordance with the requirements for interstate movement specified in the Tuberculosis Eradication in Cervidae Uniform Methods and Rules. The initial qualifying total herd size is the annual average of animals one year of age or older during the initial qualifying period, which period shall not exceed three years. The combined number of slaughtered or tested animals in the sample must be evenly distributed over a three year period, and no less than half of the qualifying animals must be slaughter inspected. The rate to detect infection at a 2.0% prevalence level with 95% confidence would require a maximum number of 178 animals.

Figure: 4 TAC §43.20(14) (No change.)

(15) Negative animals--Cervids that show no response to a Single Cervical Tuberculin [tuberculosis] test or elk, red deer, white-tailed deer, fallow deer or reindeer that test negative on the Stat-Pak test. Animals that show a non-negative response on the Single Cervical Tuberculin Test or the Stat-Pak test may be [and have been] classified negative by the DTE [testing veterinarian] based upon history, secondary supplemental tests (CTT or DPP) or[;] examination of carcasses [or laboratory results].

(16) No gross lesion (NGL) animals--Cervids that do not reveal a lesion(s) of bovine tuberculosis upon necropsy.

(17) Official eartag--An identification eartag that provides unique identification for each individual animal by conforming to the alpha-numeric National Uniform Eartagging System.

(18) Official tuberculosis test--A test for bovine tuberculosis applied and reported by approved personnel. The official tests for cervidae are the single cervical test and[;] the comparative cervical test[; and the blood tuberculosis test]. The Stat-Pak test and the DPP test are considered official tests for elk, red deer, white-tailed deer, fallow deer or reindeer only.

(19) Permit--An official document issued by a representative of the Commission, USDA APHIS-VS, or an accredited veterinarian that is required to accompany reactor, suspect or exposed cervids to slaughter. The permit will list the reactor tag number or official eartag number in the case of suspect and exposed cervids; the owner's name and address; origin and destination; number of cervids included; and the purpose of the movement. If a change in destination becomes necessary, a new permit must be issued by authorized personnel. No diversion from the destination of the permit is allowed.

(20) Qualified herd--A cervid herd that has undergone at least one complete official negative test of all eligible animals within the past 12 months and is not classified as an accredited herd, has no evidence of bovine tuberculosis, and meets the standards of the UM&Rs.

(21) Reactor--Any cervid that shows a response to an official tuberculosis test and is classified a reactor by the DTE [testing veterinarian].

(22) Single Cervical Tuberculin Test (SCT)--The intradermal injection of 0.1 mL (5,000 tuberculin units) of USDA PPD Bovis tuberculin in the mid-cervical region with reading by visual observation and palpation in 72 hours (plus or minus six hours) following injection. This test shall be administered only by a state, federal, or designated accredited veterinarian.

(23) Surveyed Herd--A cervid herd in which surveillance records are maintained on all animals over one year of age that are surveyed for evidence of bovine tuberculosis by routine post mortem inspection at an approved state/federal slaughter facility, or approved diagnostic laboratory, or routine tuberculosis tests performed by a designated accredited veterinarian or by other appropriate surveillance methods approved by a representative of the TAHC.

(24) Suspect--Any cervid that shows a response to the single cervical tuberculin test or any elk, red deer, white-tailed deer, fallow deer or reindeer that test non-negative on the Stat-Pak test and is not classified a reactor, or is classified suspect by a supplemental tuberculosis test.

(25) Tuberculin--A product that is approved by and produced under USDA license for the intradermal injection of cervids for the purpose of detecting bovine tuberculosis.

(26) Tuberculosis--A disease in Cervidae caused by *Mycobacterium bovis* (M. bovis).

§43.21. *General Requirements.*

~~[(a) Change of ownership requirements effective September 1, 1996, unless prior to that date sufficient information is obtained pursuant to §43.22(d)(1) of this title (relating to Herd Status Plans for Cervidae) to allow an epidemiological evaluation as to the necessity for change of ownership testing.]~~

~~[(1) Animal identification. All animals shall be individually identified by an official eartag or other approved identification device.]~~

~~[(2) Testing. All cervidae sold through auction markets shall be tested negative to a tuberculosis test within 90 days prior to sale, except:]~~

~~[(A) Animals originating from an accredited, qualified, monitored or surveyed herd.]~~

~~[(B) Animals consigned to an approved state/federal inspected slaughter facility.]~~

~~[(3) Recordkeeping requirements. Records documenting the sale of animals shall be maintained by the seller for a minimum period of five years.]~~

~~(a) [(b)] Reporting of tests. All cervidae tested shall be officially [individually] identified [by an official eartag] at the time of an official test. A report of all tuberculosis tests, [–]including the official identification of each animal, [by eartag number, age, sex, and breed—and] a record of the size of the response of the Single Cervical Tuberculin Test or the result of the TB Cervid Stat Pak Antibody Testing [–], where indicated, and test interpretation shall be submitted in accordance with the requirements of the cooperating state and federal officials.~~

~~(b) [(e)] Classification of cervidae tested.~~

~~(1) Single cervical tuberculin test.~~

~~(A) Herds of unknown status. All SCT responses shall be recorded and the animals classified as suspects and quarantined for retest with the CCT [or BTB], unless in the judgment of the testing veterinarian the reactor classification is indicated.~~

~~(B) Known infected herds. All responses shall be recorded and the animals classified as reactors.~~

~~(2) Comparative cervical test--All responses are to be measured to the nearest 0.5mm.~~

~~(A) Animals having a response to bovine PPD of less than 1mm should be classified negative.~~

~~(B) Animals having a response to bovine PPD from 1mm through 2mm that is equal to or greater than the avian PPD response shall be classified as suspects.~~

~~(C) Animals having a response to bovine PPD greater than 2.0mm but equal to the avian response shall be classified as suspects, except when in the judgment of the testing veterinarian the reactor classification is indicated.~~

~~(D) Animals meeting the criteria for suspect classification on two successive CCTs shall be classified as reactors.~~

~~(E) Animals having a response to bovine PPD which is greater than 2.0mm and is 0.5mm greater than the avian PPD response shall be classified as reactors.~~

~~(3) Suspect SCT cervids may be retested by [either] the CCT only [or the BTB]. The CCT may be applied within ten days following the SCT injection or after 90 days. If the CCT is applied within ten days of the SCT, the opposite side of the neck shall be used. [The~~

~~sample for the BTB shall be taken 13-30 days after the SCT injection.] Animals positive to the CCT [or the BTB] shall be classified as reactors.~~

~~(4) Suspects may be necropsied in lieu of retesting, and, if found without evidence of M. bovis infection by histopathology and culture (including selected NGL specimens submitted from animals having no gross lesions indicative of tuberculosis), shall be considered negative for tuberculosis.~~

~~[(5) Elisa Test--Animals positive to the Elisa test shall be classified as suspects and quarantined for retest with an official TB test.]~~

~~(c) Classification of captive elk, red deer, white-tailed deer, fallow deer or reindeer tested.~~

~~(1) Cervid TB Stat Pak antibody test.~~

~~(A) Herds of unknown status. All Stat Pak non-negative responses shall be recorded and the animals classified as suspects and quarantined for retest with the DPP unless in the judgment of the DTE the reactor classification is indicated.~~

~~(B) Known infected herds. All non-negative responses shall be recorded and the animals classified as reactors.~~

~~(2) Dual-Path Platform Test shall be performed on all non-negatives samples submitted for Stat Pak Testing. Animals non-negative on the Stat-Pak test and non-negative on a single DPP test should be classified as suspect unless the DTE determines that a reactor classification is warranted.~~

~~(3) Animals classified as suspect by a single DPP test may be retested with the DPP test only with a new blood sample drawn no sooner than 30 days after the initial sample was obtained.~~

~~(4) Animals that are non-negative on two successive DPP tests should be classified as reactor.~~

~~(5) Suspects may be necropsied in lieu of retesting, and, if found without evidence of M. bovis infection by histopathology and culture (including selected NGL specimens submitted from animals having no gross lesions indicative of tuberculosis), shall be considered negative for tuberculosis.~~

~~(d) Disposition of Tuberculin-Responding Cervidae.~~

~~(1) Reactors shall remain on the premises where they were disclosed until a state or federal permit for movement has been obtained. Movement for immediate slaughter will be within 15 days of classification directly to a slaughter establishment where approved state or federal inspection is maintained. Alternatively, the animals may be destroyed and necropsy conducted by or under the supervision of a state or federal regulatory veterinarian that has been trained in tuberculosis necropsy procedures.~~

~~(2) Herds containing suspects to the SCT shall be quarantined until the suspect animals are:~~

~~(A) retested by the CCT within ten days of the SCT injection; or~~

~~(B) retested by the CCT after 90 days; or~~

~~[(C) retested by the BTB test between 13 and 30 days after the SCT injection; or]~~

~~(C) [(D)] shipped under permit directly to a slaughter facility under state or federal inspection, or necropsied. If such animals are found without evidence of M. bovis infection by histopathology and culture (including selected NGL specimens submitted from animals having no gross lesions indicative of tuberculosis), they shall be considered negative for tuberculosis.~~

(3) Suspects to the CCT [~~comparative cervical test or equivocal to the BTB~~] shall remain under quarantine until:

(A) comparative cervical suspects are retested by the CCT after 90 days; or

~~(B) BTB equivocal animals are retested by the BTB test optimally before 60 days following the SCT injection; or~~

~~(B) [(C)]~~ such animals are shipped under permit directly to a slaughter facility under state or federal inspection, or necropsied. If such animals are found without evidence of *M. bovis* infection by histopathology and cultured (including selected NGL specimens submitted from animals having no gross lesions indicative of tuberculosis), they shall be considered negative for tuberculosis.

(4) An animal meeting the suspect criteria on two successive CCT [~~or two BTB equivocal~~] tests followed by one suspect CCT test shall be classified as a reactor and be identified as such. The testing veterinarian must justify exceptions in writing and have the concurrence of State or Federal animal health personnel.

(e) Identification of Reactors. Reactor cervids shall be identified by branding with the letter "T" at least two by two inches in size, high on the left hip near the tailhead, and by tagging with an official eartag bearing a serial number and inscription "U.S. Reactor" attached to the left ear of each reactor animal.

(f) Disposition of elk, red deer, white-tailed deer, fallow deer or reindeer that are non-negative on the Stat-Pak test and non-negative on a single DPP test.

(1) Reactors shall remain on the premises where they were disclosed until a state or federal permit for movement has been obtained. Movement for immediate slaughter will be within 15 days of classification directly to a slaughter establishment where approved state or federal inspection is maintained. Alternatively, the animals may be destroyed and necropsy conducted by or under the supervision of a state or federal regulatory veterinarian that has been trained in tuberculosis necropsy procedures.

(2) Herds containing suspects to the Stat-Pak test and a single DPP test shall be quarantined until the suspect animals are:

(A) retested by the DPP test only with a new blood sample drawn no sooner than 30 days after the initial sample was obtained; or

(B) shipped under permit directly to a slaughter facility under state or federal inspection, or necropsied. If such animals are found without evidence of *M. bovis* infection by histopathology and culture (including selected NGL specimens submitted from animals having no gross lesions indicative of tuberculosis), they shall be considered negative for tuberculosis.

(3) Animals that are non-negative on two successive DPP tests should be classified as reactor. Any exceptions to reactor classification must be justified by the designated TB epidemiologist in writing and have the concurrence of the regional TB epidemiologist.

(g) [(#)] Quarantine procedures.

(1) All herds in which reactor animals are disclosed shall be quarantined. Exposed animals must remain on the premises where disclosed unless a state or federal permit for movement to slaughter has been obtained. Movement for immediate slaughter must be directly to a slaughter establishment where approved state or federal inspection is administered. Animals must be identified by official eartag. Use of "S" brand is required, or animals must be shipped in an official sealed vehicle. The "S" brand shall be applied to either the left jaw or the tailhead.

(2) Cervidae herds in which *M. bovis* is confirmed shall remain under quarantine if not depopulated, and must pass three consecutive official tuberculosis tests of all animals. The first test must be conducted 90 days or more after the last test yielding a positive animal, with two additional tests at 180-day minimum intervals. Five annual complete herd tests of all animals shall be given following the release from quarantine.

(3) Cervidae herds that have had a test of all eligible animals with NGL reactors only and no evidence of tuberculosis infection is found by histopathology and culture of *M. bovis* (including selected NGL specimens submitted from animals having no gross lesions indicative of tuberculosis) may be released without further restrictions.

(4) Cervidae herds in which compatible or suggestive lesions are found by histopathology without the isolation of *M. bovis* may be released from quarantine following a negative 90-day retest of the entire herd, provided there is no known association with *M. bovis*.

(5) Cervidae herds that exhibit NGL reactors in which no evidence of tuberculosis infection is found by histopathology and culture of *M. bovis* and are unable to conduct a test of all eligible animals, shall be evaluated by the state and/or regional tuberculosis epidemiologist for possible release of quarantine.

(h) [(g)] Procedures in affected herds. Disclosure of tuberculosis in any herd shall be followed by a complete epidemiological investigation. All cervids in herds from which tuberculosis animals originate, and all cervids that are known to have associated with affected cervids or other affected animals, shall be tested promptly. These procedures shall apply to adjacent and contact herds as well as to the evaluation and testing of possible source herds for the affected herd. Herds that have received exposed animals shall be tested following the slaughter or testing of the exposed animals. Every effort shall be made to ensure the immediate elimination of the disease from all species of animals on the premises. The herd shall be handled as outlined under subsection (g) [(e)] of this section[; Quarantine Procedures].

(i) [(#)] Retest Schedules for High Risk Herds.

(1) In herds with a history of lesions compatible or suggestive for tuberculosis by histopathology, two complete annual herd tests shall be given after release from quarantine. Herds with a bacteriologic isolation of a *Mycobacteria* species other than *M. bovis* should be considered negative for bovine tuberculosis with no further testing requirements.

(2) In a newly assembled herd on premises where a tuberculosis herd has been depopulated, two annual herd tests shall be applied to all animals. The first test must be approximately six months after assembly of the new herd. If the premises are vacated for over one year, these requirements may be waived.

(3) Exposed animals previously sold from known infected herds shall be depopulated if possible, or tested with the SCT or Stat Pak/DPP by State or Federal veterinarians. ~~[The BTB test may be used simultaneously with the SCT as an additional diagnostic test.]~~ All animals non-negative [~~positive~~] to either test shall be classified as reactors.

(A) If bovine tuberculosis is confirmed in the exposed animal(s), the remainder of the receiving herd shall be classified as an infected herd and handled according to subsection (g) [(#)](2) of this section.

(B) If negative to the test, the exposed animal(s) will subsequently be handled as if a part of the infected herd of origin for purposes of testing, quarantine release, and the five annual high-risk tests. The remainder of the herd shall be tested at the time of the initial

investigation and retested in one year with the SCT or Stat Pak/DPP. Supplemental diagnostic tests may be used if needed.

(4) Herds indicated as the source(s) of animals in slaughter traceback investigations shall be placed under quarantine within 30 days of notification to the area office, and a herd test scheduled. Testing of source herds of slaughter animals having lesions of tuberculosis shall be done by state or federal regulatory veterinarians using the SCT or Stat Pak/DPP.

(A) If the herd of origin is positively identified and *M. bovis* has been confirmed by bacterial isolation from the slaughter animal, all animals responding to the SCT or Stat Pak/DPP shall be classified as reactors. In all other cases, supplemental diagnostic tests may be used.

(B) In herds identified as the source of culture negative lesioned animals, responding animals may be classified as reactors or suspects. If classified as suspects, they may be retested by supplemental diagnostic tests.

(j) [(†)] Cleaning and disinfection of premises, conveyances, and materials. All premises, including all structures, holding facilities, conveyances, and materials that are determined by program officials to constitute a health hazard to humans or animals because of tuberculosis, shall be properly cleaned and disinfected. This shall be done within 15 days after the removal of tuberculosis-affected or exposed cervids in accordance with approved procedures. However, these officials may extend the time limit for disinfection to 30 days when a request for such extension is received prior to the expiration date of the original 15-day period allowed.

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

Filed with the Office of the Secretary of State on May 28, 2013.

TRD-201302170

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: July 14, 2013

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



## CHAPTER 50. ANIMAL DISEASE TRACEABILITY

### 4 TAC §50.1, §50.2

The Texas Animal Health Commission (commission) proposes new Chapter 50, §50.1 and §50.2, concerning Animal Disease Traceability. The purpose of the new chapter is to establish standards for facilities or locations which must be approved to identify livestock moving interstate under the federal disease traceability program.

The United States Department of Agriculture (USDA) has amended its regulations and established minimum national official identification and documentation requirements for the traceability of livestock moving interstate. Under USDA's rule-making, unless specifically exempted, livestock belonging to species covered by the regulations must be officially identified and accompanied by an interstate certificate of veterinary inspection or other documentation. These regulations specify approved forms of official identification for each species but

allow the livestock covered under this rulemaking to be moved interstate with another form of identification, as agreed upon by animal health officials in the shipping and receiving States or Tribes. The federal rule provides for an approved tagging site, which is a premise, where livestock moving interstate may be officially identified upon arrival on behalf of their owner or shipper. Under the federal rule the tagging facilities must be officially approved by the state where located. The effective date of the USDA rule is March 11, 2013, and it is found in 9 CFR Part 86.

The first section in the new chapter is for applicable definitions. The second section is to establish the requirements for an approved tagging site. The USDA rule provides for approved tagging sites so producers who cannot or prefer not to tag their animals can move cattle interstate to a location where the animals will be officially identified on their behalf. An approved tagging site is authorized to receive and offload cattle that require official identification and to officially identify those cattle in accordance with the protocols defined by the State or Tribal animal health official and Federal Area Veterinarian in Charge. An approved tagging site is a premise, authorized by animal health officials, where livestock may be officially identified on behalf of their owner or the person in possession, care or control of the animals when they are brought to the premises. While livestock markets are frequently referenced as being potential approved tagging sites, other locations, such as feedlots, could also become approved tagging sites.

An animal identification number is a numbering system for the official identification of individual animals in the United States that provides a nationally unique identification number for each animal. The AIN consists of 15 digits, with the first 3 being the country code (840 for the United States or a unique country code for any U.S. territory that has such a code and elects to use it in place of the 840 code). The alpha characters USA or the numeric code assigned to the manufacturer of the identification device by the International Committee on Animal Recording may be used as an alternative to the 840 or other prefix representing a U.S. territory; however, only the AIN beginning with the 840 or other prefix representing a U.S. territory will be recognized as official for use on AIN tags applied to animals on or after March 11, 2015. The AIN beginning with the 840 prefix may not be applied to animals known to have been born outside the United States.

### FISCAL NOTE

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

has afforded the cattle producer some reduced cost by not having them identified prior to movement.

#### PUBLIC BENEFIT NOTE

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

#### LOCAL EMPLOYMENT IMPACT STATEMENT

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

#### TAKINGS ASSESSMENT

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

#### REQUEST FOR COMMENT

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

#### STATUTORY AUTHORITY

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

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

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

Section 161.005 provides that the commission may authorize the executive director or another employee to sign written instruments on behalf of the commission. A written instrument, including a quarantine or written notice signed under that authority, has the same force and effect as if signed by the entire commission. Under §161.112, the commission may adopt rules relating to the movement of livestock, exotic livestock, and exotic fowl from livestock markets and shall require tests, immunization, and dipping of those livestock as necessary to protect against the spread of communicable diseases. Also, the commission may adopt rules requiring permits for moving exotic livestock and exotic fowl from livestock markets as necessary to protect against the spread of communicable diseases.

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

#### §50.1. Definitions.

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

(1) Animal identification number (AIN)--A numbering system for the official identification of individual animals that provides a nationally unique identification number for each animal. Only the AIN beginning with the 840 or other prefix representing a U.S. territory will be recognized as official for use on AIN tags applied to animals on or after March 11, 2015.

(2) Approved livestock facility--A stockyard, livestock market, buying station, concentration point or any other premises, under State or Federal veterinary inspection, where livestock are assembled and that has been approved by the Texas Animal Health Commission.

(3) Approved tagging site--A premises, authorized by the Texas Animal Health Commission, where livestock may be officially identified on behalf of their owner or the person in possession, care, or control of the animals when they are brought to the premises.

#### §50.2. Approved Tagging Site.

(a) In order to be approved as a tagging site the person responsible for the tagging site must agree to administer the tagging of livestock at their location in accordance with the following requirements:

(1) Obtain official identification eartags only as directed by the commission.

(2) Unload animals requiring official identification only when the owner or the person in possession, care, or control of the animals agrees to have the animals officially identified in accordance with approved tagging site protocols.

(b) Requirements for officially identifying animals:

(1) Officially identify animals required to be identified before commingling with animals from different premises, or use a back-tag or other method to accurately maintain the animal's identity until the official eartag is applied. The official identification can then be correlated to the person responsible for shipping the animal.

(2) Apply only official eartags to animals not already officially identified.

(3) Do not remove official identification devices unless authorized by commission personnel.

(c) Maintain tagging records using forms or electronic systems as directed by animal health officials to include at a minimum:

(1) The name, street address, city, state, and zip code of the owner or person responsible for the animals tagged.

(2) The official identification numbers of the tags applied associated with the owner or person responsible for the animals.

(3) The date the official identification eartags were applied.

(d) Provide the records to the commission if requested.

(e) Ensure the security of official eartags and distribution records by:

(1) Maintaining a record of all official identification eartags received, distributed, and applied at the tagging site for a minimum of five years.

(2) Keeping the inventory of tags and records in a secure place accessible only to tagging site personnel.

(3) Immediately reporting any lost or stolen tags to the commission.

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

Filed with the Office of the Secretary of State on May 28, 2013.

TRD-201302169

Gene Snelson

General Counsel

Texas Animal Health Commission

Earliest possible date of adoption: July 14, 2013

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



## TITLE 16. ECONOMIC REGULATION

### PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

#### CHAPTER 31. ADMINISTRATION

##### 16 TAC §31.5

The Texas Alcoholic Beverage Commission (commission) proposes an amendment to §31.5, relating to Alcoholic Beverage Commission Charge Schedule, to re-title it to more accurately reflect its content, to change a reference to the state agency responsible for promulgating rules related to charges for public information requests, to eliminate unnecessary text that merely restates requirements already found elsewhere in Texas law or that is more appropriately addressed as a matter of internal policy, and to clarify the relationship between the officer for public information and the open records coordinator.

Texas Government Code §552.262 provides that the Attorney General shall adopt rules for use by each governmental body in determining charges for providing public information. The Attorney General's rules are found at 1 Texas Administrative Code

§§70.1 - 70.12. Under Texas Government Code §552.201, the chief administrative officer of a governmental body is the officer for public information for purposes of the Public Information Act. The commission must abide by these provisions of the Government Code and therefore it is not necessary to replicate the requirements in the commission's rules.

Section 31.5 was reviewed under Government Code §2001.039, which requires each state agency to periodically review and consider for re-adoption each of its rules. The commission has determined that the need for the rule continues to exist but that it should be amended.

Emily E. Helm, General Counsel, has determined that for each year of the first five years that the proposed amendment will be in effect, there will be no fiscal impact on state or local government.

The proposed amendment will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Ms. Helm has determined that for each year of the first five years that the proposed amendment will be in effect, the public will benefit because the agency's rules will accurately reflect administration of the agency's responses to public information requests.

Comments on the proposed amendment may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at [http://www.tabc.state.tx.us/laws/proposed\\_rules.asp](http://www.tabc.state.tx.us/laws/proposed_rules.asp). Comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed amendment if a request for such a hearing is made by June 21, 2013. Requests for a hearing may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted by email to [martin.wilson@tabc.state.tx.us](mailto:martin.wilson@tabc.state.tx.us). Notice of the hearing, if one is requested, will be provided to the requestor and on the commission's website at <http://www.tabc.state.tx.us/>. The hearing, if one is requested, will be held no earlier than July 8, 2013, at the commission's headquarters at 5806 Mesa Drive in Austin, Texas.

The proposed amendment is authorized by Alcoholic Beverage Code §5.12, which provides that the commission shall specify the duties and powers of the administrator by printed rules and regulations entered in its minutes; by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code; and by Government Code §2001.039, which requires the agency to periodically review its rules to determine whether the need for them continues to exist.

The proposed amendment affects Alcoholic Beverage Code §5.12 and §5.31 and Government Code §§552.201, 552.262 and 2001.039.

*§31.5. Public Information Act Requests [Alcoholic Beverage Commission Charge Schedule].*

(a) Charges made for providing copies of public information by the Texas Alcoholic Beverage Commission shall be assessed in accordance with the schedule of charges maintained by the Office of the Attorney General [Texas General Services Commission] and found at 1 TAC §§70.1 - 70.12 [§§111.63-111.70].



[(b) All agency charges for the production of public records will be itemized and billed utilizing an agency standardized billing statement. The statement shall reflect the following information:]

[(1) date of billing;]

[(2) description of information requested;]

[(3) name of agency, company, corporation, individual, or entity requesting the information;]

[(4) address of requestor to include street, P.O. Box, city and zip code;]

[(5) telephone number of requestor;]

[(6) method of payment, i.e. cash, check, etc;]

[(7) itemization of charges to include the delivery medium cost, personnel charges, overhead charges, computer resource charges, programming time, postage/shipping charges, fax charges, and other miscellaneous charges; and]

[(8) total charges to requestor.]

(b) [(e)] The General Counsel [counsel for the agency] or the General Counsel's designee shall be the agency's open records coordinator. The open records coordinator is subject to the direction of the Administrator, who is the officer for public information of the agency pursuant to Texas Government Code §552.201.

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

Filed with the Office of the Secretary of State on June 3, 2013.

TRD-201302251

Martin Wilson

Assistant General Counsel

Texas Alcoholic Beverage Commission

Earliest possible date of adoption: July 14, 2013

For further information, please call: (512) 206-3489



## TITLE 22. EXAMINING BOARDS

### PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

#### CHAPTER 131. ORGANIZATION AND ADMINISTRATION

##### SUBCHAPTER B. ORGANIZATION OF THE BOARD STAFF

###### 22 TAC §131.35

The Texas Board of Professional Engineers (Board) proposes an amendment to §131.35, regarding employee training and financial assistance.

The proposed amendment to §131.35(d) changes the maximum amount of financial assistance from \$900 per fiscal year per employee to \$1500.

Jeff Mutscher, Director of Financial Services for the Board, has determined that for the first five-year period the proposed amendment is in effect there is no adverse fiscal impact for the state and local government as a result of enforcing or

administering the section as amended. There is no additional cost to licensees or other individuals. There is no adverse fiscal impact to the estimated 1,000 small or 6,400 micro businesses regulated by the Board. A Regulatory Flexibility Analysis is not needed because there is no adverse economic effect to small or micro businesses.

Mr. Mutscher also has determined that for the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment is an increase in compliance of the Board's rules.

Any comments or request for a public hearing may be submitted no later than 30 days after the publication of this notice to Jeff Mutscher, Director of Financial Services, Texas Board of Professional Engineers, 1917 South Interstate 35, Austin, Texas 78741, faxed to his attention at (512) 440-2934, or sent by email to rules@engineers.texas.gov.

The amendment is proposed pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the Board to make and enforce all rules and regulations and by-laws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state; §1001.201(b), Powers and Duties of the Board, which authorizes the Board to spend money for any purpose the Board considers reasonably necessary for the proper performance of its duties under this chapter.

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

§131.35. *Employee Training.*

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

(d) Financial assistance granted under this program shall not exceed \$1500 [~~\$900~~] per fiscal year per employee.

(e) - (o) (No change.)

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

Filed with the Office of the Secretary of State on May 24, 2013.

TRD-201302157

Lance Kinney, P.E.

Executive Director

Texas Board of Professional Engineers

Earliest possible date of adoption: July 14, 2013

For further information, please call: (512) 440-7723



## PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

### CHAPTER 346. PRACTICE SETTINGS FOR PHYSICAL THERAPY

#### 22 TAC §346.1

The Texas Board of Physical Therapy Examiners proposes amendments to §346.1, regarding Educational Settings. The amendments would eliminate the requirement that a PT reevaluate the student receiving physical therapy services according to the requirements set out in §322.1, Provision of Services,

and would establish that the Plan of Care must be reviewed by the PT at least every 60 school days, or concurrent with every visit if the student is seen at intervals greater than 60 school days, to determine if revisions are necessary.

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be better support for children who receive physical therapy services in the school setting under the auspices of the Individuals with Disabilities Education Act (IDEA). Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses; therefore, an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: [nina.hurter@ptot.texas.gov](mailto:nina.hurter@ptot.texas.gov). Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register*.

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

#### §346.1. Educational Settings.

(a) In the educational setting, the physical therapist conducts appropriate screenings, evaluations, and assessments to determine needed services to fulfill educational goals. When a student is determined by the physical therapist to be eligible for physical therapy as a related service defined by Special Education Law, the physical therapist provides written recommendations to the Admissions Review and Dismissal Committee as to the amount of specific services needed by the student (i.e., consultation or direct services and the frequency and duration of services).

(b) The physical therapist implements physical therapy services in accordance with the recommendations accepted by the school committee members and as reflected in the student's Admission Review and Dismissal Committee reports.

(c) The physical therapist may provide general consultation or other physical therapy program services for school administrators, educators, assistants, parents and others to address district, campus, classroom or student-centered issues. For the student who is eligible to receive physical therapy as a related service in accordance with the student's Admission Review and Dismissal Committee reports, the physical therapist will also provide the consultation and direct types of specific services needed to implement specially designed goals and objectives included in the student's Individualized Education Program.

(d) The types of services which may require a physician's referral in the educational setting include the provision of individualized specially designed instructions and the direct physical modeling or hands-on demonstration of activities with a student who has been determined eligible to receive physical therapy as a related service. Additionally, they may include the direct provision of activities which are of

such a nature that they are only conducted with the eligible student by a physical therapist or physical therapist assistant. The physical therapist should refer to §322.1 of this title (relating to Provision of Services).

(e) Evaluation and reevaluation in the educational setting will be conducted in accordance with federal mandates under Part B of the Individuals with Disabilities Education Act (IDEA), 20 USC §1414, or when warranted by a change in the child's condition, and include onsite reexamination of the child. The Plan of Care (Individual Education Program) must be reviewed by the PT at least every 60 school days, or concurrent with every visit if the student is seen at intervals greater than 60 school days, to determine if revisions are necessary. [Treatment provided by a PT or PTA is subject to the provisions of §322.1 of this title.]

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

Filed with the Office of the Secretary of State on May 31, 2013.

TRD-201302225

John P. Maline

Executive Director

Texas Board of Physical Therapy Examiners

Earliest possible date of adoption: July 14, 2013

For further information, please call: (512) 305-6900



## 22 TAC §346.3

The Texas Board of Physical Therapy Examiners proposes amendments to §346.3, regarding Early Childhood (ECI) Setting. The amendments would correct the title of the rule and replace the word "educational" with "early childhood intervention" in subsection (e).

John P. Maline, Executive Director, has determined that for the first five-year period these amendments are in effect there will be no additional costs to state or local governments as a result of enforcing or administering these amendments.

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect the public benefit will be clearer information regarding physical therapy services provided in this setting.

Mr. Maline has determined that there will be no costs or adverse economic effects to small or micro businesses; therefore, an economic impact statement or regulatory flexibility analysis is not required for the amendment. There are no anticipated costs to individuals who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Nina Hurter, PT Coordinator, Texas Board of Physical Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701; email: [nina.hurter@ptot.texas.gov](mailto:nina.hurter@ptot.texas.gov). Comments must be received no later than 30 days from the date this proposed amendment is published in the *Texas Register*.

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subtitle H, Chapter 453, Texas Occupations Code is affected by these amendments.

§346.3. *Early Childhood Intervention (ECI) Setting.*

(a) In the provision of early childhood services through the Early Childhood Intervention (ECI) program, the physical therapist conducts appropriate screenings, evaluations, and assessments to determine needed services to fulfill family-centered goals. When a child is determined by the PT to be eligible for physical therapy, the PT provides written recommendations to the Interdisciplinary Team as to the amount of specific services needed by the child.

(b) Subject to the provisions of §322.1 of this title (relating to Provision of Services), the PT implements physical therapy services in accordance with the recommendations accepted by the Interdisciplinary Team, as stated in the Individual Family Service Plan (IFSP).

(c) The types of services which require a referral from a qualified licensed healthcare practitioner include the provision of individualized specially designed instructions, direct physical modeling or hands-on demonstration of activities with a child who has been determined eligible to receive physical therapy. Additionally, a referral is required for services that include the direct provision of treatment and/or activities which are of such a nature that they are only conducted with the child by a physical therapist or physical therapist assistant.

(d) The physical therapist may provide general consultation or other program services to address child/family-centered issues.

(e) Evaluation and reevaluation in the early childhood intervention setting [educational] setting will be conducted in accordance with federal mandates under Part C of the Individuals with Disabilities Education Act (IDEA), 20 USC §1436, or when warranted by a change in the child's condition, and include onsite reexamination of the child. The Plan of Care (Individual Family Service Plan) must be reviewed by the PT every 30 days to determine if revisions are necessary.

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

Filed with the Office of the Secretary of State on May 31, 2013.

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John P. Maline

Executive Director

Texas Board of Physical Therapy Examiners

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For further information, please call: (512) 305-6900



## TITLE 25. HEALTH SERVICES

### PART 1. DEPARTMENT OF STATE HEALTH SERVICES

#### CHAPTER 73. LABORATORIES

##### 25 TAC §73.54, §73.55

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §73.54 and §73.55, concerning fee schedules for clinical testing and newborn screening, and chemical analysis.

##### BACKGROUND AND PURPOSE

This rule package concerns fees for laboratory services--specifically, fee schedules for clinical testing, newborn screening and chemical analyses. The rule package reflects proposed changes

to the version of the rules that was recently amended in a larger rulemaking action pertaining to all department lab fees. Since the close of the public comment period for that rulemaking action, circumstances have occurred that make it necessary to submit these proposed amendments. These amendments would remove low volume tests and those performed at Women's Health Laboratory (WHL), would add new tests and rename the tests to more accurately reflect the actual procedure, and also would adjust test pricing, as described herein. A "low volume test," for purposes of this preamble, is one: that was ordered less than 100 times in 2011; that is not considered a core public health test by the department; and that is readily available from commercial laboratories. In addition, §73.54 would be reorganized by removing the language currently at subsection (c), which relates to tests performed on clinical specimens at the department's WHL, since that laboratory permanently closed on August 31, 2012. Some services offered exclusively at WHL in the rules, such as pap smears and cytology, would be eliminated through this new rulemaking proposal while some of the other tests (e.g., routine clinical tests and tuberculosis testing) would be performed at the remaining two department laboratories--South Texas Laboratory (STL) and the Austin laboratory. The WHL submitters have been notified as to which department laboratory will perform their testing as of September 1, 2012. Those few clinical tests which would no longer be offered by the department under this rulemaking proposal are available at commercial laboratories. The proposed fee changes reflect the department's current costs for providing the services at issue (see full discussion in this preamble).

The proposed amendments comport with Texas Health and Safety Code, §§12.031, 12.032, and 12.0122 that allow the department to charge fees to a person who receives public health services from the department, and which is necessary for the department to recover costs for performing laboratory services.

Tests that will no longer be offered by the department are readily available elsewhere and only two specific fees would be increased by virtue of these rule changes. The increased fees are proposed to correct an error in the original cost calculation for one fee and correct a clerical error (cost methodology calculation conducted properly, but transcribed incorrectly into the rules itself) for another fee in the large rulemaking action recently completed (the only errors identified to date out of the approximately 700 fees calculated using the new methodology in that rule package). One fee would increase from \$32.11 to \$213.79. This fee is for a PCR test for *Bordetella pertussis*, *Parapertussis*, and *Bordetella holmesii*, which our records show has recently only been requested 800 - 1,000 times annually, which is a low number in the overall spectrum of laboratory services purchased from the department. The second fee would increase from \$67.49 to \$114.04. This fee is for single metal, ICP, EPA method 200.7 and EPA SW-846 method 6010C for non-potable water, which our records show that during Fiscal Year 2011, the department only performed 93 times.

Senate Bill (SB) 80, 82nd Legislature, Regular Session, 2011, requires that the department: (1) develop, document and implement procedures for setting fees for laboratory services, including updating and implementing a documented cost allocation methodology that determines reasonable costs for the provision of laboratory tests; and (2) analyze the department's costs and update the fee schedule as needed in accordance with Texas Health and Safety Code, §12.032(c). In that recently-concluded rulemaking action (adopted October, 2012), the LSS

developed and documented a cost accounting methodology and determined the costs for each test performed. The methodology for developing cost per test included calculating the specific costs of performing the test or analysis and the administrative and overhead cost necessary to operate the state laboratories in question. It is these figures together which determined the revised fee amount for each of the tests in these fee schedules. In order to determine the specific cost for each test or analysis, LSS performed a work load unit study for every procedure or test offered by the laboratory. A work load unit was defined as a measurement of staff time, consumables and testing reagents required to perform each procedure from the time the sample enters the laboratory until the time the results are reported. More than 3,000 procedures performed by the department's laboratory were included in this analysis. These procedures translated to approximately 700 different tests listed in the department fee schedule. In the current rulemaking proposal, this same approach was employed on a much smaller number of tests. These proposed fee changes reflect the department's current costs for providing the services at issue.

#### SECTION-BY-SECTION SUMMARY

Existing §73.54(a)(1)(A)(ii) is proposed to be amended by adding a new test Amino Acid Dietary Monitoring priced at \$16.61, with proposed renumbering accordingly.

Existing §73.54(a)(1)(B)(i) and (iii) are proposed to be amended by deleting two low volume tests, Antibody identification and Antibody titer, respectively and by renumbering the remaining subsection in this section to account for the removal of these two tests. These low-volume tests are proposed for deletion to make more efficient use of laboratory staff and to lower operational costs.

Existing §73.54(a)(1)(C)(iii) is proposed to be amended by deleting clause (iii), Phenylketonuria (PKU) full gene sequencing. This low-volume test is proposed for deletion to make more efficient use of laboratory staff and to lower operational costs.

Existing §73.54(a)(2)(A)(i) is proposed to be amended by updating the name of the test to "Aerobic isolation from clinical specimen" to more accurately identify the test and by updating the fee from \$367.67 to \$303.92. The reduced fee is the cost of isolation only; identification is covered in the existing fee schedule under the definitive identification section.

Existing §73.54(a)(2)(A)(iii) is proposed to be amended by updating the name of the test to "Anaerobic isolation from clinical specimen" to more accurately identify the test and by updating the fee from \$197.10 to \$118.39. The reduced fee is the cost of isolation only; identification is covered in the existing fee schedule under the definitive identification section.

Existing §73.54(a)(2)(A)(v) is proposed to be amended by deleting clause (v) "Cholera, culture confirmation--\$32.73." This is not an accurate description of the test that is currently performed. The more accurate name and placement of the test will be in the definitive identification section.

Existing §73.54(a)(2)(A)(vii)(IV) is proposed to be amended by updating the name of the test to *Bordetella pertussis*, *Parapertussis*, and *Bordetella holmesii* detection by real-time polymerase chain reaction (PCR) to more accurately identify the test, and by correcting the price. This increase in price is necessary because an error was found in the original cost calculation (as revised in the recently-concluded rulemaking action pertaining to the entire LSS fee schedule) and needs

to be corrected. The fee for the test would increase from \$32.11 to \$213.79, with the latter amount being necessary to recoup the department's actual costs as called for in the cost calculation formula. The cost methodology used is as described in the Background and Purpose section in this preamble. The remaining subsections will be renumbered accordingly.

Existing §73.54(a)(2)(A)(vii), which would be renumbered as clause (vi), is proposed to be further amended by inserting a new subclause (VII) for tests performed for Gonorrhea/Chlamydia (GC/CT) and by renumbering the remaining subsection accordingly.

Existing §73.54(a)(2)(A)(vii) is proposed to be further amended at existing subclause (XI) by updating the name of the test to *Neisseria* to more accurately identify the test and allow for typing of other species, and by updating the fee from \$390.52 to \$141.84. This reduction in fee is the cost of isolation only; identification is covered in the existing fee schedule under the definitive identification section.

Existing §73.54(a)(2)(A)(vii) is proposed to be further amended by inserting a new subclause (XVI) regarding a *Vibrio* test, at a price of \$228.15.

Existing §73.54(a)(2)(A)(xi) is proposed to be amended by decreasing the price from \$138.64 to \$91.58. This reduction in fee is the cost of isolation only; identification is covered in the existing fee schedule under the definitive identification section.

Existing §73.54(a)(2)(B)(ii) is proposed to be amended by inserting a new subclause (IV) regarding Lewisite metabolites in urine (2-chlorovinylarsonous acid (CVAA) and 2-chlorovinylarsonic acid (CVAOA), liquid chromatography, inductively coupled plasma mass spectrometry (LC-ICP-MS), at a cost of \$157.59. The subsection would be renumbered accordingly.

Existing §73.54(a)(2)(C)(i)(I)(-e-) is proposed to be amended by lowering the price to account for the implementation of a new technology which has reduced the cost of performing the test. The price for this test, Nucleic acid amplification for *Mycobacterium tuberculosis* (*M. tuberculosis*) complex, would decrease from \$197.41 to \$166.70.

Existing §73.54(a)(2)(C)(v) is proposed to be amended by the addition of two new subclauses: (IV) MGIT drug susceptibility test, primary panel; and (V) MGIT PZA susceptibility test, priced at \$115.05 and \$77.17, respectively.

Existing §73.54(a)(2)(E)(ii), (vii), (xiv)(I) and (xvi) are proposed to be amended by deleting the following low-volume tests: (ii) *Aspergillus*; (vii) Fungus; and (xiv)(I) HIV 1,2, plus 0 screen; and (xvi) *Legionella*. These tests are proposed for deletion to make more efficient use of laboratory staff and to lower operational costs.

Existing §73.54(a)(2)(E)(v), (ix), (x), (xix), (xxiii), (xxiv), (xxviii), and (xxx) are proposed to be amended by changing the price to reflect new technology: (v) cytomegalovirus (CMV): (I) IgG is reduced from \$399.97 to \$23.23; (II) IgM is reduced from \$161.02 to \$24.26; (ix) Hepatitis A: (I) IgM is reduced from \$317.74 to \$44.04; (II) total is reduced from \$219.60 to \$34.45; (x) Hepatitis B: (I) core antibody is reduced from \$143.90 to \$36.06; (II) core IgM antibody is reduced from \$295.64 to \$44.75; (III) surface antibody (Ab) is reduced from \$103.84 to \$28.34; (IV) surface antigen (Ag) is reduced from \$51.45 to \$18.47; (xix) Mumps: (I) epidemic parotitis IgG is reduced from \$154.46 to \$22.62; (xxiii) Rubella: (I) IgM is reduced from \$329.37 to \$24.77; (II) Screen is reduced from \$24.13 to \$22.33; (xxiv) Rubeola: (II) Screen (IgG)

is reduced from \$165.16 to \$21.35; (xxviii) Toxoplasmosis is reduced from \$357.49 to \$23.23; and (xxx) *Varicella zoster* virus (VZV) is reduced from \$345.63 to \$19.70.

New §73.54(a)(2)(E)(xii) is proposed to be amended by the addition of a new subclause (II) that is necessary for a new test for HIV Combo Ag/AB EIA, priced at \$7.90. Existing §73.54(a)(2)(E)(xxi), which would be renumbered as (xviii), is proposed to be amended by lowering the price for QuantiFeron (tuberculosis serology) from \$84.45 to \$53.66 to reflect the implementation of new technology which has lowered the cost of performing the test.

Existing §73.54(a)(2)(E)(xxvii) is proposed to be further amended by adding a new test to subclause (IV), Screening, IgG at a price of \$7.57.

In §73.54(a)(2)(F)(ii)(IV), a new test for the West Nile virus was added, priced at \$57.87.

Existing §73.54(a)(2)(F)(v)(I) is proposed to be amended by updating the name of the test to Supplemental Cell Culture to more accurately identify the test.

In §73.54(a)(2)(F)(vi) is proposed to be amended by the addition of a new test for Dengue, real-time PCR, at a price of \$215.52.

Existing §73.54(a)(2)(F)(x) is proposed to be amended by reorganizing all tests related to influenza under a new subclause to improve readability and achieve consistency of format. Existing §73.54(a)(2)(F)(x) and (xi) are proposed to be renumbered as §73.54(a)(2)(F)(xi)(I) and (II). New §73.54(a)(2)(F)(xi)(III) is proposed to add a new test for Influenza pyrosequencing for antiviral resistance for the amount of \$13.11. Existing §73.54(a)(2)(F)(xii) is proposed to be renumbered as §73.54(a)(2)(F)(xi)(IV). Existing §73.54(a)(2)(F)(xiii) is proposed to be renumbered as §73.54(a)(2)(F)(xii). New §73.54(a)(2)(F)(xiii), (xiv) and (xv) are proposed to add a new test for Measles, real-time PCR for the amount of \$126.83, Mumps, real-time PCR for the amount of \$127.83 and a new test for Respiratory viral panel, PCR, for the amount of \$167.13.

Existing §73.54(a)(2)(F)(xv)(I) is proposed to be amended by updating the name of the test to "Viral isolation, clinical" to more accurately identify the test.

New §73.54(b)(1)(D) and (G) is proposed to be amended to add new tests--(D) Gram Stain, priced at \$8.06, and (G) Urine culture, priced at \$11.59. Existing tests in this subclause would be renumbered accordingly.

New §73.54(b)(2)(A) is proposed to add a new test, Alanine Amino Transferase (ALT), priced at \$1.34. New §73.54(b)(2)(F) is proposed to add a new test, Bilirubin, direct for \$1.69. New §73.54(b)(2)(H) is proposed to add a new test, Bilirubin, total and direct profile for \$2.44. New §73.54(b)(2)(R)(i) is proposed to add a new test, Glucose for \$1.34. Subsequent subsections are proposed to be renumbered accordingly.

Existing §73.54(b)(2)(M),(V), and (BB) are proposed to be amended by changing the names of the test for better clarity. (M) Electrolyte panel--includes anion gap (calculated), CO<sub>2</sub>, chloride, potassium and sodium will be renamed Electrolyte panel--includes CO<sub>2</sub>, chloride, potassium and sodium. (V) Lipid profile panel--includes, cholesterol, HDL, and triglycerides will be renamed Lipid profile panel--includes, cholesterol, HDL, LDL, and triglycerides. (BB) Renal function panel--includes albumin, calcium, CO<sub>2</sub>, chloride, creatinine, phosphate, potassium, sodium, and BUN will be renamed Renal function panel--in-

cludes albumin, glucose, calcium, CO<sub>2</sub>, chloride, creatinine, phosphate, potassium, sodium, and BUN.

New §73.54(b)(3) is a proposed new paragraph to add tests related to emergency preparedness with subclauses (A) - (D): (A) Biological Threat reference culture--\$198.28; (B) Definitive identification: (i) *Bacillus anthracis*--\$145.72; (ii) *Brucella* species--\$214.30; (iii) *Burkholderia*--\$221.62; (iv) *Francisella tularensis*--\$107.07; (v) *Yersinia pestis*--\$313.47; and (vi) Unknown biological threat agent--\$220.08; (C) Food Samples: (i) *Bacillus anthracis*--\$23.77; (ii) *Brucella* Species--\$25.77; (iii) *E.Coli* 0157:H7--\$7.15; (iv) *Francisella*--\$17.20; (v) *Listeria*--\$21.30; (vi) *Salmonella*--\$19.05; (vii) *Yersinia pestis*--\$313.47; (D) PCR: (i) *Bacillus anthracis*--\$58.41; (ii) *Brucella*--\$58.41; (iii) *Burkholderia*--\$58.41; (iv) *Francisella tularensis*--\$58.41; (v) Influenza--\$51.26; (vi) Influenza A--\$53.63; (viii) Influenza A/H5--\$125.00; (viii) Multiple Agent Panel--\$169.39; (ix) Ricin--\$150.00; and (x) *Yersinia pestis*--\$58.41. Existing §73.54(b)(3) - (7) are proposed to be renumbered as §73.54(b)(4) - (8).

Existing §73.54(b)(3)(F) is proposed to add a new test Peripheral Smear Review, priced at \$7.59 and renumber existing (F) to (G). Existing §73.54(b)(5)(A)(iii)(I) and (II) are updated to reflect new pricing: (I) conventional susceptibility (each drug) is reduced from \$36.45 to \$14.06, and (II) MGIT susceptibility (each drug) is reduced from \$92.69 to \$43.47. New §73.54(b)(6)(A)(iii) and (iv) are proposed to add new tests (III) MGIT susceptibility (each Drug) PZA, priced at \$92.69, and (iv) for the Identification of AFB isolate, DNA probe, priced at \$44.63. Existing §73.54(b)(6)(A)(iv) and (v) are proposed to be renumbered as §73.54(b)(6)(A)(v) and (vi) respectively. New §73.54(b)(6) would add a new test to subclause (G) Thyroxine (T<sub>4</sub>), free, priced at \$10.89. Section 73.54(b)(6)(H) proposes to add a new test to the subclause, Thyroid Hormone (T<sub>3</sub>), uptake for \$23.67, with subsequent renumbering accordingly. New §73.54(b)(8)(D) and (G) proposes to add a new test, (D) Random urine/creatinine profile, for \$6.44 and (G) Urine Microscopic analysis for \$5.54. Subsequent subsections are proposed to be renumbered accordingly. Existing §73.54(b)(7)(F) and (H) are proposed to be renamed for better clarity. Subparagraph (F) Thyroxin (T<sub>4</sub>), free, prenatal will be renamed to Thyroxine (T<sub>4</sub>), total. Subparagraph (H) Tri-iodothyronine (T<sub>3</sub>), uptake, total, prenatal will be renamed to new subparagraph (J) Tri-iodothyronine (T<sub>3</sub>), free.

Existing §73.54 is proposed to be reorganized by removing subsection (c), which relates to tests performed on clinical specimens at the department's WHL, since that laboratory was permanently closed on August 31, 2012. Some services offered exclusively at WHL in the rules, such as pap smears and cytology, would be eliminated through this new rulemaking proposal while some of the other tests would be performed at the remaining two department laboratories, STL and the Austin laboratory (e.g., routine clinical tests and tuberculosis testing). Those clinical tests, which would no longer be offered by the department under these proposed amendments, are readily available at commercial laboratories. Subsequent subsections are proposed to be renumbered accordingly.

Existing §73.54(d)(4)(A)(iv) is proposed to add a new test for *Cronobacter sakazakii*, priced at \$115.17. New §73.54(d)(4)(A)(v)(II) is proposed by adding a new test for Non-0157 STEC, priced at \$295.02 and by reorganizing all tests related to *Escherichia coli* under a new clause to improve readability and achieve consistency of format. Existing §73.54(d)(4)(A)(iv) and (v) are proposed to be renumbered

as §73.54(c)(4)(A)(v)(I) and (III). Existing §73.54(d)(8)(A) is proposed by adding a new test for West Nile Virus (WNV), mosquitoes, PCR, priced at \$57.87 in new §73.54(c)(8)(A)(v).

Existing §73.54(d)(9) is proposed to be reorganized by deleting existing §73.54(d)(9)(A), (B) and (F) which are low volume tests. These low-volume tests are proposed for deletion to make more efficient use of laboratory staff and to lower operational costs. Existing §73.54(d)(9)(C), (D) and (E) are proposed to be renumbered as §73.54(c)(9)(A), (B) and (C) respectively.

New §73.54(e)(4) is proposed to add a new specimen processing and storage service, with an associated fee of \$25.

Existing §73.55(2) is proposed to be amended by removing the phrase "including bottled water" to accurately reflect the testing. New §73.55(2)(C)(xiii) would add trihalomethanes, EPA method 551.1, priced at \$43.91. Subsequent subsections are proposed to be renumbered accordingly.

Section 73.55(3)(A)(x) is proposed to add a new test for gluten, priced at \$92.11, and existing §73.55(3)(A)(x) - (xx) are proposed to be renumbered as §73.55(3)(A)(xi) - (xxi) respectively.

Existing §73.55(3)(B)(ii)(I) is proposed to update pricing for mercury, EPA method 245.1 and EPA SW-846 methods 7470A and 7471B from \$192.35 to \$37.90. New pricing reflects increase in volume which reduces operational cost and increases efficiency.

Existing §73.55(4)(A)(iii)(I) is proposed to update pricing for mercury, sediment, EPA SW-846 method 7471B from \$194.22 to \$37.90. New pricing reflects increase in volume which reduces operational cost and increases efficiency.

Existing §73.55(5)(A)(i) is proposed to update pricing for fillets from \$34.56 to \$19.98. Existing §73.55(5)(B)(ii)(I) is proposed to update pricing for mercury, EPA method 7471B from \$192.35 to \$37.90. New pricing reflects increase in volume which reduces operational cost and increases efficiency.

Existing §73.55(6)(B)(ii)(II) is proposed to correct the price for the single metal, ICP, EPA method 200.7 and EPA SW-846 method 6010C for non-potable water. The fee would increase from \$67.49 to \$114.04. This increase in price is necessary because a clerical error was found in the existing rule text. The actual cost to perform the test is \$114.04. This is the price that is listed on the published fee schedule on the department's Laboratory website. The error in the rule text was clerical and must be corrected to ensure that the Laboratory recoups the department's actual costs as called for in the cost calculation formula. The cost methodology used is as described in the Background and Purpose section in this preamble.

New §73.55(9)(G) is proposed to add a new composite sample storage service and associated fee of \$19.23.

#### FISCAL NOTE

Dr. Grace Kubin, Director, LSS, has determined that for each year of the first five year years the sections are in effect, there will be fiscal implications to the state as a result of administering the sections as proposed. It is impossible to predict the volume of testing the laboratory will receive under a revised fee schedule as well as the actual resulting revenues, but this rulemaking proposal reflects the fee calculation methodology derived and implemented in the large recently-completed rulemaking action which revised the entire department laboratory fee schedule, consistent with Senate Bill (SB) 80, 82nd Legislature, Regular Session, 2011. SB 80 requires the LSS to develop and document a cost accounting methodology to determine costs for each test per-

formed. Because the proposed rulemaking would reduce fees for some tests, the volume of those same tests may increase and thus result in a net increase in revenue. Some fees are being lowered to reflect cost savings that the department recently realized through changes in technology. The correction to the *Bordetella pertussis*, *Parapertussis*, and *Bordetella holmesii* and single metal, ICP, EPA method 200.7 and EPA SW-846 method 6010C for non-potable water fees would result in increased revenues to department unless the increase results in a substantial decrease of orders for that test.

General revenue from the state for the LSS operations has been reduced by \$7.9 million (roughly 10%) for fiscal years 2012 - 2013. A portion of the revenues which come to LSS will be used to pay the bond debt on the laboratory building at the department's Central Office main campus, as required by the General Appropriations Act (GAA). Dr. Kubin has also determined that there may be an increased financial burden placed on certain department programs, as well as on local health departments, health care providers, and others that submit specimens for testing for the one test which would experience a fee increase in these proposed amendments. Some of the impacted external submitters may be small or micro-businesses. However, the fees for some tests would go under the proposed rule amendments, and so the fiscal impact would be determined by the combination of tests ordered by the particular submitter.

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

Varieties of entities, and some few persons, approach the department to purchase laboratory services. Many of those services are currently included in department rules with fee schedules which list amounts for each service. The proposed amendments in this rulemaking proposal include two fees which would be increased, *Bordetella pertussis*, *Parapertussis*, and *Bordetella holmesii* detection by real-time polymerase chain reaction (PCR) and single metal, ICP, EPA method 200.7 and EPA SW-846 method 6010C for non-potable water. As discussed previously, that proposed increase is to correct a fee calculation error and clerical error in the previous rulemaking action, recently concluded, which updated the entirety of the LSS fee schedule consistent with SB 80. The corrected fee amounts would properly reflect the methodology used in that previous rulemaking action, which was designed to recoup the department's costs related to providing the service in its laboratories. Some of these proposed amendments would decrease other fee amounts for specific tests. The two fee increases may not be offset by the other fee decreases, for a particular submitter, and thus may have an adverse economic impact on such a small or micro-business. Since these increased fees will potentially impact all submitters (i.e., anyone who might order this test, alone or in combination with other tests), the department analysis under the Economic Impact Statement in this preamble will also serve to satisfy the Small Business Impact Analysis required by Texas Government Code, §2006.002(a).

Texas Government Code, Chapter 2006, was amended by the 80th Legislature, Regular Session, 2007, (House Bill (HB) 3430) to require that, before adopting a rule that may have an adverse economic effect on small businesses, a state agency must first prepare an Economic Impact Statement and a Regulatory Flexibility Analysis.

The definition of a "small business" for purposes of this requirement was codified at Texas Government Code, §2006.001(2). Under this definition, a "small business" is an entity that is: for

profit, independently owned and operated; and have fewer than 100 employees or less than \$6 million in annual gross receipts. Independently owned and operated businesses are self-controlling entities that are not subsidiaries of other entities or otherwise subject to control by other entities (and are not publicly traded).

Dr. Kubin has determined that there may be an adverse economic effect on those small businesses who submit specimens or samples to the LSS for analysis using either of the two tests which would experience a fee increase under the proposed amendments. Therefore, the following two analyses have been performed:

#### --ECONOMIC IMPACT STATEMENT

The Economic Impact Statement in this preamble does not explicitly cover "micro-businesses," but Texas Government Code, §2006.002(a), requires an analysis of the impacts on such businesses. The department believes that some of the health care providers impacted by this proposed rule will be "micro-businesses" as well as "small businesses," and thus the department's analyses regarding the latter will also be applicable to the former. While it is true that a micro-business may be inherently somewhat less able to absorb new increased fees than a small business, the department believes that all businesses periodically experience increases in the cost of doing business. The revised fees in this package of proposed amendments were derived using the mandated methodology in SB 80. Two fees went up (correcting a previous calculation error and clerical error), and some fees went down. The impact on a particular submitter will vary depending on, among other things, what particular tests are ordered by that submitter.

The laboratory does not collect information on the size of a submitter's business, and so it does not have direct data at hand to definitely determine what percentage of its usual submitters are small or micro-businesses. However, the department has made an estimate, using an approach suggested in the Texas Office of the Attorney General guidance document associated with HB 3430. A review of The North American Industry Classification System (NAICS) on the U.S. Census Bureau website revealed four classifications that appear to represent all the submitter types for the LSS. Specific information on the number of small businesses listed for each of these codes in 2007 was found on the Texas Comptroller of Public Accounts Website. The NAICS codes that represent submitters to the LSS include: "6221" - General Medical and Surgical Hospitals (364 businesses listed of which 56 are defined as small businesses), "6214" - Outpatient Care Centers (578 businesses listed of which 442 are defined as small businesses), and "6223" - Specialty (except Psychiatric and Substance Abuse) Hospitals (116 businesses listed of which 80 are defined as small businesses). The total number of businesses listed for these three classification codes is 1058. Of that number, only 576 of the businesses listed (physician, clinics, and hospitals) are small businesses that could be affected by these rule amendments. This estimate corresponds to approximately 4% of the total number of submitters who submitted specimens to the LSS from January 1, 2010 through June 30, 2011, extrapolating based on the assumptions and data discussed previously. The department believes that most of these 578 small or micro-businesses are contractors for department programs such as Texas Health Steps and HIV Prevention. Therefore, the economic impact would be to the department program which hires each contractor, and it is those department programs which would ultimately have to absorb the fee increases. Subtracting these contractors from the total, the department believes

this leaves a much smaller number of non-department contractor small and micro-businesses that could be impacted by any fee increases.

#### --REGULATORY FLEXIBILITY ANALYSIS

Texas Government Code, Chapter 2006, was amended by the 80th Legislature, Regular Session, 2009, HB 3430, to require, as part of the rulemaking process, state agencies to prepare a Regulatory Flexibility Analysis that considers alternative methods of achieving the purpose of the rule. The department has considered several options for minimizing the adverse impacts on small businesses.

Option 1 - Maintain the *Bordetella pertussis*, *Parapertussis*, and *Bordetella holmesii* and single metal, ICP, EPA method 200.7 and EPA SW-846 method 6010C for non-potable water fees at their current level. The department cannot implement this option because SB 80 requires the department to develop, document and implement procedures for setting fees for laboratory services, including updating and implementing a documented cost allocation methodology that determines reasonable costs for specific types of tests, as well as analyzing the department's costs and updating the fee schedule as needed in accordance with Texas Health and Safety Code, §12.032(c). The fee corrections included in these proposed amendments to the rule were derived using that methodology required by SB 80, consistent with Texas Health and Safety Code, §12.032. Keeping the fee at its current level would not reflect the use of the required methodology.

Option 2 - Allow an exemption from *Bordetella pertussis*, *Parapertussis*, and *Bordetella holmesii* and single metal, ICP, EPA method 200.7 and EPA SW-846 method 6010C for non-potable water fees increase for small and micro-businesses. Texas Health and Safety Code, §§12.031, 12.032, and 12.0122 allow the department to charge fees to a "person" who receives public health services from the department, with the fee amount reflecting that which is necessary for the department to recover costs for performing laboratory services. Public health service fees generated by laboratory testing are appropriated to the LSS and are used to purchase supplies and equipment necessary for testing and to pay salaries of laboratory personnel (as well as to service the bond debt for the main department's laboratory building in Austin). If the department were to allow an exemption from any fees for small and micro-businesses, the reduction in revenues generated would impact the department's ability to maintain the current level of laboratory services. Such a fee structure would also not reflect the SB 80 methodology discussed at Option 1. Additionally, Texas Health and Safety Code, §12.032(e), states that the department may not fail to provide the service at issue if the submitter can demonstrate a financial inability to pay. So, if a small or micro-business could demonstrate, through submission of appropriate financial documentation that it truly was unable to pay for the one laboratory service at issue that would be an option for such a business. It should be noted, though, that an inability to pay is not the same thing as not having budgeted sufficient funds to pay, for example. The submitter would have to demonstrate, to the agency's satisfaction (through submission of tax returns and other documentation), that it simply did not have the funds at all to pay for the service in question.

Option 3 - Change *Bordetella pertussis*, *Parapertussis*, and *Bordetella holmesii* and single metal, ICP, EPA method 200.7 and EPA SW-846 method 6010C for non-potable water fees to level which preceded the recent rulemaking revision to the overall LSS

fee schedule. Texas Health and Safety Code, §§12.031, 12.032, and 12.0122 allow the department to charge fees to a person who receives public health services from the department, and those fees cannot exceed the amount which is necessary for the department to recover costs for performing laboratory services. Public health service fees generated by laboratory testing are appropriated to the LSS and are used to purchase supplies and equipment necessary for testing and to pay salaries of laboratory personnel (as well as to service the bond debt for the main department's laboratory building in Austin). If the department were to lower this fee back to its level prior to the recently-completed rulemaking action, as opposed to raising it as proposed in these amendments, the reduction in revenues generated would have a negative impact on the department's ability to maintain the current level of laboratory services. Such a fee structure would also not reflect the SB 80 methodology discussed at Option 1.

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC BENEFIT

In addition, Dr. Kubin has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be the continued operation of the department's laboratories, which perform important public health activities every day. The public would also benefit by the department adjusting its fees to recover the costs associated with providing these laboratory services, which is money for LSS operations that would then reduce the amount of funding required to come from the public's tax dollars (i.e. General Revenue). The public would also benefit from the proposed changes designed to improve clarity, readability and user-friendliness of the rules, in that there is a public benefit whenever a state improves the efficiency of its operations. The public will also benefit from the list of laboratory services currently available being updated for accuracy.

#### PUBLIC COMMENT

Comments on the proposal may be directed to Amy Schlabach, Laboratory Services Section, Mail Code 1947, P.O. Box 149347, Austin, Texas 78714-9347, (512) 776-6191 or by email at amy.schalabach@dshs.state.tx.us. Comments will be accepted for 30 days following the date of publication of this proposal in the *Texas Register*.

#### LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

#### STATUTORY AUTHORITY

The amendments are authorized under Texas Health and Safety Code, §12.031 and §12.032, which allow the department to charge fees to a person who receives public health services from the department, §12.034, which requires the department to establish collection procedures, §12.035, which required the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to

the credit of the department's public health service fee fund, and §12.0122, which allows the department to enter into a contract for laboratory services; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Texas Health and Safety Code, Chapter 1001.

The amendments affect the Texas Health and Safety Code, Chapters 12 and 1001; and Texas Government Code, Chapter 531.

#### §73.54. Fee Schedule for Clinical Testing and Newborn Screening.

(a) Tests performed on clinical specimens, Austin Laboratory.

(1) Biochemistry and genetics.

(A) Newborn screening.

(i) Newborn screening panel--\$33.60. (Fees are based on the newborn screening specimen collection kit which is a department approved, bar-coded, FDA approved medical specimen collection device that includes a filter paper collection device, parent information sheet, specimen storage and use information, parent disclosure request form, demographic information sheet, and specimen collection directions with protective wrap-around cover for the specimen that should be used to submit a newborn's blood specimen for the first or second screen, repeat or follow-up testing and which includes the cost of screening.)

(ii) Amino Acid Dietary Monitoring--\$16.61.

(iii) [(ii)] Phenylalanine/tyrosine--\$16.61.

(B) Clinical chemistry.

[(i)] Antibody identification--\$260.70.]

(i) [(ii)] Antibody screen--\$20.51.

[(iii)] Antibody titer--\$46.07.]

(ii) [(iv)] Blood typing ABO--\$20.51.

(iii) [(v)] Cholesterol--\$4.07.

(iv) [(vi)] Glucose:

(I) glucose fasting--\$3.96;

(II) glucose post prandial (1 hour)--\$3.96;

(III) glucose post prandial (2 hour)--\$7.91;

(IV) glucose random--\$3.96;

(V) glucose tolerance test 1 hour--\$7.91;

(VI) glucose tolerance test 2 hour--\$11.87; and

(VII) glucose tolerance test 3 hour--\$15.82.

(v) [(vii)] Hematocrit--\$6.62.

(vi) [(viii)] Hemoglobin--\$1.53.

(vii) [(ix)] Hemoglobin electrophoresis--\$3.98.

(viii) [(x)] High-density lipoprotein (HDL)--\$7.14.

(ix) [(xi)] Lead--\$3.47.

(x) [(xii)] Lipid panel (consists of cholesterol, triglycerides, high density lipoprotein (HDL), and low density lipoprotein (LDL))--\$10.57.



(xi) ~~[(xiii)]~~ Red blood cell antigens, other than ABO or Rh(D)--\$260.70.

(xii) ~~[(xiv)]~~ RH typing--\$20.51.

(C) DNA Analysis.

(i) - (ii) (No change.)

~~[(iii)] Phenylketonuria (PKU) full gene sequencing--\$1726.03;~~

(iii) ~~[(iv)]~~ Galactosemia common mutation panel--\$383.21.

(iv) ~~[(v)]~~ Medium chain acyl-CoA dehydrogenase deficiency (MCAD), common mutation panel--\$280.79.

(v) ~~[(vi)]~~ Very long chain acyl-CoA dehydrogenase deficiency (VLCAD), full gene sequencing--\$1596.93.

(2) Microbiology.

(A) Bacteriology. Charges for bacteriology testing will be based upon the actual testing performed as determined by suspect organisms, specimen type and clinical history provided.

(i) Aerobic isolation ~~[culture]~~ from clinical specimen--\$303.92 [~~\$367.37~~].

(ii) (No change.)

(iii) Anaerobic isolation ~~[culture]~~ from clinical specimen--\$118.39 [~~\$197.10~~].

(iv) (No change.)

~~[(v)] Cholera, culture confirmation--\$32.73;~~

(v) ~~[(vi)]~~ Culture, stool--\$158.07.

(vi) ~~[(vii)]~~ Definitive identification:

(I) bacillus--\$175.88;

(II) group B streptococcus (Beta strep)--

\$113.70;

(III) *Bordetella*--\$147.77;

(IV) *Bordetella pertussis*, *Parapertussis*, and *Bordetella holmesii* detection by real-time polymerase chain reaction (PCR)--\$213.79 [~~\$32.11~~];

(V) *Campylobacter*--\$165.44;

(VI) enteric bacteria--\$243.97;

(VII) Gonorrhea/Chlamydia (GC/CT):

(-a-) GC/CT, amplified RNA probe--\$20.28;

(-b-) GC culture confirmation by amplified or

direct probe--\$37.66; and

(-c-) GC screen--\$44.54.

(VIII) ~~[(VIII)]~~ gram negative rod--\$261.00;

(IX) ~~[(VIII)]~~ gram positive rod--\$226.12;

(X) ~~[(IX)]~~ *Haemophilus*--\$242.23;

(XI) ~~[(X)]~~ *Legionella*--\$265.57;

(XII) ~~[(XI)]~~ *Neisseria* [~~*meningitides*~~]~~--\$141.84~~

[\$390.52];

(XIII) ~~[(XII)]~~ pertussis--\$287.98;

(XIV) ~~[(XIII)]~~ *Staphylococcus*--\$188.88; and

(XV) ~~[(XIV)]~~ *Streptococcus*--\$258.91.

(XVI) *Vibrio*--\$228.15.

(vii) ~~[(viii)]~~ Enteric bacteria:

(I) culture confirmation--\$158.53;

(II) *Shigella* serotyping--\$120.38; and

(III) *Salmonella* serotyping--\$86.63.

(viii) ~~[(ix)]~~ Enterohaemorrhagic *Escherichia Coli* (EHEC), shiga-like toxin assay--\$38.60.

(ix) ~~[(x)]~~ *Escherichia coli* (*E.coli*) O157:H7, culture confirmation--\$26.64.

(x) ~~[(xi)]~~ *Haemophilus*:

(I) culture confirmation, serological--\$91.58 [~~\$138.64~~]; and

(II) isolation from clinical specimen--\$100.18.

(xi) ~~[(xii)]~~ *Neisseria meningitides*, serotyping--\$167.48.

(xii) ~~[(xiii)]~~ Shiga toxin producing *E.coli*, PCR--\$36.60.

(xiii) ~~[(xiv)]~~ Toxic shock syndrome toxin I assay (TSST 1)--\$125.25.

(xiv) ~~[(xv)]~~ *Vibrio cholerae*, serotyping--\$32.73.

(B) Emergency preparedness.

(i) (No change.)

(ii) Chemical Threat agent Analysis

(I) - (III) (No change.)

(IV) Lewisite metabolites in urine (2-chlorovinylarsonous acid (CVAA) and 2-chlorovinylarsonic acid (CVAOA), liquid chromatography, inductively coupled plasma mass spectrometry (LC-ICP-MS))--\$157.59.

(V) ~~[(IV)]~~ Metabolic Toxin Panel (monochloroacetate and monofluoro acetate in urine, LC/MS-MS)--\$93.38.

(VI) ~~[(V)]~~ Metals in blood (mercury, lead, cadmium), inductively coupled plasma mass spectrometry (ICP/MS)--\$194.64.

(VII) ~~[(VI)]~~ Metals in urine (antimony, barium, beryllium, cadmium, cesium, cobalt, lead, molybdenum, platinum, titanium, tungsten, uranium), ICP/MS--\$173.25.

(VIII) ~~[(VII)]~~ Organophosphorus nerve agent, LC/MS-MS--\$81.28.

(IX) ~~[(VIII)]~~ Tetramine, gas chromatography/mass selective detector (GC/MSD)--\$183.05.

(X) ~~[(IX)]~~ Tetranitromethane metabolite in urine (4-hydroxy-2-nitrophenylacetic acid (HNPA)), liquid chromatography, tandem mass spectrometry (LC/MS-MS)--\$62.21.

(XI) ~~[(X)]~~ Volatile organic compounds in blood, GC/MS--\$124.85

(C) Mycobacteriology/mycology.

(i) Acid fast bacilli (AFB).

(I) Clinical specimen, AFB isolation and identification.

(-a-) - (-d-) (No change.)  
 (-e-) Nucleic acid amplification for *Mycobacterium tuberculosis* (*M. tuberculosis*) complex--\$166.70 [~~\$197.41~~].  
 (-f-) - (-g-) (No change.)  
 (II) (No change.)  
 (ii) - (iv) (No change.)  
 (v) *Mycobacterium tuberculosis* (*M. tuberculosis*) complex drug susceptibility.  
 (I) - (III) (No change.)  
 (IV) MGIT drug susceptibility test, primary panel--\$115.05.  
 (V) MGIT PZA susceptibility test--\$77.17.  
 (D) (No change.)  
 (E) Serology.  
 (i) (No change.)  
 [(ii)] *Aspergillus*--\$84.13.  
 (ii) [(iii)] *Brucella*--\$74.52.  
 (iii) [(iv)] Cat scratch fever (*Bartonella*)--\$171.30.  
 (iv) [(v)] Cytomegalovirus (CMV):  
 (I) IgG--\$23.23 [~~\$399.97~~]; and  
 (II) IgM--\$24.26 [~~\$161.02~~].  
 (v) [(vi)] *Ehrlichia* indirect fluorescent antibody (IFA)--\$174.20.  
 [(vii)] Fungus:  
 [(t)] fungal identification (blastomycosis, coccidioidomycosis, histoplasmosis)--\$142.05; and  
 [(H)] fungal panel (blastomycosis, coccidioidomycosis, histoplasmosis)--\$130.55.  
 (vi) [(viii)] Hantavirus IgG/IgM--\$362.05.  
 (vii) [(ix)] Hepatitis A:  
 (I) IgM--\$44.04 [~~\$317.74~~]; and  
 (II) total--\$34.45 [~~\$219.60~~].  
 (viii) [(x)] Hepatitis B:  
 (I) core antibody--\$36.06 [~~\$143.90~~];  
 (II) core IgM antibody--\$44.75 [~~\$295.64~~];  
 (III) surface antibody (Ab)--\$28.34 [~~\$103.84~~];  
 and  
 (IV) surface antigen (Ag)--\$18.47 [~~\$51.45~~].  
 (ix) [(xi)] Hepatitis BeAb--\$109.20.  
 (x) [(xii)] Hepatitis BeAg--\$195.14.  
 (xi) [(xiii)] Hepatitis C (HCV)--\$25.68.  
 (xii) [(xiv)] Human immunodeficiency virus (HIV):  
 [(t)] HIV 1, 2, plus 0 screen--\$11.40;]  
 (I) [(H)] serum, multi-spot--\$40.74; and[-]  
 (II) HIV Combo Ag/Ab EIA--\$7.90.

(xiii) [(xv)] Human immunodeficiency virus-1 (HIV-1):  
 (I) enzyme immunoassay (EIA) Dried Blood Spots (DBS)--\$14.32;  
 (II) enzyme immunoassay (EIA) oral fluid--\$69.99;  
 (III) Nucleic acid amplification test (NAAT)--\$7.79;  
 (IV) western blot serum--\$277.23;  
 (V) western blot DBS--\$277.23; and  
 (VI) western blot oral--\$324.71.  
 [(xvi)] *Legionella*--\$168.42.  
 (xiv) [(xvii)] Lyme (*Borrelia*) IgG/IgM Panel--\$706.25.  
 (xv) [(xviii)] Measles, mumps, rubella - *Varicella zoster* virus (MMR-VCV) Magnetic Immunoassay (MIA)--\$345.63.  
 (xvi) [(xix)] Mumps:  
 (I) epidemic parotitis IgG--\$22.62 [~~\$154.46~~]; and  
 (II) epidemic parotitis IgM--\$251.96.  
 (xvii) [(xx)] Q-Fever--\$234.97.  
 (xviii) [(xxi)] QuantiFERON (tuberculosis serology)--\$53.66 [~~\$84.45~~].  
 (xix) [(xxii)] *Rickettsia* panel (includes: Rocky Mountain spotted fever and typhus)--\$134.14.  
 (xx) [(xxiii)] Rubella:  
 (I) IgM--\$24.77 [~~\$329.37~~]; and  
 (II) screen--\$22.33 [~~\$24.13~~].  
 (xxi) [(xxiv)] Rubeola:  
 (I) IgM--\$210.24; and  
 (II) screen [Screen] (IgG)--\$21.35 [~~\$165.16~~].  
 (xxii) [(xxv)] Schistosoma enzyme immunoassay (EIA)--\$134.49.  
 (xxiii) [(xxvi)] Strongyloides [Strongyloide] enzyme immunoassay (EIA)--\$73.45.  
 (xxiv) [(xxvii)] Syphilis:  
 (I) Confirmation fluorescent treponemal antibody absorbed (FTA-ABS)--\$80.20;  
 (II) Confirmation particle agglutination (TP-PA)--\$27.02; [and]  
 (III) Rapid plasma reagin (RPR):  
 (-a-) screen (qualitative)--\$2.89; and  
 (-b-) titer (quantitative)--\$12.88; and[-]  
 (IV) Screening, IgG--\$7.57.  
 (xxv) [(xxviii)] Toxoplasmosis--\$23.23 [~~\$357.49~~].  
 (xxvi) [(xxix)] Tularemia (*Francisella tularensis*)--\$54.53.  
 (xxvii) [(xxx)] *Varicella zoster* virus (VZV) [VZV]--\$19.70 [~~\$345.63~~].

~~(xxviii)~~ [~~(xxxi)~~] *Yersinia pestis* (Plague), serum--\$237.18.

(F) Virology.

(i) (No change.)

(ii) Arbovirus identification, PCR:

(I) (No change.)

(II) St. Louis Encephalitis (SLE)--\$60.18; ~~and~~

\$60.41; ~~and~~ [-]

(IV) West Nile virus--\$57.87.

(iii) - (iv) (No change.)

(v) Culture:

(I) Supplemental Cell Culture [~~clinical~~]-\$135.46; and

(II) reference--\$96.66.

(vi) Dengue, real-time PCR--\$215.52.

(vii) [~~(vii)~~] Echovirus, DFA--\$115.80.

(viii) [~~(viii)~~] Electron microscopy (includes observation, electron microscopy and photography)--\$527.91.

(ix) [~~(ix)~~] Enterovirus:

(I) DFA--\$162.96; and

(II) PCR--\$393.27.

(x) [~~(x)~~] *Herpes simplex virus* 1 and 2, identification, DFA--\$96.52.

(xi) Influenza.

(I) [~~(i)~~] Influenza A/B identification, DFA--\$54.02.

(II) [~~(ii)~~] Influenza surveillance with culture [~~Influenza, culture~~]-\$248.00.

(III) Influenza pyrosequencing for antiviral resistance--\$13.11.

(IV) [~~(iii)~~] Influenza surveillance without culture (typing, PCR)--\$131.32 [~~\$248.00~~].

(xii) [~~(xii)~~] Norovirus (Norwalk-like virus) PCR--\$55.77.

(xiii) Measles, real-time PCR--\$126.83.

(xiv) Mumps, real-time PCR--\$127.83.

(xv) Respiratory viral panel, PCR--\$167.13.

(xvi) [~~(xvi)~~] Rotovirus, PCR--\$55.75.

(xvii) [~~(xvii)~~] Viral agent:

(I) Viral isolation, clinical--\$172.70;

(II) indirect fluorescent antibody (IFA) detection, other--\$147.83; and

(III) indirect fluorescent antibody (IFA) detection, respiratory--\$95.34.

(xviii) [~~(xviii)~~] Viral molecular sequencing--\$400.65.

(xix) [~~(xviii)~~] Virus detection hemadsorption--\$42.18.

(xx) [~~(xviii)~~] Virus isolation, mouse inoculation--\$1029.50.

(xxi) [~~(xix)~~] Virus typing, hemagglutination inhibition--\$67.49.

(b) Tests performed on clinical specimens, South Texas Laboratory. Specimens that must be sent to a reference lab for testing will be billed at the reference laboratory price plus a \$3.00 handling fee.

(1) Bacteriology.

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

(D) Gram Stain--\$8.06.

(E) [~~(D)~~] KOH exam except for skin, hair nails--\$7.85.

(F) [~~(E)~~] Wet mount, vaginal--\$9.14.

(G) Urine culture--\$11.59.

(2) Clinical Chemistry.

(A) Alanine Amino Transferase (ALT)--\$1.34.

(B) [~~(A)~~] Albumin, serum, urine or other source--\$1.27.

(C) [~~(B)~~] Alkaline phosphatase--\$1.37.

(D) [~~(C)~~] Amylase, serum--\$7.37.

(E) [~~(D)~~] Aspartate aminotransferase (AST)--\$1.32.

(F) Bilirubin, direct--\$1.69.

(G) [~~(E)~~] Bilirubin, total--\$1.30.

(H) Bilirubin, total and direct profile--\$2.44.

(I) [~~(F)~~] Blood urea nitrogen (BUN)--\$1.48.

(J) [~~(G)~~] Calcium--\$1.64.

(K) [~~(H)~~] Carbon dioxide (CO2)--\$1.35.

(L) [~~(I)~~] Chloride, serum--\$1.35.

(M) [~~(J)~~] Cholesterol:

(i) total--\$1.36;

(ii) High-density lipoprotein (HDL)--\$1.37; and

(iii) Low-density lipoprotein (LDL)--\$2.20.

(N) [~~(K)~~] Creatine kinase (CK) assay--\$2.79.

(O) [~~(L)~~] Creatinine assay--\$1.30.

(P) [~~(M)~~] Electrolyte panel--includes [~~anion gap (calculated)~~], CO2, chloride, potassium, and sodium--\$2.83.

(Q) [~~(N)~~] Gamma-glutamyl transferase (GGT)--\$3.90.

(R) [~~(O)~~] Glucose:

(i) Glucose--\$1.34;

(ii) [~~(i)~~] Glucose tolerance test, 2 hour--\$1.37; and

(iii) [~~(ii)~~] postprandial, 0 and 2 hours--\$1.34.

(S) [~~(P)~~] Hepatic function panel--includes Alanine phosphatase (ALT), albumin, alkaline phosphatase, AST, bilirubin (direct and total), and protein (total)--\$2.47.

(T) [~~(Q)~~] Hemoglobin A1C--\$10.37.

- (U) [~~R~~] Iron binding capacity, total--\$8.55.
- (V) [~~S~~] Iron, total--\$7.08.
- (W) [~~T~~] Lactic acid dehydrogenase (LDH)--\$8.17.
- (X) [~~U~~] Lipase--\$20.43.
- (Y) [~~V~~] Lipid profile panel--includes cholesterol, HDL, LDL, and triglycerides--\$8.84.
- (Z) [~~W~~] Magnesium--\$7.82.
- (AA) [~~X~~] Metabolic panels:
  - (i) basic panel--includes calcium, carbon dioxide (CO<sub>2</sub>), chloride, creatinine, glucose, potassium, sodium and blood urea nitrogen (BUN)--\$3.65; and
  - (ii) comprehensive panel--includes alanine amino transferase (ALT), albumin, alkaline phosphatase, AST, bilirubin (total), calcium, CO<sub>2</sub>, chloride, creatinine, glucose, potassium, protein (total), sodium, and BUN--\$6.39.
- (BB) [~~Y~~] Phosphorus--\$11.56.
- (CC) [~~Z~~] Potassium--\$1.35.
- (DD) [~~AA~~] Protein, total--\$1.41.
- (EE) [~~BB~~] Renal function panel--includes albumin, glucose, calcium, CO<sub>2</sub>, chloride, creatinine, phosphate, potassium, sodium, and BUN--\$18.13.
- (FF) [~~CC~~] Sodium--\$1.35.
- (GG) [~~DD~~] Triglycerides--\$1.36.
- (HH) [~~EE~~] Tuberculosis panel--includes-ALT, alkaline phosphatase, AST, bilirubin (total), cholesterol, creatinine, GGT, BUN, and uric acid (blood)--\$10.36.
- (II) [~~FF~~] Uric acid--\$4.07.
- (3) Emergency Preparedness.
  - (A) Biological Threat reference culture--\$198.28.
  - (B) Definitive identification.
    - (i) Bacillus anthracis--\$145.72.
    - (ii) Brucella species--\$214.30.
    - (iii) Burkholderia--\$221.62.
    - (iv) Francisella tularensis--\$107.07.
    - (v) Yersinia pestis--\$313.47.
    - (vi) Unknown biological threat agent--\$220.08.
  - (C) Food samples.
    - (i) Bacillus anthracis--\$23.77.
    - (ii) Brucella Species--\$25.77.
    - (iii) E.Coli 0157:H7--\$7.15.
    - (iv) Francisella--\$17.20.
    - (v) Listeria--\$21.30.
    - (vi) Salmonella--\$19.05.
    - (vii) Yersinia pestis--\$313.47.
  - (D) PCR.
    - (i) Bacillus anthracis--\$58.41.

- (ii) Brucella--\$58.41.
- (iii) Burkholderia--\$58.41.
- (iv) Francisella tularensis--\$58.41.
- (v) Influenza--\$51.26;
- (vi) Influenza A--\$53.63;
- (vii) Influenza A/H5--\$125.00;
- (viii) Multiple Agent Panel--\$169.39;
- (ix) Ricin--\$150.00; and
- (x) Yersinia pestis--\$58.41.
- (4) [(3)] Hematology.
  - (A) CBC (complete blood count) with smear review--\$9.11.
  - (B) CBC complete, automated with differential--\$1.51.
  - (C) Differential, manual--\$9.89.
  - (D) Hematocrit--\$6.01.
  - (E) Hemoglobin, total--\$6.01.
  - (F) Peripheral Smear Review--\$7.59.
  - (G) [(F)] Sedimentation rate--\$11.38.
- (5) [(4)] Immunology.
  - (A) Pregnancy test:
    - (i) serum--\$4.40; and
    - (ii) urine--\$4.24.
  - (B) Rheumatoid factor--\$4.73.
- (6) [(5)] Microbiology.
  - (A) Mycobacteriology, Acid fast bacillus (AFB).
    - (i) Concentration--\$4.31.
    - (ii) Culture, any source--\$49.89.
    - (iii) Drug susceptibility studies:
      - (I) conventional susceptibility (each drug)--\$14.06; [~~\$36.45;~~ and
      - (II) MGIT susceptibility (each drug)--\$43.47; and [~~\$92.69-~~
      - (III) MGIT susceptibility (each drug) PZA--\$92.69.
    - (iv) Identification of AFB isolate, DNA probe--\$44.63.
    - (v) [(iv)] Identification, referred isolates, DNA probe--\$44.63.
    - (vi) [(v)] Smear only--\$5.09.
  - (B) Parasitology, ova and parasites (concentration and trichrome stain)--\$67.17.
  - (C) Serology, syphilis.
    - (i) Rapid plasma reagin (RPR):
      - (I) screen (qualitative)--\$7.99; and
      - (II) titer (quantitative)--\$7.99.

- \$9.30.
- (ii) Confirmation particle agglutination (TP-PA)--
- (D) Wet mount, vaginal--\$9.14.
- (7) [(6)] Special chemistry.
- (A) Ferritin--\$22.31.
- (B) Follicle stimulating hormone (FSH)--\$15.10.
- (C) Leuteinizing hormone (LH)--\$17.83.
- (D) Prolactin--\$18.07.
- (E) Prostate specific antigen (PSA), total--\$27.90.
- (F) Thyroxine (T4), free--\$10.89.
- (G) Thyroxine (T4), total--\$35.53.
- (H) Thyroid Hormone (T3) uptake--\$23.67.
- (I) Thyroid stimulating hormone (TSH), prenatal--\$9.41.
- (J) Tri-iodothyronine (T3), free--\$19.10.
- [(F) Thyroxin (T4), free, prenatal--\$35.53.]
- [(G) Thyroid stimulating hormone (TSH), prenatal--\$9.41.]
- [(H) Tri-iodothyronine (T3) uptake, total, prenatal--\$19.10.]
- (8) [(7)] Urinalysis.
- (A) Creatinine clearance test--\$12.00.
- (B) Protein, total, 24 hour--\$5.82.
- (C) Microscopy with urinalysis (UA)--\$32.25.
- (D) Random Urine/Creatinine Profile--\$6.44.
- (E) [(D)] Urinalysis, no reflex--\$5.24.
- (F) [(E)] Urine microalbumin, random--\$5.69.
- (G) Urine Microscopic Analysis--\$5.54.
- [(e) Tests performed on clinical specimens, Women's Health Laboratory.]
- [(1) Bacteriology.]
- [(A) Bacterial culture, routine:]
- [(i) body fluid--\$33.19;]
- [(ii) eye, ear, and nasopharynx (np)--\$36.67;]
- [(iii) sputum/trach (tracheostomy)--\$35.35;]
- [(iv) stool--\$37.35;]
- [(v) throat--\$26.57;]
- [(vi) urine--\$11.03;]
- [(vii) urogenital--\$40.14; and]
- [(viii) wound--\$92.82.]
- [(B) Fecal occult blood--\$32.65.]
- [(C) Fungus:]
- [(i) clinical, definitive identification:]
- [(i) mold, noecardia--\$87.80; and]
- [(ii) yeast identification--\$49.28.]
- [(ii) reference culture:]
- [(i) genital/urine--\$49.46;]
- [(ii) routine with KOH--\$29.44;]
- [(iii) skin, hair, nail--\$71.85; and]
- [(iv) tissue with KOH--\$86.85.]
- [(D) Genetic probe:]
- [(i) Group B streptococcus--\$18.97;]
- [(ii) Gonorrhea/Chlamydia (GC/CT):]
- [(i) amplified GenProbe--\$19.72; and]
- [(ii) CT and GC, DNA--\$19.72.]
- [(E) Gram stain smear with fecal WBC:]
- [(i) fecal leukocytes--\$6.97; and]
- [(ii) gram stain--\$11.20.]
- [(F) KOH prep--\$6.88.]
- [(G) Wet mount, vaginal--\$18.05.]
- [(2) Cytology:]
- [(A) Pap smear:]
- [(i) conventional--\$13.28;]
- [(ii) liquid based--\$25.45; and]
- [(iii) physician interpretation--\$5.82.]
- [(B) Non-gynecological (non-GYN) cytology--\$66.78.]
- [(3) Clinical chemistry:]
- [(A) Albumin, serum, urine or other source--\$1.27.]
- [(B) Alkaline phosphatase--\$1.37.]
- [(C) Alanine aminotransferase (ALT)--\$6.50.]
- [(D) Amylase, serum--\$7.37.]
- [(E) AST--\$1.32.]
- [(F) Beta-human chorionic gonadotropin (beta-HCG) pregnancy test:]
- [(i) qualitative--\$9.15; and]
- [(ii) quantative--\$27.18.]
- [(G) Blood typing:]
- [(i) indirect COOMBS (AB screen)--\$26.31; and]
- [(ii) ABO RH--\$15.36.]
- [(H) BUN--\$1.48.]
- [(I) CO2--\$1.35.]
- [(J) Chloride, serum--\$1.35.]
- [(K) Cholesterol, total--\$1.36.]
- [(L) Cord blood panel--includes antihuman globulin tests (COOMBS); direct, each antiserum; blood typing ABO and RH (D)--\$10.83.]
- [(M) Creatine Kinase--\$2.79]
- [(N) Creatinine:]

*{(i)}* 24 hour urine--\$16.37; and]
   
*{(ii)}* 24 hour urine creatinine clearance--\$27.66.]
   
 {(O) Electrolyte panel--includes anion GAP (calculated) CO<sub>2</sub>, chloride, potassium, sodium--\$2.83.]
   
 {(P) Glucose:]
   
     *{(i)}* one half hour--\$5.96;]
   
     *{(ii)}* one hour--\$6.00;]
   
     *{(iii)}* 2 specimens--\$9.27;]
   
     *{(iv)}* 3 specimens--\$12.54;]
   
     *{(v)}* 4 specimens--\$15.84;]
   
     *{(vi)}* fasting--\$5.98;]
   
     *{(vii)}* gestational, 2 specimens--\$9.27;]
   
     *{(viii)}* postprandial, 0 and 2 hours--\$1.34; and]
   
     *{(ix)}* random--\$5.96.]
   
 {(Q) Hematology:]
   
     *{(i)}* CBC automated, with differential--\$1.51.]
   
     *{(ii)}* CBC automated, without differential:]
   
         *{(I)}* CBC--\$12.13;]
   
         *{(II)}* eosinophil screen--\$6.63; and]
   
         *{(III)}* hematocrit--\$6.01.]
   
     *{(iii)}* CBC with manual differential--\$9.99.]
   
     *{(iv)}* Hemoglobin and hematocrit--\$6.78.]
   
     *{(v)}* Hemoglobin, total--\$6.01.]
   
 {(R) Hepatic function panel--includes ALT, albumin, alkaline phosphatase, AST, bilirubin (direct and total), and protein (total)--\$2.47.]
   
 {(S) High risk panel--includes cholesterol, glucose, and triglycerides--\$9.19.]
   
 {(T) Lipid profile panel--includes cholesterol, HDL and triglycerides--\$8.84.]
   
 {(U) Liver function panels:]
   
     *{(i)}* liver function test (LFT) 4--includes ALT, alkaline phosphatase, AST and bilirubin (total)--\$15.43; and]
   
     *{(ii)}* LFT 6--includes ALT, alkaline phosphatase, AST, bilirubin(total), creatinine, and BUN--\$12.71.]
   
 {(V) LDH, total--\$19.95.]
   
 {(W) Metabolic panels:]
   
     *{(i)}* basic panel--includes calcium, CO<sub>2</sub>, chloride, creatinine, glucose, potassium, sodium and BUN--\$3.65; and]
   
     *{(ii)}* comprehensive panel--includes ALT, albumin, alkaline phosphatase, AST, bilirubin (total), calcium, CO<sub>2</sub>, chloride, creatinine, glucose, potassium, protein (total), sodium, and BUN--\$5.38.]
   
 {(X) Obstetric (OB) panels:]
   
     *{(i)}* OB--includes ABO RH, antibody screen, RBC, hepatitis B surface Ag, RPR, and rubella antibody--\$80.18; and]

*{(ii)}* OB with CBC--includes ABO HR, antibody screen RBC, CBC with differential, hepatitis B surface Ag, RPR and rubella antibody--\$91.58.]
   
 {(Y) Phosphorus--\$11.56.]
   
 {(Z) Potassium, urine--\$15.49.]
   
 {(AA) Protein:]
   
     *{(i)}* total--\$1.41; and]
   
     *{(ii)}* total, 24 hour urine--\$13.34.]
   
 {(BB) Sodium--\$1.35.]
   
 {(CC) Triglycerides--\$1.36.]
   
 {(DD) Uric acid--\$4.07.]
   
 {(EE) Urinalysis:]
   
     *{(i)}* with microscopic examination--\$32.25;]
   
     *{(ii)}* with microscopic examination and reflex culture--\$20.74;]
   
     *{(iii)}* bilirubin ietotest confirmation--\$3.74;]
   
     *{(iv)}* ehemstrip UGK--\$2.37;]
   
     *{(v)}* protein SSA confirmation--\$2.49; and]
   
     *{(vi)}* urine analysis without microscopic examination--\$17.00.]
   
 {(4) Mycobacteriology:]
   
     {(A) Acid fast bacillus (AFB):]
   
         *{(i)}* Anaerobic or aerobic identification--\$30.77.]
   
         *{(ii)}* Culture; Accuprobe--\$62.46.]
   
         *{(iii)}* Culture and smear, any source--\$59.14.]
   
         *{(iv)}* Drug susceptibility studies direct and indirect, each drug--\$47.58.]
   
         *{(v)}* Smear only--\$5.09.]
   
     {(B) Broth dilutions, minimum inhibitory concentration (MIC):]
   
         *{(i)}* BACTEC--\$140.91; and]
   
         *{(ii)}* MGIT--\$98.20.]
   
     {(C) Rifabutin, agar susceptibility--\$47.57.]
   
 {(5) Serology:]
   
     {(A) Hepatitis B surface antigen (Ag)--\$14.68.]
   
     {(B) Human papillomavirus (HPV)--\$68.68.]
   
     {(C) Human immunodeficiency virus-1 (HIV-1):]
   
         *{(i)}* enzyme immunoassay (EIA) DBS--\$16.07; and]
   
         *{(ii)}* enzyme immunoassay (EIA) oral fluid--\$16.07.]
   
     {(D) Rubella, IgG--\$16.37.]
   
     {(E) Syphilis:]
   
         *{(i)}* Rapid plasma reagin (RPR):]
   
             *{(I)}* screen (qualitative)--\$7.99; and]
   
             *{(II)}* titer (quantitative)--\$7.99.]

~~[(ii) Confirmation particle agglutination (TP-PA)--~~  
~~\$9.30.]~~

~~[(6) Surgical pathology:]~~

~~[(A) level I--\$19.52;]~~

~~[(B) level II--\$45.91;]~~

~~[(C) level III--\$45.24;]~~

~~[(D) level IV--\$37.29; and]~~

~~[(E) level V--\$89.29.]~~

~~(c) [(4)] Non-clinical testing, Austin Laboratory.~~

~~(1) *Legionella*, culture--\$265.48.~~

~~(2) Bat identification--\$3.52.~~

~~(3) Entomology:~~

~~(A) insect identification--\$20.86;~~

~~(B) mosquito identification for surveillance--\$17.66;~~

~~(C) mosquito larvae identification--\$6.04.~~

~~(4) Food.~~

~~(A) Bacterial identification.~~

~~(i) Bacillus:~~

~~(I) identification--\$101.16; and~~

~~(II) enumeration, most probable number (MPN)-~~

~~-\$245.53.~~

~~(ii) *Campylobacter* identification--\$145.40.~~

~~(iii) *Clostridium perfringens* identification--~~

~~\$217.06.~~

~~(iv) *Cronobacter sakazakii*--\$115.17.~~

~~(v) *Escherichia coli*.~~

~~(I) [(iv)] *E.coli* 0157 identification--\$121.52.~~

~~(II) Non-0157 STEC--\$295.02.~~

~~(III) [(v)] *E.coli* enumeration (MPN)--\$180.97.~~

~~(vi) *Listeria* identification--\$150.75.~~

~~(vii) *Salmonella* identification--\$66.07.~~

~~(viii) *Shigella* identification--\$119.40.~~

~~(ix) *Staphylococcus* identification--\$127.28.~~

~~(x) *Yersinia* identification--\$62.48.~~

~~(B) *Staphylococcus* enterotoxin detection--\$90.80.~~

~~(C) Yeast and mold enumeration (MPN)--\$128.50.~~

~~(D) Standard plate count--\$67.38.~~

~~(5) Milk and dairy.~~

~~(A) Aflatoxin--\$65.63.~~

~~(B) Bacterial counts:~~

~~(i) coliform count, milk--\$33.97;~~

~~(ii) coliform count, containers--\$41.28;~~

~~(iii) standard plate count, milk--\$22.14; and~~

~~(iv) standard plate count, container--\$44.33.~~

~~(C) Dairy water--\$16.19.~~

~~(D) Freezing point--\$26.59.~~

~~(E) Growth inhibitors.~~

~~(i) Charm SL-6 beta-lactam test--\$81.14.~~

~~(ii) Charm SLBL beta-lactam test--\$58.91.~~

~~(iii) Charm II sulfonamide test--\$51.69.~~

~~(iv) Charm II tetracycline test--\$55.15.~~

~~(v) Delvo test--\$25.60.~~

~~(F) Phosphatase--\$37.82.~~

~~(G) Somatic cell counts.~~

~~(i) Direct microscope somatic cell count (DMSC):~~

~~(I) bovine (cow)--\$50.83; and~~

~~(II) caprine (goat)--\$58.54.~~

~~(ii) Optical somatic cell count (OSCC):~~

~~(I) bovine (cow)--\$51.05; and~~

~~(II) caprine (goat)--\$51.05.~~

~~(6) *Yersinia pestis* (plague), Nobuto--\$8.57.~~

~~(7) Shellfish.~~

~~(A) Bay water--\$25.76.~~

~~(B) Brevetoxin identification--\$242.95.~~

~~(C) *E.coli*, identification and enumeration (MPN)--~~

~~\$151.43.~~

~~(D) Standard plate count--\$67.38.~~

~~(E) *Vibrio* identification--\$211.47.~~

~~(F) *Vibrio* identification and enumeration (MPN)--~~

~~\$478.70.~~

~~(8) Virology.~~

~~(A) Arbovirus:~~

~~(i) culture from mosquito--\$44.25;~~

~~(ii) Eastern Equine Encephalitis (EEE), mosquitoes,~~

~~PCR--\$60.39;~~

~~(iii) St. Louis Encephalitis (SLE), mosquitoes,~~

~~PCR--\$60.18; [and]~~

~~(iv) Western Equine Encephalitis (WEE), mosquitoes,~~  
~~PCR--\$60.41; and [-]~~

~~(v) West Nile Virus (WNV), mosquitoes,~~  
~~PCR--\$57.87.~~

~~(B) Rabies:~~

~~(i) detection, DFA--\$72.99;~~

~~(ii) detection, DFA, cell culture--\$158.77;~~

~~(iii) molecular typing--\$181.05; and~~

~~(iv) monoclonal typing--\$31.19.~~

~~(9) Water.~~

~~[(A) Bottled water--\$71.74.]~~

~~[(B) Fecal coliforms, multiple tube fermentation (MTF)--\$182.01.]~~

~~(A) [(C) Heterotrophic plate count (HPC) bacteria in water (Simplate)--\$84.86.~~

~~(B) [(D) Potable water--\$16.19.~~

~~(C) [(E) Surface water, (MPN) (Quanti-tray)--\$257.66.~~

~~[(F) Reagent water suitability--\$60.26.]~~

~~(d) [(e) Non-clinical testing, South Texas Laboratory, Water bacteriology, potable water--\$8.82.~~

~~(e) [(f) Service charges.~~

~~(1) Restocking fee for NBS specimen collection kit--\$50.00.~~

~~(2) Thermometer calibration--\$12.23.~~

~~(3) Shipping and handling fees:~~

~~(A) AFB--\$50.20;~~

~~(B) Arbovirus reference sample--\$96.66; and~~

~~(C) CDC reference virus isolation--\$23.00.~~

~~(4) Specimen processing and storage--\$25.00.~~

~~§73.55. Fee Schedule for Chemical Analyses.~~

~~Fees for chemical analyses and physical testing.~~

~~(1) Analysis of volatile organic compounds in air (charcoal tubes), National Institute for Occupational Safety and Health NIOSH method--\$127.24.~~

~~(2) The following fees apply to analysis of drinking water [(including bottled water)] samples.~~

~~(A) - (B) (No change)~~

~~(C) Organic compounds:~~

~~(i) - (xi) (No change.)~~

~~(xii) trihalomethanes, EPA methods 502.2 or 524.2--\$50.13; [and~~

~~(xiii) trihalomethanes, EPA method 551.1--\$43.91;~~

~~and~~

~~(xiv) [(xiii)] volatile organic compounds VOCs by GC-MS, EPA method 542.2--\$55.12.~~

~~(D) (No change.)~~

~~(3) The following fees apply to the analysis of food and food products.~~

~~(A) Inorganic analyses:~~

~~(i) - (ix) (No change.)~~

~~(x) gluten--\$92.11;~~

~~(xi) [(x)] insect identification, Food and Drug Administration (FDA) Technical Bulletin #2 [Number 2]--\$88.92;~~

~~(xii) [(xi)] meat protein, AOAC calculation--\$5.34;~~

~~(xiii) [(xii)] moisture (total water), USDA M01 method--\$63.00;~~

~~(xiv) [(xiii)] pH of food products, USDA PHM--\$43.12;~~

~~(xv) [(xiv)] phosphate determination-(tri-poly-phosphate), USDA PHS1--\$65.36;~~

~~(xvi) [(xv)] protein, total, USDA PRO1--\$81.14;~~

~~(xvii) [(xvi)] salt, USDA SLT--\$85.81;~~

~~(xviii) [(xvii)] soy protein concentrate, USDA SOY1 method--\$53.21;~~

~~(xix) [(xviii)] soya, USDA SOY1 method--\$53.21;~~

~~(xx) [(xix)] sulfite AOAC 980.17--\$28.27; and~~

~~(xxi) [(xx)] water activity, AOAC method 978.18--\$33.22.~~

(B) Metals analyses. A sample preparation fee applies to all food samples analyzed by ICP or ICP-MS techniques. A sample requiring both ICP and ICP-MS techniques will require two sample preparations. The total analysis fee includes the sample preparation fees and the per-element fee. The fee for analysis of multiple metals by a single method includes a single sample preparation fee and the appropriate per-element fees.

(i) (No change.)

(ii) Per-element fees:

(I) mercury, EPA method 245.1 and EPA SW-846 methods 7470A and 7471B--\$37.90 [~~\$192.35~~];

(II) - (III) (No change.)

(4) The following fees apply to the analysis of soil and solids.

(A) Metals analysis. A sample preparation fee applies to the analysis of all solid (soil, sediment, etc.) samples. A sample requiring both ICP and ICP-MS techniques will require two sample preparations. The total cost of the analysis will be the sample preparation fees plus the per-element fee. The fee for analysis of multiple metals by a single method includes a single sample preparation fee and the appropriate per-element fees. Determination of leachable metals in solid samples will require a solid leachate sample preparation procedure, as well as analysis of the leachate using non-potable water analytical methods. The total cost of the analysis will be the solid leachate sample preparation fee plus the required non-potable water preparation fee(s) and the per-element test(s).

(i) - (ii) (No change.)

(iii) Per-element fee:

(I) mercury, sediment, EPA SW-846 method 7471B--\$37.90 [~~\$194.22~~];

(II) - (III) (No change.)

(B) (No change.)

(5) The following fees apply to the analysis of tissue and vegetation samples. A tissue preparation (homogenization) fee applies to all seafood tissue samples analyzed for metals. The total analysis cost includes the tissue preparation fee, any analyte specific sample preparation fee, and the per-element or per-group test fee.

(A) Tissue preparation fees:

(i) fillets--\$19.98 [~~\$34.56~~]; and

(ii) (No change.)

(B) Metals analyses. A sample preparation fee applies to all tissue samples analyzed by ICP or ICP-MS. The total analysis



cost includes the per-element or per-group fee plus any required sample preparation fee:

(i) (No change.)

(ii) per-element fees:

(I) mercury, EPA method 7471B--~~\$37.90~~ [~~\$192.35~~];

(II) - (III) (No change.)

(C) (No change.)

(6) The following fees apply to the analysis of non-potable water.

(A) (No change.)

(B) Metals analysis. The following sample preparation fees apply to the analysis of non-potable water samples. A sample requiring both ICP and ICP-MS techniques will require two sample preparations. The total cost of the analysis will be the required sample preparation fee(s) plus the per-element fee. The fee for analysis of multiple metals by a single method includes a single sample preparation fee and the appropriate per-element fees.

(i) (No change.)

(ii) Per-element fees:

(I) (No change.)

(II) single metal, ICP, EPA method 200.7 and EPA SW-846 method 6010C--~~\$114.04~~ [~~\$67.49~~]; and

(III) (No change.)

(C) (No change.)

(7) - (8) (No change.)

(9) Additional charges.

(A) - (F) (No change.)

(G) Composite storage fee--~~\$19.23~~.

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

Filed with the Office of the Secretary of State on June 3, 2013.

TRD-201302252

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: July 14, 2013

For further information, please call: (512) 776-6972



## TITLE 34. PUBLIC FINANCE

### PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

#### CHAPTER 3. TAX ADMINISTRATION

##### SUBCHAPTER O. STATE SALES AND USE TAX

###### 34 TAC §3.306

The Comptroller of Public Accounts proposes to amend §3.306, concerning sales of mobile offices, portable buildings, prefabricated buildings, and ready-built homes. The section is being amended to reflect policy clarification and amendments to the Texas Tax Code.

The title is being amended to reflect the addition of oilfield portable units due to statutory changes to Tax Code, §151.308 and §152.001 by House Bill 3182, 82nd Legislature, 2011.

Subsection (a) is amended to add definitions for "bunkhouse," "contract for the improvement to realty," "house trailer," "manufactured home," "park model," "set up or installation," and "travel trailer or recreational vehicle"; to revise the definition of "office trailer" to conform more closely to the definition in §3.72 of this title (relating to Farm Machines, Timber Machines, and Trailers); to add a definition for an oilfield portable unit in order to implement statutory changes to Tax Code, §151.308 and §152.001 by House Bill 3182, 82nd Legislature, 2011; to reflect statutory changes to the definition of "department" in Tex. Rev. Civ. Stat. art. 5221f (Tex. Occ. Code §1201) by House Bill 785, 74th Legislature, 1995; and to reflect current policy as to the definition of sales price pursuant to Tax Code, §151.007.

Subsection (b) is amended to reflect long-standing policy as to what is included in the sales price pursuant to Tax Code, §151.007; to add new topic headings for the various paragraphs; to add a new paragraph (2) to state that oilfield portable units are subject to sales and use tax in order to implement statutory changes to Tax Code, §151.308 and §152.001 by House Bill 3182, 82nd Legislature, 2011; and to combine original paragraph (3) with paragraph (4) relating to prefabricated buildings and ready-built homes under a single topic for reasons of readability.

Subsection (c) is amended to reflect long-standing policy as to the taxability of certain taxable services performed on manufactured homes as improvements to residential real property and tangible personal property.

Non-substantive changes have been made for conformity and consistency throughout the section.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying for taxpayers current statutory law and comptroller policy regarding manufactured housing. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

This amendment is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§151.051, 151.007, 151.308 and 152.001.

§3.306. *Sales of Mobile Offices, Oilfield Portable Units, Portable Buildings, Prefabricated Buildings, and Ready-Built Homes.*

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

(1) Bunkhouse--This term has the meaning given in §3.72 of this title (relating to Trailers, Farm Machines, and Timber Machines).

(2) Contract for the improvement to realty--A contract, as described in §3.347(a) of this title (relating to Improvements to Realty). Such a contract includes installation or set-up performed to permanently affix a structure defined in this section to real property.

(3) House trailer--This term has the meaning given in §3.72 of this title.

(4) Installation or set-up--Activities associated with either a contract for the improvement to real property or the temporary placement of a structure defined in this section, including, but not limited to, spotting the structure; preparing the foundation; connecting separate sections of the structure, if any; placing, blocking, leveling, and anchoring the structure; connecting sewer, water, electricity, and other utilities; and installing skirting, awnings, and steps.

(5) Manufactured home--This term has the meaning given in §3.481 of this title (relating to Imposition and Collection of Manufactured Housing Tax).

(6) [(+) Mobile office [Office]--A self-contained transportable structure built on a permanent chassis, with or without wheels, axles, and a towing device, that is [trailer] designed to be used as an office, sales outlet, or work place. A food and beverage concession trailer is an example of a towable structure designed to be used as a sales outlet or work place.

(7) Oilfield portable unit.

(A) A self-contained transportable structure built on a permanent chassis, with or without wheels, axles, and a towing device, designed to be used for temporary lodging or temporary office space that:

(i) does not require attachment to a foundation or real property to be functional;

(ii) is located exclusively upon, or immediately adjacent to, the lease premises or assigned acreage of an oil, gas, water disposal, or injection well located within an oil or gas lease, field, pooled unit, or unitized tract;

(iii) is used exclusively to provide sleeping accommodations, temporary office space, or any other temporary work space for employees, contractors, or other workers at an oil, gas, water disposal, or injection well; and

(iv) is not a travel trailer, camper trailer, or recreational vehicle.

(B) Examples of items that qualify as an oilfield portable unit when located and used exclusively as provided in this paragraph include, but are not limited to, a bunkhouse, trailer, semitrailer, park model, house trailer, and manufactured home. For more information regarding the taxation of travel trailers, camper trailers, and recreational vehicles, refer to §3.72 of this title.

(8) Park model--This term has the meaning given in §3.481 of this title.

(9) [(2)] Portable building--A self-contained transportable structure that does not require attachment to a foundation or to realty in order to be functional. An example of a portable building is a tool shed.

(10) [(3)] Prefabricated building--A structure, not designed to be a residential dwelling, built at a location other than its permanent site, and that is later transported in one or more sections and affixed to real property [realty].

(11) [(4)] Ready-built home--A structure that does not bear a label or decal issued by the Texas Department of Licensing and Regulation, the Texas Department of Housing and Community Affairs, or the U.S. Department of Housing and Urban Development, but that is designed to be a residential dwelling which is constructed, precut, partially assembled, or fabricated in whole or in part at a location other than the home site and subsequently [later] transported, in one or more sections, to the home site, where it is [and] assembled on a permanent foundation.

(12) Travel trailer or recreational vehicle--This term has the meaning given in §3.72 of this title.

(13) [(5)] The terms mobile home, ready-built home, prefabricated building, and portable building do not include a house trailer, as defined in and subject to the provisions of [Texas] Tax Code, Chapter 152, or a manufactured home, as defined in and subject to the provisions of [Texas] Tax Code, Chapter 158. See §3.72 of this title [(relating to Farm Machines, Timber Machines, and Trailers)] and §3.481 of this title [(relating to Imposition and Collection of Tax)].

(b) Application of the sales and use tax to mobile offices, oilfield portable units, portable buildings, prefabricated buildings, ready-built homes, and tangible personal property.

(1) Mobile offices. A sale, lease, or rental of a mobile office is a taxable sale of tangible personal property. Sales tax is due on the total sales price charged by the seller, including charges for delivery and installation or set-up, even if separately stated on the invoice issued to the purchaser. See §3.303 of this title (relating to Transportation and Delivery Charges) and §3.294 of this title (relating to charges on Rental and Lease of Tangible Personal Property) [charges].

(2) Oilfield portable units. A sale, lease, or rental of an oilfield portable unit is subject to sales tax. Sales tax is due on the total sales price charged by the seller, including charges for delivery and installation or set-up, even if separately stated on the invoice issued to the purchaser. See §3.303 and §3.294 of this title.

(A) An oilfield portable unit that ceases to be used exclusively as an oilfield portable unit, as required by this section, and that meets the definition of a motor vehicle, pursuant to Tax Code, §152.001(3), is subject to tax imposed by Tax Code, Chapter 152. Examples include bunkhouses, trailers, semitrailers, park models, or house trailers. For more information regarding the application of the Motor Vehicle Sales Tax to oilfield portable units, refer to §3.72(c) of this title.

(B) The lease or rental of a manufactured home as defined in §3.481 of this title that ceases to be used exclusively as an oilfield portable unit as required by this section is subject to hotel occupancy tax as provided under Tax Code, Chapter 156.

(3) [(2)] Portable buildings. A sale, lease, or rental of a portable building is a taxable sale of tangible personal property. Sales tax is due on the total sales price charged by the seller, including charges for delivery and installation or set-up, even if separately stated on the invoice issued to the purchaser. See §3.303 and §3.294 of this title [charges].

(4) Prefabricated buildings and ready-built homes.

(A) [(3)] A contract to sell a prefabricated building or a ready-built home is considered a contract for an improvement to real property [realty] when the seller is required to build, transport, and affix the structure to a permanent site. See §3.347 of this title [(relating to Improvements to Realty)]. If the contract requires the seller to perform installation or set-up services [such as preparing the foundation, plumbing, sewer hookup, septic tank preparation, supporting, blocking, or leveling], the seller's sales tax responsibilities are determined by whether the contract is a lump-sum contract or a contract that separately states [separates] charges for materials and [from charges for] labor. See §3.291 of this title (relating to Contractors).

(B) [(4)] The sale of a ready-built home or a prefabricated building that is not at the time of sale affixed to its permanent site is a taxable sale of tangible personal property if sold to a person responsible for affixing the structure to real property [realty].

(5) Structures deemed to be tangible personal property. A sale of a structure that is affixed to real property [realty] is nonetheless a taxable sale of tangible personal property if the purchaser is obligated to remove the structure from its site.

(6) Tangible personal property affixed to real property. An "in-place" sale of items such as fixtures, machinery, and equipment is considered a sale of tangible personal property if the seller:

(A) is a lessee of the real property [estate] or structure [building] to which the items are affixed; and

(B) has the present right to remove the items either as trade fixtures or under the express terms of the lease. Sales tax is due on that portion of the total consideration allocable to the in-place items without regard to the fact of their physical attachment to real property.

(c) Application of limited sales and use tax to manufactured homes. [Parts and accessories added to manufactured housing by the retailer.]

(1) Limited sales or use tax is due on parts or accessories installed in a manufactured home by the retailer of the [in a] manufactured home, whether the home is sold alone or as part of a contract for the improvement to realty. See §3.291 of this title.

(A) [(1)] If the retailer sells the home for a lump sum amount that includes both the home and parts, the retailer should not collect limited sales or use tax on the lump sum charge. The retailer must pay limited sales or use tax on the parts at the time of purchase.

(B) [(2)] If the retailer separates the charge to the customer into one charge for the home and a separate charge for the additional parts, the retailer must collect limited sales or use tax on the amount charged for the parts. The retailer may issue a resale certificate in lieu of tax when purchasing the parts.

(C) [(3)] If a third party sells and installs the items, the installer's sales tax responsibilities are determined by whether the contract separates charges for materials from charges for labor. If the installer charges a lump-sum amount for materials and labor, the installer should not collect tax on the lump-sum charge, and the installer must pay limited sales or use tax on the parts at the time of purchase. If the installer separately states the charges for materials and labor, the installer must collect limited sales tax on the amount charged for the parts, and the installer may issue a resale certificate in lieu of tax when purchasing the parts. [See paragraphs (1) and (2) of this subsection.]

(2) A manufactured home affixed to real property, including placement on a foundation and/or supporting, blocking, leveling,

securing, anchoring, and connecting multiple sections, is presumed to be an improvement to real property for sales and use tax purposes.

(3) Repair, remodeling, restoration and maintenance.

(A) Sales or use tax is not due on labor for the repair, remodeling, restoration, and maintenance of a manufactured home affixed to real property and used for residential purposes pursuant to §3.291 of this title. Residential use of a manufactured home occurs when the building is occupied as a home or residence by the owner or by a tenant who occupies the building under a contract for an express initial term of more than 29 consecutive days. Absent a contract, only the period exceeding 29 consecutive days will be considered residential use, when supported by valid documentation, such as receipts or canceled checks.

(B) Sales or use tax is due on the repair, remodeling, and restoration of a manufactured home affixed to real property and used for nonresidential purposes pursuant to §3.357 of this title (concerning Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(C) Sales or use tax is due on the repair, remodeling, restoration, and maintenance of a manufactured home temporarily affixed to real property pursuant to §3.292 of this title (relating to the Repair, Remodeling, Maintenance, and Restoration of Tangible Personal Property). A manufactured home temporarily affixed to real property is deemed to be tangible personal property if the owner of the home is a lessee of the real property to which the home is affixed and is obligated to remove the home from the real property under the express terms of the lease without regard to the home's attachment to the real property. For example, a manufactured home used exclusively to provide sleeping accommodations for employees, contractors, or other workers at a construction site is temporarily affixed to the real property.

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

Filed with the Office of the Secretary of State on May 28, 2013.

TRD-201302176

Ashley Harden

General Counsel

Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



## SUBCHAPTER T. MANUFACTURED HOUSING SALES AND USE TAX

### 34 TAC §3.481

The Comptroller of Public Accounts proposes amendments to §3.481, concerning imposition and collection of manufactured housing tax. The section is being amended to reflect policy clarification and amendments to the Tax Code, Texas Occupations Code, the Texas Local Government Code and the Texas Health and Safety Code.

The section title is being amended to more clearly identify the purpose of the section. In addition, the section has changes in form, style, wording, and organization to improve clarity and readability.

Subsection (a) is amended to implement a statutory change to Tax Code, §158.002, by House Bill 271, 69th Legislature, 1985,

which added to the definition of "manufactured home" the term "industrialized housing," as defined by Article 5221f-1 Vernon's Revised Civil Statutes 1985, and which added that a decal or label issued by the U.S. Department of Housing and Urban Development, the Texas Department of Housing and Community Affairs, or the Texas Department of Licensing and Regulation is required to be permanently affixed to each section or module; to reflect the statutory change in Article 5221f, Manufactured Housing Standards Act, that the transfer and installation of HUD-code manufactured homes are administered by the Texas Department of Housing and Community Affairs; to add a definition of the term "house trailer" to clarify the distinction between manufactured housing and certain trailers defined as motor vehicles and taxed under Tax Code, Chapter 152; to amend the definition of the term "park model" for clarity; to delete the term "modular home" because the term is replaced by the term "industrialized housing"; to reflect the statutory change to the definition of "retailer" in Occupations Code, Chapter 1201, relating to Manufactured Housing, by House Bill 2813, 77th Legislature, 2001; to add examples to the definition of "recreational vehicle"; and to substitute the word "section" for the word "provision" throughout the subsection for uniformity and consistency.

Subsection (b) is amended to add the word "consigned" to conform to the section and Tax Code, Chapter 158; to delete the dates "March 1, 1982," and "September 1, 1983," as no longer being relevant due to the passage of time; and to substitute the phrase "this state" for the word "Texas" throughout the subsection for uniformity and consistency. Paragraph (2) is amended to reflect existing sales and use tax policy under Tax Code, Chapter 151 concerning manufactured homes and to delete wording no longer relevant due to the passage of time. New paragraph (3) is added to reflect existing sales and use tax policy under Tax Code, Chapter 151 concerning the repair, remodeling, restoration and maintenance of manufactured homes.

Subsection (c) is amended to delete the dates "September 1, 1983," and "March 1, 1982," as no longer being relevant due to the passage of time, and to substitute the phrase "this state" for the word "Texas" throughout the subsection for uniformity and consistency.

Subsection (d) is amended to substitute the phrase "this state" for the word "Texas" throughout the subsection for uniformity and consistency.

Subsection (e) is amended in recognition of the fact that federal land bank associations and farm credit banks are treated the same as federal credit unions in the United States Code; to reflect a statutory change to Local Government Code, Chapter 501, relating to Development Corporations and Health and Safety Code, Chapter 221, relating to the Health Facilities Development Act; and to substitute for the paragraph concerning adopting a certificate by reference and obtaining copies of the certificate a new paragraph with the comptroller's Internet address for ordering forms.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying for taxpayers current statutory law and comptroller policy regarding manufactured housing. This rule is proposed under Tax Code, Title 2,

and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendments implement Tax Code, §§158.002, 158.101 and 158.154(c).

§3.481. *Imposition and Collection of Manufactured Housing Tax.*

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

(1) Charitable or eleemosynary organization--A nonprofit organization devoting all or substantially all of its activities to the alleviation of poverty, disease, pain, and suffering by providing food, clothing, drugs, treatment, shelter, or psychological counseling directly to indigent or similarly deserving members of society with its funds derived primarily from sources other than fees or charges for its services. If the organization engages in any substantial activity other than the activities described in this section, it will not be considered as having been organized for purely public charity, and therefore, will not qualify for exemption under this section [~~provision~~]. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are fraternal organizations, lodges, fraternities, sororities, service clubs, veterans groups, mutual benefit or social groups, professional groups, trade or business groups, trade associations, medical associations, chambers of commerce, and similar organizations. Even though not organized for profit and performing services which are often charitable in nature, these types of organizations do not meet the requirements for exemption under this section [~~provision~~].

(2) Educational organization--A nonprofit organization or governmental entity whose activities are devoted solely to systematic instruction, particularly in the commonly accepted arts, sciences, and vocations, and which has a regularly scheduled curriculum, using the commonly accepted methods of teaching, a faculty of qualified instructors, and an enrolled student body or students in attendance at a place where the educational activities are regularly conducted. An organization that has activities consisting solely of presenting discussion groups, forums, panels, lectures, or other similar programs, may qualify for exemption under this section [~~provision~~], if the presentations provide instruction in the commonly accepted arts, sciences, and vocations. The organization will not be considered for exemption under this section [~~provision~~] if the systematic instruction or educational classes are incidental to some other facet of the organization's activities. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are professional associations, business leagues, information resource groups, research organizations, support groups, home schools, and organizations that merely disseminate information by distributing printed publications. Entities that are defined in [~~the~~] Education Code,

§61.003, as "institutions of higher education" are recognized for exemption under this section [provision]. Included in the definition of "institutions of higher education" are state and private universities and colleges.

(3) Exempt use--A use to promote the purpose for which an exempt organization was created.

(4) House trailer--A trailer designed for human habitation, including a park model as defined in this section. The term does not include mobile offices as defined in §3.306 of this title (relating to Sales of Mobile Offices, Oilfield Portable Units, Portable Buildings, Prefabricated Buildings, and Ready-Built Homes); manufactured homes as defined in this section; or portable buildings, prefabricated buildings, and ready-built homes, as defined in §3.306 of this title.

(5) [(4)] HUD-code manufactured home--A structure constructed on or after June 15, 1976, according to the rules of the United States Department of Housing and Urban Development, [;] transportable in one or more sections, which in the traveling mode is eight body feet or more in width or 40 body feet or more in length, or when erected on site is 320 or more square feet; [; is] built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities; [;] and which includes the plumbing, heating, air conditioning, and electrical systems.

(6) Industrialized housing--A residential structure that is designed for the occupancy of one or more families; constructed in one or more modules, or one or more modular components built at a location other than the home site; designed to be used as a permanent residential structure when the module or the modular component is transported to the permanent site and erected or installed on a permanent foundation system; and that includes the structure's plumbing, heating, air conditioning, and electrical systems. Industrialized housing does not include a residential structure that exceeds three stories or 49 feet in height; housing constructed of a sectional or panelized system that does not use a modular component; or a ready-built home constructed in a manner in which the entire living area is contained in a single unit or section at a temporary location for the purpose of selling and moving the home to another location.

(7) [(5)] Manufactured home--A HUD-code manufactured home that has a label or decal issued by the U.S. Department of Housing and Urban Development and the Texas Department of Housing and Community Affairs permanently affixed to each section, industrialized housing that has a label or decal issued by the Texas Department of Licensing and Regulations permanently affixed to each module or modular component, or [;] a mobile home [; or modular home]. A manufactured home does not include a recreational vehicle, park model, or house trailer, as those terms are defined in this section. Further, the term [it] does not include a structure [which is not] designed as a residence and [if] constructed since June 15, 1976, that lacks [would not have been required to have affixed] a label or decal issued by the U.S. Department of Housing and Urban Development and the Texas Department of Housing and Community Affairs or by the Texas Department of Licensing and Regulations permanently affixed to each section, module, or modular component.

(8) [(6)] Manufacturer--Any person who constructs or assembles manufactured housing for sale, exchange, or lease-purchase within this state.

(9) [(7)] Mobile home--A structure constructed before June 15, 1976; [;] transportable in one or more sections, which in the traveling mode is eight body feet or more in width or 40 body feet or more in length, or when erected on site is 320 or more square feet; [; is] built on a permanent chassis; [and] designed to be used as a dwelling with or

without a permanent foundation when connected to the required utilities; [;] and that includes the plumbing, heating, air conditioning, and electrical systems.

[(8) Modular home--A dwelling constructed in one or more modules at a location other than the homesite, or constructed utilizing one or more modular components, and designed to be used as a permanent residence when the modular components or modules are transported to the homesite and joined together or erected and installed on a permanent foundation. The term includes the plumbing, heating, air-conditioning, and electrical systems. "Modular home" does not include:]

[(A) housing constructed of sectional or panelized systems not utilizing modular components;]

[(B) a ready-built home which is constructed so that the entire living area is contained in a single unit or section at a temporary location for the purpose of selling it and moving it to another location; or]

[(C) any dwelling constructed in modules incorporating concrete as the predominant structural component.]

(10) [(9)] New manufactured home--One that has not been subject to a retail sale.

(11) [(10)] Park model [or house trailer]--A trailer [structure built on a permanent chassis and] designed to be used for human habitation, [as a dwelling] with or without a permanent foundation, when connected to the required utilities, and that:

(A) [which] is less than eight body feet in width and 40 body feet in length in the traveling mode; [; and less than 320 square feet when installed or erected on site.]

(B) includes the plumbing, heating, air conditioning and electrical systems; and

(C) is not required to be affixed with a label or decal issued by the U.S. Department of Housing and Urban Development and by the Texas Department of Housing and Community Affairs.

(12) [(11)] Person--An individual, partnership, company, corporation, association, or other group, however organized.

(13) [(12)] Recreational vehicle--A vehicle which is self-propelled or designed to be towed by a motor vehicle, but is not designed to be used as a permanent dwelling, and which contains [containing] plumbing, heating, and electrical systems that may be operated without connection to outside utilities. Examples include, but are not limited, to travel trailers, camper trailers, and motor homes. For information on the taxability of recreational vehicles, see §3.72 of this title (relating to Trailers, Farm Machines, and Timber Machines).

(14) [(13)] Religious organization--A nonprofit organization that is an organized group of people regularly meeting for the primary purpose of holding, conducting and sponsoring religious worship services, according to the rites of their sect. The organization must be able to provide evidence of an established congregation showing that there is an organized group of people regularly attending these services. An organization that supports and encourages religion as an incidental part of its overall purpose, or one whose general purpose is furthering religious work or instilling its membership with a religious understanding, will not qualify for exemption under this section [provision]. No part of the net earnings of the organization may inure to the benefit of any private party or individual other than as reasonable compensation for services rendered to the organization. Some examples of organizations that do not meet the requirements for exemption under this definition are conventions or associations of churches, evangelistic as-

sociations, churches with membership consisting of family members only, missionary organizations, and groups who meet for the purpose of holding prayer meetings, bible study, or revivals.

(15) [(14)] Retail sale--Sale to a consumer as opposed to a sale to a retailer for resale or for further processing and resale.

(16) [(15)] Retailer--Any person engaged in the business of buying for resale, selling, or exchanging manufactured homes or offering them for sale, exchange, or lease-purchase to consumers, including a person who maintains a location for the display of manufactured homes. No person will be considered a retailer unless engaged in the sale, exchange, or lease-purchase of two or more manufactured homes to consumers in any consecutive 12-month period.

(17) [(16)] Sales price--The total amount to be paid, as set forth in the invoice or bill of sale, excluding any separately stated shipping, freight, or delivery charges from the manufacturer to the retailer or other person.

(18) [(17)] Use--The exercise of any right or power over a manufactured home incident to its ownership, including the sale, lease, or rental, or the incorporation of any manufactured home into real estate or into improvements on real estate.

(19) [(18)] Used manufactured home--One that has been subject to a retail sale.

(b) Imposition of tax.

(1) The manufactured housing sales tax is due on all new manufactured homes sold or consigned by a manufacturer to a retailer or other person in this state. [by manufacturers on or after March 1, 1982, regardless of the date the manufacturing process was started or when the order for the home was placed.]

(A) Invoices [dated September 1, 1983, or after,] for all new manufactured homes sold by manufacturers<sup>[-]</sup> must set forth the amount of tax imposed at the rate of 5.0% of 65% of the sales price (equivalent to 3.25% of the sales price).

(B) The manufacturer must report and pay the tax to the comptroller on or before the last day of the month following the month in which the manufactured home was sold.

(C) A manufactured home is presumed to be "sold" at the time the home is sold or consigned by the manufacturer to a retailer or other person in this state [Texas] or is shipped to any point in this state [Texas] for the use and benefit of any person.

(2) Parts and accessories added to a manufactured home by the retailer. Limited sales or use tax is due on parts or accessories installed by a retailer in or on a manufactured home, pursuant to Tax Code, Chapter 151. For information on the taxability of parts and accessories added to a manufactured home, see §3.306(c) of this title. [Any person who has purchased a mobile home for personal use and not for resale prior to March 1, 1982, and who has not paid the motor vehicle sales and use tax imposed on mobile homes prior to March 1, 1982, will be held liable for the motor vehicle sales and use tax rather than the manufactured housing sales and use tax.]

(3) Repair, remodeling, restoration, and maintenance of a manufactured home. The labor to repair, remodel, restore, or maintain a manufactured home may be subject to the limited sales and use tax, pursuant to Tax Code, Chapter 151. For more information, see §3.306(c) of this title.

(c) Use tax.

(1) Manufactured homes purchased outside Texas.

(A) New manufactured homes. A [Effective September 1, 1983, a] use tax of 5.0% of 65% of the purchase price (equivalent to 3.25% of the purchase price) is due on a manufactured home that was purchased new outside of this state [Texas] for use, occupancy, resale, or exchange in this state [Texas]. The tax is to be paid by the person to whom or for whom the home was sold, shipped, or consigned. It is presumed that a manufactured home was not purchased for use or occupancy in this state if the purchaser has purchased the home at a retail sale at least one year prior to its being brought or shipped to this state [Texas].

(B) Used manufactured homes. The use tax does not apply to a manufactured home that was purchased used at a retail sale outside of this state [Texas. Use tax does apply to used manufactured homes acquired prior to March 1, 1982, for resale by a retailer].

(2) Manufactured homes purchased in this state [Texas].

(A) New manufactured homes.

(i) A use tax of 5.0% of 65% of the purchase price (equivalent to 3.25% of the purchase price) is imposed on a manufactured home that was purchased new in this state [Texas].

(ii) The use tax is not due if the manufacturer has paid the sales tax on the home to this state. It will be presumed that the sales tax has been paid on a manufactured home sold, shipped, or consigned by the manufacturer to a retailer or other person in this state [Texas]. The comptroller, the manufacturer, the retailer, and the user of the home may introduce evidence to establish whether or not the sales tax has been paid.

(B) Used manufactured homes. The use tax does not apply to a manufactured home purchased used at retail in this state [Texas. Use tax does apply to a used manufactured home acquired prior to March 1, 1982, for resale by a retailer].

(3) A credit equal to the amount of any legally imposed sales or use tax paid to another state on a manufactured home may be taken against the use tax imposed in this state.

(4) The use tax imposed is to be paid directly to the comptroller by the person to whom or for whom the home was sold, shipped, or consigned. The use tax is due and payable by the last day of the month following the month after the home is sold, shipped, or consigned to a person in this state [Texas].

(d) Interstate sales of manufactured housing.

(1) A manufacturer engaged in business in this state [Texas] but located outside this state must collect and remit to the comptroller the manufactured housing sales tax on the initial sale, shipment, or consignment of a manufactured home to a retailer or other person in this state.

(2) The sales tax is not imposed on a manufactured home that is sold, shipped, or consigned to a retailer or other person when a manufacturer located in this state [Texas] ships the home to a point outside this state by means of:

(A) the facilities of the manufacturer; or

(B) delivery by the manufacturer to a carrier for shipment under a bill of lading to a consignee at a location outside this state.

(3) The sales tax is not imposed on a manufactured home that is sold to a [Texas] retailer in this state for resale at retail to a resident of another state if the home is transported to and installed for occupancy on a home site [homesite] located in another state.

(A) This exemption does not apply if the home is titled or registered in this state [Texas] or if the home is used for any purpose other than display prior to being transported outside of the state.

(B) The manufacturer may accept an exemption certificate which has been properly completed and signed by the retailer and the consumer in compliance with subsection (e) of this section.

(C) A retailer who has previously paid the sales tax imposed by this chapter to the manufacturer on a transaction exempt under this section [rule] may claim a credit or a refund from the manufacturer.

(e) Exemption Certificates.

(1) An exemption certificate may be issued by:

(A) the United States~~;~~ ~~its unincorporated agencies or instrumentalities~~];

(B) any incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States;

(C) federal credit unions organized under 12 United States Code, §1768, federal land bank associations organized under 12 United States Code, §2098, or farm credit banks organized under 12 United States Code, §2023;

(D) the State of Texas, its unincorporated agencies and instrumentalities;

(E) any county, city, special district, or other political subdivision of the State of Texas, and any college or university created or authorized by the State of Texas;

(F) nonprofit corporations formed under Local Government Code, Chapter 501, Provisions Governing Development Corporations [~~the Development Corporation Act of 1979~~] or Health and Safety Code, Chapter 221, Health Facilities Development Act [~~the Health Facilities Development Act of 1984~~] when purchasing items for their exclusive use and benefit. The exemption does not apply to items purchased by the corporation to be lent, sold, leased, or rented;

(G) any organization created for religious, educational, charitable, or eleemosynary purposes, provided that such organization must have requested and been granted exempt status by the comptroller [~~Comptroller~~]. In order to qualify for exempt status the organization must meet all of the following requirements:

(i) An organization must be organized or formed solely to conduct one or more exempt activities. All documents necessary to prove the purpose for which an organization is formed will be considered when exempt status is sought.

(ii) An organization must devote its operations exclusively to one or more exempt activities.

(iii) An organization must dedicate its assets in perpetuity to one or more exempt activities.

(iv) No profit or gain may pass directly or indirectly to any private shareholder or individual. All salaries or other benefits furnished officers and employees must be commensurate with the services actually rendered.

(H) A resident of another state who purchases a new manufactured home from a [Texas] retailer in this state for immediate transport, installation, and occupancy at a home site [~~homesite~~] located outside of this state [Texas], provided the home:

(i) has not been used by the retailer for any purpose other than display; and

(ii) is not titled or registered in this state [Texas].

(2) A manufacturer who accepts an exemption certificate in good faith is relieved of the responsibility for collecting the tax as required by [the] Tax Code, §158.053. A retailer must submit to the manufacturer an exemption certificate which has been signed and completed by itself and the purchaser.

(A) A retailer must keep a copy of the exemption certificate attached to the invoice or bill of sale transferring title to the purchaser.

(B) The manufacturer must retain the original of the exemption certificate attached to the invoice or bill of sale.

(3) Any person who issues an exemption certificate for a manufactured home and then uses the home for other than exempt use will be liable for the tax. The tax will be based on the selling price of the manufactured home to the person who issued the exemption certificate.

(4) The exemption certificate must include:

(A) names and addresses of the manufacturer, retailer, and purchaser;

(B) a description of the manufactured home;

(C) the address where the manufactured home will be installed;

(D) reason for exemption; and

(E) signatures of both the retailer and purchaser.

(5) Form of an exemption certificate. An exemption certificate must be in substantially the form of a Texas Manufactured Housing Sales and Use Tax Exemption Certificate (Form 18-301). Copies of the exemption certificate are available at: <http://window.state.tx.us/tax-info/taxforms/99-forms.html>. [The comptroller adopts the certificate by reference. Copies are available for inspection at the office of the Texas Register or may be obtained from the Comptroller of Public Accounts, Tax Policy Division, 111 West Sixth Street, Austin, Texas 78701-2913. Copies may also be requested by calling our toll-free number 1-800-252-1382. In Austin call 463-4600. (From a Telecommunication Device for the Deaf (TDD) only, call 1-800-248-4099 toll free. In Austin, the local TDD number is 463-4621-]

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

Filed with the Office of the Secretary of State on June 3, 2013.

TRD-201302241

Ashley Harden

General Counsel

Comptroller of Public Accounts

Earliest possible date of adoption: July 14, 2013

For further information, please call: (512) 475-0387



## SUBCHAPTER V. FRANCHISE TAX

**34 TAC §§3.541, 3.544 - 3.563, 3.565 - 3.570, 3.575, 3.576, 3.578 - 3.580**

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

The Comptroller of Public Accounts proposes the repeal of §§3.541, 3.544 - 3.563, 3.565 - 3.570, 3.575, 3.576, and 3.578 - 3.580, concerning taxable capital and earned surplus. These rules are being repealed as the provisions apply only to reports due for periods that are beyond the statute of limitations. The proposed repeal is a result of a rule review of Texas Administrative Code, Title 34, Part 1, Chapter 3, Subchapter V, conducted by the comptroller. The rule review was performed under Government Code, §2001.039, and concluded that these rules are now obsolete. New rules were adopted in 2008 to administer the revised Texas franchise tax based on margin.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the repeal will be in effect, there will be no fiscal implications to the state or to units of local government.

Mr. Heleman also has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be by removing obsolete provisions from the Texas Administrative Code. There would be no anticipated significant economic cost to the public. The repeal is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There are no additional costs to persons who are required to comply with the repeal.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The repeal is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The repeal implements Tax Code, Chapter 171 for replacement with margin tax.

- §3.541. *Exemptions.*
- §3.544. *Reports and Payments.*
- §3.545. *Extensions.*
- §3.546. *Taxable Capital: Nexus.*
- §3.547. *Taxable Capital: Accounting Methods.*
- §3.548. *Taxable Capital: Close and S Corporations.*
- §3.549. *Taxable Capital: Apportionment.*
- §3.550. *Taxable Capital: Stated Capital.*
- §3.551. *Taxable Capital: Surplus.*
- §3.552. *Taxable Capital: In Process of Liquidation.*
- §3.553. *Taxable Capital: Oil and Gas Reserves.*
- §3.554. *Earned Surplus: Nexus.*
- §3.555. *Earned Surplus: Computation.*
- §3.556. *Earned Surplus: S Corporations.*
- §3.557. *Earned Surplus: Apportionment.*
- §3.558. *Earned Surplus: Officer and Director Compensation.*
- §3.559. *Earned Surplus: Temporary Credit.*
- §3.560. *Banking Corporations.*
- §3.561. *Enterprise Zones and Defense Economic Readjustment Zones.*
- §3.562. *Limited Liability Companies.*

- §3.563. *Savings and Loan Associations.*
- §3.565. *Survivors of Mergers.*
- §3.566. *Title Insurance Holding Companies.*
- §3.567. *Additional Tax on Earned Surplus.*
- §3.568. *Changes in Corporate Organization.*
- §3.569. *Texas Youth Commission Credit.*
- §3.570. *Liens.*
- §3.575. *Annual Extensions/Electronic Funds Transfer.*
- §3.576. *Earned Surplus: Allocation.*
- §3.578. *Economic Development Credits.*
- §3.579. *Child Care Credits.*
- §3.580. *Credit for Hiring Persons with Disabilities.*

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

Filed with the Office of the Secretary of State on June 3, 2013.

TRD-201302242

Ashley Harden

General Counsel

Comptroller of Public Accounts

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For further information, please call: (512) 475-0387



## TITLE 43. TRANSPORTATION

### PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

#### CHAPTER 4. EMPLOYMENT PRACTICES SUBCHAPTER F. EMPLOYEE TRAINING AND EDUCATION

The Texas Department of Transportation (department) proposes the repeal of §§4.60 - 4.63 and new §4.61, concerning employee training and education.

#### EXPLANATION OF PROPOSED REPEALS AND NEW SECTION

The department operates a Tuition Assistance Program under the State Employee Training Act, Government Code, §§656.041 - 656.104. A recent internal audit revealed that the program as currently operated is vulnerable to possible waste, excess, fraud, and lack of compliance. Existing §§4.60 - 4.63 do not afford the department sufficient flexibility to address these vulnerabilities, nor to otherwise administer the program efficiently. Further, the rules contain information relating solely to the internal personnel rules and practices of the agency. The repeal of these sections is necessary to provide greater flexibility in administering the tuition assistance program and to eliminate unnecessary internal operating procedures from the rules.

New §4.61, Tuition Assistance Program, is adopted to authorize the department generally to adopt policies regarding employee education in compliance with the State Employee Training Act, Government Code, §§656.041 - 656.104.

#### FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the repeals and new section as proposed are in effect, there will be no fiscal implications



for state or local governments as a result of enforcing or administering the repeals and new section.

Lauren Garduno, Chief Procurement Officer and Deputy Administration Officer, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeals and new section.

#### PUBLIC BENEFIT AND COST

Mr. Garduno has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeals and new section will be improved efficiency and accountability in the department's tuition assistance program. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed repeal of §§4.60 - 4.63 and new §4.61 may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@tx-dot.gov with the subject line "4.61." The deadline for receipt of comments is 5:00 p.m. on July 15, 2013. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed repeals and new section, or is an employee of the department.

#### 43 TAC §§4.60 - 4.63

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

#### STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, §656.048, which requires state agencies to adopt rules relating to the eligibility and assumed obligations for training and education provided by the agency.

#### CROSS REFERENCE TO STATUTE

Government Code, §§656.041 - 656.104.

§4.60. *Purpose.*

§4.61. *Definitions.*

§4.62. *General Standards.*

§4.63. *Particular Programs.*

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

Filed with the Office of the Secretary of State on May 31, 2013.

TRD-201302211

Jeff Graham

General Counsel

Texas Department of Transportation

Earliest possible date of adoption: July 14, 2013

For further information, please call: (512) 463-8683

#### 43 TAC §4.61

#### STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Government Code, §656.048, which requires state agencies to adopt rules relating to the eligibility and assumed obligations for training and education provided by the agency.

#### CROSS REFERENCE TO STATUTE

Government Code, §§656.041 - 656.104.

§4.61. Tuition Assistance Program.

The department shall develop programs for the continuing education of employees under the State Employees Training Act, Texas Government Code §§656.041 - 656.104. The eligibility of employees for training and education provided or funded by the department under the programs, and the obligations, including restrictions and potential liability, assumed by employees on receiving training or education, shall be provided in the department's policies.

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

Filed with the Office of the Secretary of State on May 31, 2013.

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Jeff Graham

General Counsel

Texas Department of Transportation

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For further information, please call: (512) 463-8683

## CHAPTER 5. FINANCE

### SUBCHAPTER E. PASS-THROUGH FARES AND TOLLS

#### 43 TAC §§5.52, 5.58, 5.59, 5.61

The Texas Department of Transportation (department) proposes amendments to §5.52, Definitions, §5.58, Calculation of Pass-Through Fares and Tolls, and §5.59, Project Development by Public or Private Entity, and new §5.61, Solicitation of Private Proposals, all concerning Pass-Through Fares and Tolls.

#### EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTION

Transportation Code, §222.104(b) authorizes the department to enter into an agreement with a public or private entity that provides for the payment of pass-through tolls to the public or private entity as reimbursement for the design, development, financing, construction, maintenance, or operation of a toll or non-toll facility on the state highway system by the public or private entity.

The amendments will allow the department to solicit private pass-through proposals for highway projects in circumstances other than a program call issued under §5.54, and will allow the department to make payments to the private developer from any available source, including project revenues and money in the state highway fund, in order to reimburse a private entity's

project-related costs, including financing costs, and to pay a return on any private investment. The payment amounts may be adjusted based on the private developer's compliance with performance requirements in the pass-through agreement, including the availability of the highway for use by the traveling public, and because of increased operations and maintenance costs.

The amendments will authorize the department to solicit private proposals using a two-step procurement process (issuance of a request for qualifications and issuance of a request for proposals from qualified proposers), and using a one-step procurement process in which a request for proposals is issued to prequalified proposers, including proposers qualified under a comprehensive development agreement procurement that is converted by the Texas Transportation Commission (commission) to a procurement for a pass-through agreement.

Amendments to §5.52 revise the definition of certain terms used in §§5.51 - 5.60.

Amendments to §5.58 authorize the commission, for a highway project designed, developed, financed, constructed, maintained, or operated under a pass-through agreement procured under new §5.61, to approve payment of a level of pass-through tolls that exceeds the department's estimate to perform the work proposed to be performed under the agreement, and to approve the payment of pass-through tolls to reimburse the private entity's project-related costs, including financing costs, and to pay a return on any private investment.

Under the existing program, the department can only reimburse a private entity what it would cost the department to construct the project if a pass-through toll agreement was not used. There are critical highway improvement projects the department cannot currently construct because there is insufficient funding or other financing methods available to do so. There exists the potential to use a pass-through toll agreement to obtain private financing of these priority projects. In order to obtain private financing, the department will need to reimburse the private entity's financing costs and to pay a reasonable return on investment, which is prohibited under the existing program. The commission may approve the payment of pass-through tolls from any available source, including money in the state highway fund and project revenues, but not from funds derived from the issuance of bonds under Transportation Code, §201.943. Payments are subject to the availability of funds appropriated by the legislature that can be used for that purpose. In order to comply with applicable legal requirements, the amount of money that can be paid from money in the state highway fund may not exceed the amount that is eligible to be paid from those funds under state law, and that is incurred or is reasonably anticipated to be incurred by the private entity during the term of the pass-through agreement.

Amendments to §5.58 authorize the pass-through toll to vary based on the availability of the highway for use by the traveling public and the private entity's compliance with any other performance requirements included in the pass-through agreement. These amendments will allow the amount the department agrees to pay to the private entity under a pass-through agreement to be reduced if the private entity fails to comply with performance measures included in the agreement. The pass-through toll may be adjusted because of increasing operations and maintenance costs, which may occur if the amount of traffic on the highway is substantially above the traffic projections made prior to entering into the pass-through agreement. Amendments to §5.58 recognize that there may not be a minimum payment amount specified

in the pass-through agreement, and that the department may make milestone payments and annual, monthly, or other periodic payments to compensate the public or private entity with whom it enters into a pass-through agreement. Amendments to §5.58 provide that the agreement, like other agreements the department enters into, may provide for the payment of compensation to the private entity as a result of a compensation event or relief event, as defined in the agreement.

Amendments to §5.59 recognize that there are restrictions in state and federal law as to when a contractor may conduct the environmental review and public involvement for a project. Amendments to §5.59 authorize the commission, for a project designed, developed, financed, constructed, maintained, or operated under a pass-through agreement procured under new §5.61, to approve the use of criteria or other requirements applicable to a particular item of work that differ from the requirements of §5.59. There are certain requirements in this section that typically are not used in agreements for privately financed projects. For example, the department has typically included performance specifications in such an agreement, rather than using prescriptive specifications. The use of performance specifications or other requirements that differ from those prescribed by §5.59 may only be approved if the executive director of the department determines that the alternative requirements are sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the traveling public. Amendments to §5.59 also authorize the executive director to approve a design exception if the proposed design is at least equivalent in quality and safety to the particular criteria.

New §5.61 authorizes the department to solicit private proposals for a pass-through agreement with a private entity for the design, development, financing, construction, maintenance, or operation of a highway project. New §5.61 provides that the requirements of §§5.53 - 5.57 and §5.59 that conflict with new §5.61 do not apply to a proposal submitted under §5.61. Those requirements are superseded by the requirements of §5.61.

New §5.61 prescribes requirements applicable to a procurement under that section, including requirements for commission approval of the issuance of a request for qualifications (RFQ) and request for proposals (RFP), required and authorized provisions in an RFQ or RFP, including evaluation criteria established for the project, the process for providing notice of the issuance of an RFQ, the process for evaluating and ranking qualifications submittals and proposals, shortlisting proposers, and selecting the proposal determined to provide the best value, and requirements for commission approval of the department's recommendation and award of a pass-through agreement.

New §5.61 provides that if authorized by the commission, the department may utilize a one-step process for the procurement of a pass-through agreement under which an RFP is issued to prequalified private entities. This includes private entities that are prequalified by being shortlisted under a comprehensive development agreement procurement that is converted by the commission to a procurement under this section. This process will facilitate the department's ability to attract meaningful proposals and generate competition in procurements for certain projects. New §5.61 authorizes the department to make payments to unsuccessful proposers that submit responsive proposals in exchange for the work product in the proposal that can be used by the department in the performance of its functions, and establishes criteria to be considered by the commission in approving a payment.

New §5.61 provides requirements for the department's negotiation of a pass-through agreement with the selected proposer, provides rights reserved by the department in administering the subchapter, provides procedures for a proposer's submission of questions or requests for clarification regarding a procurement, and prescribes procedures for submission of a protest regarding a procurement. New §5.61 provides that a pass-through agreement procured under that section may provide for the payment of compensation as a result of the termination of the agreement. Similar payments are made as a result of the termination of other highway construction contracts entered into by the department. This includes compensation for the purchase by the department, under the terms and conditions established in the agreement, of the interest of the private entity in the agreement and related property.

#### FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new section as proposed are in effect, there will be fiscal implications for state or local governments as a result of enforcing or administering the amendments and new section. Those fiscal implications cannot be quantified with any certainty, as it depends on the number of pass-through agreements entered into under §5.61, and the amount of pass-through payments to be made under those agreements.

James Bass, Chief Financial Officer, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new section.

#### PUBLIC BENEFIT AND COST

Mr. Bass has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and new section will be to facilitate the timely financing and development of critical highway improvement projects that could not otherwise be developed on a timely basis because of insufficient highway funds. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§5.52, 5.58, and 5.59 and new §5.61 may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "5.52-5.61." The deadline for receipt of comments is 5:00 p.m. on July 15, 2013. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments and new section, or is an employee of the department.

#### STATUTORY AUTHORITY

The amendments and new section are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.104, which provides the commission with the authority to adopt rules necessary to implement that section.

#### CROSS REFERENCE TO STATUTE

Transportation Code, §222.104.

#### §5.52. Definitions.

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

- (1) Commission--The Texas Transportation Commission.
- (2) Department--The Texas Department of Transportation.
- (3) Department estimate--An estimate of what it would cost the department to perform the work proposed by the public or private entity, whether the work is proposed to be performed by the department or whether it is proposed to be performed by the public or private entity. The estimate is developed or updated by the department after receipt of a public or private entity's request and prior to the time the department executes an agreement with the public or private entity.
- (4) Environmental Permits, Issues, and Commitments (EPIC)--Any permit, issue, coordination, commitment, or mitigation obtained to satisfy social, economic, or environmental impacts of a project, including sole source aquifer coordination, wetland permits, stormwater permits, traffic noise abatement, threatened or endangered species coordination, archeological permits, and any mitigation or other commitment associated with any of those issues.
- (5) Executive director--The executive director of the department or the executive director's designee not below district engineer, division director, or office director.
- (6) Highway--Includes any facility convenient or necessary to the operation of a highway.
- (7) Operation--Includes maintenance.
- (8) Pass-through agreement--A pass-through toll agreement or a pass-through agreement entered under the terms of this subchapter by the department and a public or private entity.
- (9) Pass-through fare--A dollar amount, including a surcharge or user fee for freight shipments, that is tied to a measure of actual or projected usage of a railway and is used under this subchapter as a means of calculating payments made by one entity to another to provide reimbursement for some or all of the costs of acquiring, designing, developing, financing, constructing, relocating, maintaining, or operating a passenger or freight railway.
- (10) Pass-through toll--A dollar amount that is tied to a measure of actual or projected usage of a highway and is used under this subchapter as a means of calculating payments made by one entity to another to provide reimbursement for some or all of the costs of designing, developing, financing, constructing, maintaining, or operating a highway on the state highway system.
- (11) Public or private entity--Any entity authorized by law to enter into a pass-through agreement with the department under this subchapter for the acquisition, design, development, financing, construction, relocation, maintenance, or operation of a highway or railway.
- (12) Railway--Includes both passenger and freight railways and any facility convenient or necessary to the operation of a railway.

#### §5.58. Calculation of Pass-Through Fares and Tolls.

- (a) Pass-through fares.
  - (1) Amount to be reimbursed.
    - (A) General. The commission shall establish the level of pass-through fares or shall establish parameters within which the de-

partment may negotiate the level of pass-through fares. In establishing the level of pass-through fares or parameters within which the department may negotiate the level of pass-through fares, the commission shall consider whether:

- (i) the project's estimated benefits to mobility warrant a pass-through fare at a level that is more or less than the department's estimate of project costs;
- (ii) the project will result in a significant economic gain or loss to the entity responsible for its development;
- (iii) the public or private entity proposes to share in the cost of the project; and
- (iv) the state or the public or private entity will benefit, and to what extent, if the project is built sooner than would be the case in the absence of a pass-through agreement.

(B) Limits on pass-through fare levels.

(i) The commission will not approve payment by the department of a level of pass-through fares that exceeds the department's estimate, except as permitted by this subparagraph. The commission may approve the department's payment of a level of pass-through fares that exceeds the department's current estimate, but only by the difference between the department's current estimate and the department's estimate for the time when the project would likely have been completed in the absence of a pass-through agreement.

(ii) In determining the level of pass-through fares, the commission will not consider any financing cost incurred by the public or private entity.

(2) Payment schedule and method.

(A) Payment schedule. The schedule of pass-through fare payments will be calculated based on the department's traffic projections for the railway and a number and frequency of payments to be negotiated between the department and the public or private entity. The payment schedule may include a maximum and a minimum periodic amount to be paid annually or in total.

(B) Variable payments. The pass-through fare may vary on any basis that reasonably reflects the value of improvements, the nature of the railway traffic, or benefits to the highway system, including:

- (i) number, type, and class of passengers;
- (ii) type of freight;
- (iii) tonnage of freight;
- (iv) number or type of cars;
- (v) mileage traveled; or
- (vi) characteristics of track.

(3) Allocation of risk.

(A) Cost overruns and underruns. Unless otherwise authorized by the commission and incorporated in a pass-through agreement by the department, the department's liability under a pass-through agreement shall be neither increased nor decreased by cost overruns or underruns. Pass-through fare payments by the department shall not be increased if there is a cost overrun or decreased if there is a cost under-run unless an adjustment is specifically authorized by the commission and incorporated in a pass-through agreement by the department.

(B) Traffic volume. If traffic volume exceeds or falls below expectations, the pass-through fare will not be adjusted. Payments shall not exceed the maximum annual amount specified in the pass-through agreement and shall not be below the minimum annual

amount specified in the pass-through agreement. The pass-through agreement shall provide that if required, payments shall continue until the total of all payments equals the total pass-through fare amount specified by the commission in approving the pass-through fare.

(b) Pass-through tolls.

(1) Level of pass-through tolls.

(A) General. The commission shall establish the level of pass-through tolls or shall establish parameters within which the department may negotiate the level of pass-through tolls. In establishing the level of pass-through tolls or parameters within which the department may negotiate the level of pass-through tolls, the commission shall consider whether:

(i) the project's estimated benefits to mobility warrant a pass-through toll at a level that is more or less than the department's estimate of project costs;

(ii) the project will result in a significant economic gain or loss to the entity responsible for its development;

(iii) the public or private entity proposes to share in the cost of the project; and

(iv) the state or the public or private entity will benefit, and to what extent, if the project is built sooner than would be the case in the absence of a pass-through agreement.

(B) Limits on pass-through toll levels.

(i) Except as provided by this clause or except for a highway project designed, developed, financed, constructed, maintained, or operated under an agreement procured under §5.61 of this subchapter (relating to Solicitation of Private Proposals), the [The] commission will not approve payment by the department of a level of pass-through tolls that exceeds the department's estimate[; except as permitted by this subparagraph]. The commission may approve the department's payment of a level of pass-through tolls that exceeds the department's current estimate, but only by the difference between the department's current estimate and the department's estimate for the time when the project would likely have been completed in the absence of a pass-through agreement.

(ii) In determining the level of pass-through tolls, the commission will not consider any financing cost incurred by the public or private entity. This clause does not apply to a highway project financed under an agreement procured under §5.61 of this subchapter.

(2) Payment schedule and method.

(A) Payment schedule. The schedule of pass-through toll payments will be calculated based on the department's traffic projections for the highway made prior to entering into the pass-through agreement and a number and frequency of payments to be negotiated between the department and the public or private entity. The department may make milestone payments and annual, monthly, or other periodic payments to compensate the public or private entity with whom it enters into a pass-through agreement [payment schedule may include a maximum and a minimum annual amount to be paid periodically or in total].

(B) Variable payments. The level of the pass-through toll may vary on any basis that reasonably reflects the value or cost of improvements or services, the nature of the highway, or benefits to other aspects of the highway system, including:

- (i) the number of vehicles using the highway;
- (ii) the number of vehicle-miles traveled on the highway;

- (iii) the condition of the highway; [and]
- (iv) the availability of the highway for use by the traveling public;
- (v) compliance with any other performance requirements included in the pass-through agreement;
- (vi) increasing operations and maintenance costs;
- and
- (vii) [(iv)] whether the highway is tolled.

(3) Allocation of risk.

(A) Cost overruns and underruns. Unless otherwise authorized by the commission and incorporated in a pass-through agreement by the department, the department's liability under a pass-through agreement shall be neither increased nor decreased by cost overruns or underruns.

(i) Projects developed by the public or private entity. If the project is being developed by the public or private entity, the pass-through toll payments by the department shall not be increased if there is a cost overrun or decreased if there is a cost underrun unless an adjustment is specifically authorized by the commission and incorporated in a pass-through agreement by the department.

(ii) Projects developed by the department. If the project is being developed by the department, the pass-through agreement shall provide that the pass-through toll or the maximum amount payable, or both, shall be adjusted to reflect the department's actual costs unless the commission specifically directs that the department shall bear the risk of cost overruns or underruns.

(B) Traffic volume. If traffic volume exceeds or falls below projections [expectations], the pass-through toll will not be adjusted. [Payments shall not exceed the maximum annual amount specified in the pass-through agreement and shall not be below the minimum annual amount specified in the pass-through agreement. The pass-through agreement shall provide that if required, payments shall continue until the total of all payments equals the total pass-through toll amount specified by the commission in approving the pass-through toll.]

(C) Maximum and minimum amounts. The pass-through agreement may include a maximum amount, a minimum amount, or a maximum and minimum amount, to be paid in intervals or in total for the specified period. The payments may be made periodically as defined in the pass-through agreement. Payments shall not exceed the maximum amount, if any, specified in the pass-through agreement and shall not be below the minimum amount, if any, specified in the pass-through agreement. If a pass-through agreement procured under §5.61 of this subchapter specifies a periodic maximum amount calculated based on the level of the pass-through toll and the department's traffic projections for the highway made prior to or at the time of entering into the pass-through agreement, the pass-through agreement may also include any terms and conditions that the commission approves for calculating and making payments in lesser amounts, including downward adjustments based on the availability of the highway for use by the traveling public or compliance with other performance measures set forth in the pass-through agreement. The pass-through agreement may also include any terms and conditions the commission approves for paying compensation to the private entity as a result of a compensation event or relief event, as defined in the agreement.

(D) Source of payments. The commission may approve the payment of pass-through tolls from any available source, including money in the state highway fund and the revenues, if any, of a project,

but not from funds derived from the issuance of bonds under Transportation Code, §201.943. Payments may be made in connection with a highway project financed under an agreement procured under §5.61 of this subchapter in order to reimburse the private entity's project-related costs, including financing costs, and to pay a return on any private investment. Payments are subject to the availability of funds appropriated by the legislature that may be used for that purpose or other funds that may be used for that purpose. The amount that may be paid from money in the state highway fund may not exceed the amount that is eligible to be paid from those funds under the Texas Constitution and that is incurred or is reasonably anticipated to be incurred by the entity during the term of the pass-through agreement.

§5.59. *Project Development by Public or Private Entity.*

(a) Social and environmental impact.

(1) General. To the extent allowed by law, a [A] public or private entity that is responsible for the construction of a project shall conduct the environmental review and public involvement for the project in the manner prescribed by Chapter 2, Subchapter A of this title (relating to Environmental Review and Public Involvement for Transportation Projects). The department may choose to conduct the environmental review and public involvement.

(2) Department approval. The department must approve each environmental review under this section before construction of the project begins.

(b) Right of way and utilities.

(1) Responsibility. This subsection applies when the public or private entity is responsible for the acquisition of right of way or the adjustment of utilities.

(2) Right of way procedures.

(A) Manual requirements. The acquisition of right of way performed by or on behalf of the public or private entity shall comply with the latest version of each of the department's manuals.

(B) Alternative procedures. The department may authorize or require a [A] public or private entity [may request written approval] to use a different accepted procedure for a particular item or phase of work. The use of an alternative procedure is subject to the approval of the Federal Highway Administration. The executive director may approve the use of an alternative procedure if the alternative procedure is determined to be sufficient to discharge the department's state and federal responsibilities in acquiring real property.

(3) Utility adjustments. The adjustment, removal, or relocation of utility facilities performed by or on behalf of the public or private entity shall comply with applicable federal and state laws and regulations.

(c) Design and construction.

(1) Responsibility. This subsection applies when the public or private entity is responsible for the design, construction, and[-] operation, as applicable, of each project it undertakes. This responsibility includes ensuring that all EPIC are addressed in project design and carried out during project construction and operation.

(2) Design criteria.

(A) State criteria. All designs developed by or on behalf of the public or private entity shall comply with the latest version of the department's manuals.

(i) Highway projects. Each highway project shall, at a minimum, comply with the:

- (I) Roadway Design Manual;

- Devices;
- (II) Pavement Design Manual;
  - (III) Hydraulic Design Manual;
  - (IV) Texas Manual on Uniform Traffic Control Devices;
  - (V) Bridge Design Manual;
  - (VI) Texas Accessibility Standards;
  - (VII) 16 TAC Chapter 68 relating to Elimination of Architectural Barriers; and
  - (VIII) Americans with Disabilities Act Accessibility Guidelines.

(ii) Railway projects. Each railway project shall comply, at a minimum, with the current version of the American Railway Engineering and Maintenance of Right of Way Association standards.

(B) Alternative criteria. The department may authorize or require a [A] public or private entity [may request approval] to use different accepted criteria for a particular item of work. Alternative criteria may include the latest version of the AASHTO Policy on Geometric Design of Highways and Streets, the AASHTO Pavement Design Guide, and the AASHTO Bridge Design Specifications. The use of alternative criteria is subject to the approval of the Federal Highway Administration or the Federal Railroad Administration for those projects involving federal funds. The executive director may approve the use of alternative criteria if the alternative criteria are determined to be sufficient to protect the safety of the traveling public and protect the integrity of the transportation system.

(C) Exceptions to design criteria. A public or private entity may request approval to deviate from the state or alternative criteria for a particular design element on a case-by-case basis. The request for approval shall state the criteria for which an exception is being requested and must include a comprehensive description of the circumstances and engineering analysis supporting the request. The executive director may approve an exception after determining that:

(i) the particular criteria could not reasonably be met due to physical, environmental, or other relevant factors and that the proposed design is a prudent engineering solution; or [-]

(ii) the proposed design is at least equivalent in quality and safety to the particular criteria.

(3) Access to a highway project.

(A) Access management. Access to a highway shall be in compliance with the department's access management policy.

(B) Interstate access. For proposed highway projects that will change the access control line to an interstate highway, the public or private entity shall submit to the department all data necessary for the department to request Federal Highway Administration approval.

(4) Preliminary design submission and approval. When design is approximately 30% complete or as otherwise provided in a pass-through agreement, the public or private entity shall send the following preliminary design information to the department for review, review and comment, or review and approval, as designated by the department in the pass-through agreement, in accordance with the procedures and timeline established in the pass-through [project development] agreement [described in subsection (d) of this section]:

(A) for a highway project, a completed Design Summary Report form as contained in the department's Project Development Process Manual;

(B) a design schematic depicting plan, profile, and superelevation information for each roadway or a design schematic depicting plan, profile, and superelevation based on top of railway for each railway line;

(C) typical sections showing existing and proposed horizontal dimensions, cross slopes, location of profile grade line, pavement layer thickness and composition, earthen slopes, and right of way lines for each roadway or subballast and ballast layer thickness and composition for each railway line;

(D) bridge, retaining wall, and sound wall layouts;

(E) hydraulic studies and drainage area maps showing the drainage of waterways entering the project and local project drainage;

(F) an explanation of the anticipated handling of existing traffic during construction;

(G) when structures meeting the definition of a bridge as defined by the National Bridge Inspection Standards are proposed, an indication of structural capacity in terms of design loading;

(H) an explanation of how the U.S. Army Corps of Engineers permit requirements, including associated certification requirements of the Texas Commission on Environmental Quality, will be satisfied if the project involves discharges into waters of the United States; and

(I) for a highway project, the location and text of proposed mainlane guide signs shown on a schematic that includes lane lines or arrows indicating the number of lanes.

(5) Highway design and construction specifications.

(A) Except as provided in subparagraph (C) of this paragraph, all [A#] plans, specifications, and estimates developed by or on behalf of the public or private entity for a highway project shall conform to the latest version of the department's Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges, and shall conform to department-required special specifications and special provisions.

(B) The executive director may approve the use of an alternative specification if the proposed alternative specification is determined to be sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the traveling public.

(C) For a project designed, developed, financed, constructed, maintained, or operated under a pass-through agreement procured under §5.61 of this subchapter (relating to Solicitation of Private Proposals), the executive director may approve the use of criteria or other requirements applicable to a particular item of work that differ from the requirements of this section. The criteria or requirements approved by the executive director may include the standard technical provisions and specifications that the department uses for transportation projects delivered under comprehensive development agreements that are procured under Chapter 27, Subchapter A of this title (relating to Comprehensive Development Agreements). In approving the alternative criteria or requirements, the executive director must determine that the alternative criteria or requirements are sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the traveling public.

(6) Railway construction specifications.

(A) All plans, specifications, and estimates developed by or for the public or private entity for a railway project shall conform to all construction and material specifications established in the American Railway Engineering and Maintenance of Right of Way Association standards.

(B) The executive director may approve the use of an alternative specification if the proposed alternative specification is determined to be sufficient to ensure the quality and durability of the finished product for the intended use and the safety of the public and the railway system.

(7) Submission and approval of final design plans and contract administration procedures. When final plans are complete, the public or private entity shall send ~~[the following information]~~ to the department for review, ~~review and comment, or review and approval, as designated by the department in the pass-through agreement,~~ in accordance with the procedures and timelines established in the pass-through agreement [contract described in §5.57(b) of this subchapter]:

(A) seven copies of the final set of plans, specifications, and engineer's estimate (PS&E) that have been signed and sealed by the responsible engineer;

(B) revisions to the preliminary design submission previously ~~reviewed [approved]~~ by the department in a format that is summarized or highlighted for the department;

(C) a proposal for awarding the construction contract in compliance with applicable state and federal requirements;

(D) contract administration procedures for the construction contract with criteria that comply with the applicable national or state administration criteria and manuals; and

(E) the location and description of all EPIC addressed in construction.

(8) Construction inspection and oversight.

(A) Unless the department agrees in writing to assume responsibility for some or all of the following items, the public or private entity is responsible for:

(i) overseeing all construction operations, including the oversight and follow through with all EPIC;

(ii) assessing contract revisions for potential environmental impacts; and

(iii) obtaining any necessary EPIC required for contract revisions.

(B) The department may inspect the construction of the project at times and in a manner it deems necessary to ensure compliance with this section.

(9) Contract revisions. All revisions to any construction contract entered into under a pass-through agreement under this subchapter shall comply with the latest version of the applicable national or state administration criteria and manuals, and must be submitted to the department for its records. Any revision that affects prior environmental approvals or significantly revises project scope or the geometric design must be submitted to the department for approval prior to beginning the revised construction work. Procedures governing the department's approval, including time limits for department review, shall be included in the agreement described in §5.57(b) of this subchapter (relating to Final Approval).

(10) As-built plans. Within six months after final completion of the construction project, the public or private entity shall file

with the department a set of the as-built plans incorporating any contract revisions. These plans shall be signed, sealed, and dated by a professional engineer licensed in Texas certifying that the project was constructed in accordance with the plans and specifications.

(11) Document and information exchange. The public or private entity agrees to deliver to the department all materials used in the development of the project including aerial photography, computer files, surveying information, engineering reports, environmental documentation, general notes, specifications, contract provision requirements, and all information necessary for the department to update legacy data systems.

(12) State and federal law. The public or private entity shall comply with all federal and state laws and regulations applicable to the project and the state highway system, and shall provide or obtain all applicable permits, plans, and other documentation required by a federal or state entity except for any permits, plans, or other documentation that the department agrees to obtain.

(d) Contracts. All contracts for the development, construction, or operation of a project shall be awarded in compliance with applicable law.

(e) Federal law. If any federal funds are used in the development or construction of a project under this subchapter, or if the department intends to fund pass-through toll payments with federal funds, the development and construction of the project shall be accomplished in compliance with all applicable federal requirements.

(f) Bond financing.

(1) Department review. If any public or private entity responsible for financing a portion of a project to be developed under a pass-through agreement intends to sell bonds and use pass-through toll or fare payments from the department as evidence of financial capability to repay the bonds, the entity shall provide the department an opportunity to review and comment on bond offering documents prior to sale of the bonds.

(2) Pass-through agreement. The pass-through agreement or the terms of a solicitation for a pass-through agreement procured under §5.61 of this subchapter must provide that:

(A) the department will have at least five business days after the date on which it receives all of the bond offering documents to review those documents; and

(B) the public or private entity must obtain department pre-approval of any provision in the bond offering documents that describes the pass-through agreement, the department's obligations under the pass-through agreement, the interrelationship of the department, commission, and state highway fund, and the department's obligation to provide bond investors with updated information on the status of the state highway fund.

(3) Business day. For purposes of this subsection, "business day" excludes Saturday, Sunday, a federal holiday, the Friday after Thanksgiving, and December 24 and 26.

#### §5.61. Solicitation of Private Proposals.

(a) Scope. This section applies only to the procurement of a pass-through agreement with a private entity for the design, development, financing, construction, maintenance, or operation of a highway project.

(b) Applicability of other provisions. The requirements of §§5.53 - 5.56, 5.57(a), 5.59(c)(7)(C), (D), and (c)(9) of this subchapter (relating to Proposal, Participation in the Program, Commission Approval to Negotiate, Proposals from Private Entities, Final Approval,

and Project Development by Public or Private Entity, respectively) do not apply to a proposal submitted under this section.

(c) Content of pass-through agreement. The requirements for pass-through agreements set forth in §5.57(b) of this subchapter apply to a pass-through agreement procured under this section, except that the department may exclude the requirement for an estimated budget.

(d) Request for qualifications - notice. If authorized by the commission to issue a request for qualifications for a project, the department will prepare a request for qualifications under subsection (e) of this section and will publish notice advertising the issuance of the request for qualifications in the *Texas Register*. The department will post the notice and the request for qualifications on the department's Internet website. The department may also furnish the request for qualifications to private entities that the department believes might be interested and qualified to participate in the proposed project.

(e) Request for qualifications - content. The request for qualifications will include the criteria for professional experience, technical competence, and capability to complete the proposed project, other information that the department considers relevant or necessary for the project, and the criteria that will be used to evaluate the submittals made in response to the request and the relative weight given to the criteria. At its sole option, the department may furnish conceptual designs, fundamental details, technical studies and reports, or detailed plans of the proposed project in the request for qualifications. The request for qualifications may request one or more conceptual approaches to bring the project to fruition.

(f) Request for qualifications - evaluation. The department, after evaluating the submittals received in response to a request for qualifications, will identify the entities that are considered most qualified to submit detailed proposals for a proposed project and approve a short-list that is composed of those entities. The department shall notify each entity that provides a qualification submittal whether or not it is on the short-list of qualified entities.

(g) Requests for proposals. If authorized by the commission, the department will issue a request for proposals from all qualified entities on the short-list that requires the submission of detailed documentation regarding the project. Specific evaluation criteria established for the project under subsection (j) of this section and requests for pertinent information will be set forth in the request for proposals. The request for proposals may require the submission of information relating to:

- (1) the proposer's qualifications and demonstrated technical competence;
- (2) the feasibility of developing the project as proposed;
- (3) detailed engineering or architectural designs;
- (4) the proposer's ability to meet schedules;
- (5) a detailed financial plan, including costing methodology, cost proposals, and project financing approach;
- (6) the amount and period of payments requested and proposed pass-through payment schedule;
- (7) the amount of the project proposed to be delivered for a schedule of periodic payments established by the department; and
- (8) any other information the department considers relevant or necessary.

(h) Alternative solicitation process. If authorized by the commission, the department may utilize a one-step process for the procurement of a pass-through agreement under this section in which a request for proposals is issued in accordance with subsection (g) of this sec-

tion to prequalified private entities. Subsections (d), (e), and (f) of this section do not apply for a procurement under this subsection. Private entities may be prequalified using the procedure set forth in §27.7 of this title (relating to Design-Build Contracts), or may be prequalified by being shortlisted under a comprehensive development agreement procurement that is converted by the commission to a procurement for a pass-through agreement under this section.

(i) Requests for proposals - payment for work product. The request for proposals may stipulate an amount of money that the department will pay to an unsuccessful proposer that submits a detailed proposal that is responsive to the requirements of the request for proposals, not to exceed the value of any work product contained in the proposal that can, as determined by the department, be used by the department in the performance of its functions. The request for proposals may provide for the payment of a partial amount in the event the procurement is terminated. The commission shall approve the amount of the payment to be stipulated in the request for proposals. In determining whether to approve a payment, the commission shall consider:

(1) the effect of a payment on the department's ability to attract meaningful proposals and to generate competition;

(2) the work product expected to be included in the proposal and the anticipated value of that work product; and

(3) the costs anticipated to be incurred by a private entity in preparing a proposal.

(j) Detailed proposal evaluation criteria. The department will evaluate proposals using evaluation criteria the department considers appropriate for the project. The criteria may include:

(1) the reasonableness of any financial plan submitted by a proposer;

(2) the reasonableness of the project schedule;

(3) the amount of pass-through tolls to be paid;

(4) the period of payment;

(5) any maximum and minimum payment amounts;

(6) the amount of the project proposed to be delivered for a schedule of periodic payments established by the department;

(7) the reasonableness of assumptions, including those related to ownership, legal liability, law enforcement, and operation and maintenance of the project;

(8) financial exposure and benefit to the department;

(9) compatibility with other planned or existing transportation facilities;

(10) likelihood of obtaining necessary approvals and other support;

(11) cost and pricing;

(12) scheduling;

(13) environmental impact;

(14) manpower availability;

(15) use of technology;

(16) public outreach and communications;

(17) project coordination, with attention to efficiency and quality of finished product; and

(18) any other criteria, including conformity with department policies, guidelines, and standards, that the department considers



appropriate to maximize the overall performance of the project and the resulting benefits to the state.

(k) Apparent best value proposal. After evaluation of the proposals under subsection (j) of this section, the department will rank all proposals that are complete and responsive to the request for proposals, and that comply with the requirements of this subchapter. The department may select the private entity whose proposal offers the apparent best value to the department. After award of the pass-through agreement, the department will notify proposers in writing of the department's rankings and will make the rankings available to the public.

(l) Selection of entity. The department will submit a recommendation to the commission regarding approval of the proposal determined to provide the apparent best value to the department. The commission may approve or disapprove the recommendation, and if approved, will award the pass-through agreement, subject to the successful completion of negotiations, any necessary federal action, execution by the executive director of the agreement, and satisfaction of any other conditions that are identified in the request for proposals or by the commission.

(m) Negotiations with selected entity. If authorized by the commission, the department will attempt to negotiate a pass-through agreement with the apparent best value proposer, or the department may accept the proposal and enter into the agreement without negotiation. If an agreement satisfactory to the department cannot be negotiated with that proposer, or if, in the course of negotiations, it appears that the proposal will not provide the department with the best value, the department will formally end negotiations with that proposer and, in its discretion:

(1) reject all proposals;

(2) modify the request for proposals and issue that request in accordance with subsection (g) of this section; or

(3) proceed to the next most highly ranked proposal and attempt to negotiate a pass-through agreement with the entity that submitted that proposal in accordance with this section.

(n) Reservation of rights. The department reserves all rights available to it by law in administering this section, including, without limitation, the right in its sole discretion to:

(1) withdraw a request for qualifications or a request for proposals at any time, and issue a new request in accordance with the appropriate provisions of this section;

(2) reject any and all qualifications submittals or proposals at any time;

(3) terminate the evaluation of any and all qualifications submittals or proposals at any time;

(4) suspend, discontinue, or terminate negotiations with any proposer at any time before the execution of the agreement by all parties;

(5) negotiate with a proposer without being bound by any provision in its proposal;

(6) negotiate with a proposer to include aspects of unsuccessful proposals for that project in the agreement;

(7) request or obtain additional information about any qualifications submittal or proposal from any source;

(8) modify, issue addenda to, or cancel any request for qualifications or request for proposals; or

(9) waive deficiencies in a qualifications submittal or proposal or accept and review a non-conforming qualifications submittal or proposal.

(o) Department information. Any information that the department makes available to a proposer is provided as a convenience to the proposer and without representation or warranty of any kind except as expressly specified in the request for qualifications or request for proposals.

(p) Procedure for communications. If a proposer has a question or request for clarification regarding this subchapter or any request for qualifications or request for proposals issued by the department, the proposer must submit the question or request for clarification in writing to the person responsible for receiving those submissions, as designated in the request for qualifications or request for proposals, and the department will provide its responses in writing. The proposer shall comply with all requirements in the request for qualifications or request for proposals regulating communications. A proposer may not rely on any oral responses to inquiries.

(q) Protest procedures. A protest regarding a procurement conducted under this section may only be made to the extent authorized under §27.6 of this title (relating to Protest Procedures), and in accordance with the procedures prescribed in that section.

(r) Termination of pass-through agreement. A pass-through agreement procured under this section may provide for the payment of compensation as a result of the termination of the agreement, including compensation for the purchase by the department, under terms and conditions established in the agreement, of the interest of the private entity in the agreement and related property.

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

Filed with the Office of the Secretary of State on May 31, 2013.

TRD-201302213

Jeff Graham

General Counsel

Texas Department of Transportation

Earliest possible date of adoption: July 14, 2013

For further information, please call: (512) 463-8683



## CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

### SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

#### 43 TAC §9.35

The Texas Department of Transportation (department) proposes amendments to §9.35, Federal Process, concerning Contracting for Architectural, Engineering, and Surveying Services.

#### EXPLANATION OF PROPOSED AMENDMENTS

The Federal Highway Administration is conducting a pilot program to evaluate the use of a "safe harbor rate" for engineering and design-related services contracts. The safe harbor rate serves as an indirect cost rate for engineering and design-related firms that lack a Federal Acquisition Regulation (FAR) compli-

ant indirect cost rate. The amendment to §9.35 allows the safe harbor rate to be used, which accommodates the department's participation in the pilot program.

#### FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the amendment as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mark Marek, Director, Design Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendment.

#### PUBLIC BENEFIT AND COST

Mr. Marek has also determined that for each year of the first five years in which the section is in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be the department's participation in the pilot program, which serves to enhance competition for engineering and design-related services contracts by accommodating firms that lack an FAR-compliant indirect cost rate. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §9.35 may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "9.35." The deadline for receipt of comments is 5:00 p.m. on July 15, 2013. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

#### STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.041, regarding the use by the department of private sector professional services for transportation projects, and Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act), which sets forth requirements for selection and contracting of architectural and engineering services.

#### CROSS REFERENCE TO STATUTE

Government Code, Chapter 2254, Subchapter A (Professional Services Procurement Act) and Transportation Code, §223.041.

#### §9.35. Federal Process.

(a) This section applies to an engineering or design related service contract directly related to a highway construction project and reimbursed with federal-aid highway program (FAHP) funding.

(b) A firm providing engineering and design related services must be administratively qualified under §9.34(b)(2) - (6) of this subchapter (relating to Standard Process), or use an indirect cost rate applicable under Federal Highway Administration regulations or guidelines, by the closing date of the NOI to compete for contracts under this section.

Paragraphs (7) and (8) of §9.34(b) of this subchapter do not apply to a contract under this section.

(c) Except as provided in subsection (b) of this section, the process described in §9.34 of this subchapter applies to contracts under this section.

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

Filed with the Office of the Secretary of State on May 31, 2013.

TRD-201302214

Jeff Graham

General Counsel

Texas Department of Transportation

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For further information, please call: (512) 463-8683



## CHAPTER 28. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS

### SUBCHAPTER F. PORT FREEPORT NAVIGATION DISTRICT PERMITS

#### 43 TAC §§28.60 - 28.67

The Texas Department of Transportation (department) proposes new §§28.60 - 28.67, concerning Port Freeport Permits.

#### EXPLANATION OF PROPOSED NEW SECTIONS

Under Transportation Code, Chapter 623, Subchapter K, the Texas Transportation Commission (commission) has the authority to authorize Port Freeport (district) to issue permits for oversize and overweight vehicles on certain roads within the district's territory. The district contacted the department and expressed the desire to obtain the authority needed to issue permits as allowed under current state law. The proposed new sections are necessary to authorize the district to issue permits and to implement and carry out the provisions of Transportation Code, Chapter 623, Subchapter K. These rules add new Subchapter F, which was developed to be consistent with similar optional permitting programs previously established by the commission.

New §28.60 sets out the purpose of Subchapter F, which is to allow the district the authority to issue permits for the movement on roads designated by Transportation Code, §623.219(b) of oversize or overweight vehicles weighing up to 125,000 pounds.

New §28.61 sets out the applicable definitions used in the subchapter.

New §28.62 provides the powers and duties of the district and the department for the implementation and oversight of the district permit program. Subsection (a) authorizes the issuance of permits and collection of fees and provides the maximum dimensions and gross weight that may be allowed under a permit. Subsection (b) authorizes the department to require a surety bond to pay for the costs of the maintenance of the roadways that are used by the permitted vehicles if the amount of the fees deposited in the state highway fund is not sufficient to cover those costs. The district can prevent recovery on the bond by paying the amount not covered by the fees. The section also covers the verification of permits, the provision of training necessary for the district to issue permits, and the accounting and auditing re-

quirements. Subsection (g) provides the department's authority to ensure that the district complies with applicable law, including the rules in new Subchapter F. Subsection (h) sets out the fee requirements. Subsection (i) requires the district to enter into a contract with the department for the maintenance of roads on which the permitted vehicles will travel. Finally, subsection (j) sets out the district's reporting requirements. The provisions of the section were developed to be in compliance with Transportation Code, Chapter 623, Subchapter K, and to be consistent with similar optional permitting programs previously established.

New §28.63 establishes the eligibility requirements that must be satisfied for the issuance of a permit by the district. The section prohibits the district from issuing a permit to a person or for a vehicle if administrative penalties imposed under Transportation Code, §623.271 have not been paid. This prohibition is required under Transportation Code, §623.271.

New §28.64 sets out the requirements related to the form and content of the application for a permit and of the permit. The requirements are necessary to comply with Transportation Code, §623.215 and are as consistent as possible with similar optional permitting programs previously established by the department.

New §28.65 provides the permit weight limits for axles that the district must follow as part of the permit program. Requirements and specifications include minimum axle group spacing and maximum permit weight for single and multiple axles.

New §28.66 sets forth movement requirements and restrictions that the district and a permittee must follow as part of the permit program. A permittee is required to carry the issued permit when moving the permitted vehicle and is prohibited under this section from moving an oversize or overweight load if a permit becomes void. A permit is void on issuance if the applicant for the permit gives false or incorrect information and becomes void when the permittee fails to comply with the restrictions or conditions stated in the permit or when the permittee changes or alters the information in the permit. The section provides limitations on the movement of a permitted vehicle because of weather conditions, road work, or time of day. Finally, the section sets out the requirements for types of scales that may be used to weigh permitted vehicles and provides speed restrictions.

New §28.67 provides the records maintenance requirements that the district must follow as part of the permit process.

#### FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years in which the new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new sections. The cost of authorizing the district to issue oversize and overweight vehicle permits and maintaining the affected roads will be offset by the permit fees collected by the district.

Howard Holland, Director, Maintenance Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the new sections.

#### PUBLIC BENEFIT AND COST

Mr. Holland has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the new sections will be convenience and improved public safety. There will be no adverse economic effect on small businesses.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed new §§28.60 - 28.67 may be submitted to Robin Carter, Office of General Counsel, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "28.60 - 28.67." The deadline for receipt of comments is 5:00 p.m. on July 15, 2013. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed new sections, or is an employee of the department.

#### STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §623.212, which allows the commission to authorize the district to issue permits for the movement of oversize or overweight vehicles, and Transportation Code, §623.002, which provides the commission with the authority to establish rules necessary to implement Transportation Code, Chapter 623.

#### CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 623, Subchapter K.

##### §28.60. Purpose.

In accordance with Transportation Code, Chapter 623, Subchapter K, the commission may authorize Port Freeport to issue permits for the movement of oversize or overweight vehicles carrying cargo on roads designated by Transportation Code, §623.219(b). This subchapter sets forth the requirements and procedures applicable to the issuance of permits by Port Freeport for the movement of oversize and overweight vehicles.

##### §28.61. Definition.

In this subchapter, "district" means Port Freeport, which is subject to Special District Local Laws Code, Chapter 5002.

##### §28.62. District's Powers and Duties.

(a) District authorized to issue permits. The district may issue a permit and collect a fee for the movement within the territory of the district on the roads designated by Transportation Code, §623.219(b) of a vehicle or vehicle combination that exceeds the vehicle size or weight limits specified by Transportation Code, Chapter 621, Subchapters B and C, but does not exceed loaded dimensions of 12 feet wide, 16 feet high, and 110 feet long, and does not exceed 125,000 pounds gross weight.

(b) Surety bond. The department may require the district to post a surety bond in the amount of \$500,000 for the reimbursement of the department for actual maintenance costs of roads designated by Transportation Code, §623.219(b) if revenue collected from permits issued under this subchapter is insufficient to pay for those costs and the district fails to reimburse the department for those costs.

(c) Verification of permits. The district shall provide law enforcement and department personnel access to any of the district's property to verify compliance with this subchapter by the district or another person.

(d) Training. The district shall provide or obtain any training necessary for personnel to issue permits under this subchapter. The department may provide assistance with training on request by the district.

(e) Accounting. The department shall develop accounting procedures related to permits issued under this subchapter with which the district must comply for revenue collections and any payment made to the department under subsection (i) of this section.

(f) Audits. The department may conduct audits annually or at the direction of the executive director of all permit issuance activities of the district. To insure compliance with applicable law, audits at a minimum will include a review of all permits issued, financial transaction records related to permit issuance and vehicle scale weight tickets, and the monitoring of personnel issuing permits under this subchapter.

(g) Revocation of authority to issue permits. If the department determines as a result of an audit that the district is not complying with this subchapter or other applicable law, the executive director will issue a notice to the district allowing 30 days for the district to correct any non-compliance issue. If the department determines that, after that 30-day period, the district has not corrected the issue, the executive director may revoke the district's authority to issue permits under this subchapter. The district may appeal to the commission in writing the revocation of its authority under this subsection. If the district appeals the revocation, the district's authority to issue permits under this subchapter remains in effect until the commission makes a final decision on the appeal.

(h) Fees. Fees under this subchapter may be collected, deposited, and used only as provided by Transportation Code, §623.214. The district may determine acceptable methods of payment. All fees transmitted to the department must be in U.S. currency. On revocation of the district's authority to issue permits, termination of the maintenance contract entered into under subsection (i) of this section, or expiration of this subchapter, the district shall pay to the department all permit fees collected by the district, less allowable administrative costs.

(i) Maintenance contract. The district shall enter into a contract with the department for the maintenance of roads designated by Transportation Code, §623.219(b) for which a permit may be issued under this subchapter. The contract will cover routine maintenance, preventive maintenance, and total reconstruction of the roadway and bridge structures, as determined by the department to maintain the current level of service, and may include other types of maintenance.

(j) Reporting. The district shall provide monthly and annual reports to the department's Finance Division regarding all permits issued and all fees collected during the period covered by the report. The report must be in a format approved by the department.

§28.63. Permit Eligibility.

(a) Registration requirements. To be eligible for a permit under this subchapter:

(1) a vehicle or combination of vehicles must be registered under Transportation Code, Chapter 502; and

(2) the owner of the vehicle or combination of vehicles must be registered as a motor carrier under Transportation Code, Chapter 643 or 645.

(b) Prohibition for unpaid penalties. The district may not issue a permit under this subchapter:

(1) to a person or company that is prohibited under Transportation Code, §623.271 from being issued a permit; or

(2) for a vehicle that is prohibited under Transportation Code, §623.271 from being issued a permit.

§28.64. Permit Issuance Requirements and Procedures.

(a) Permit application. Application for a permit issued under this subchapter must be in a form approved by the department and at a minimum must include:

(1) the name of the applicant;

(2) the name of the driver of the vehicle in which the cargo is to be transported;

(3) a description of the kind of cargo to be transported;

(4) the kind and weight of each commodity to be transported;

(5) the maximum weight and dimensions of the proposed vehicle combination, including number of tires on each axle, tire size for each axle, distance between each axle measured from center of axle to center of axle, and the specific weight of each individual axle when loaded;

(6) the location where the cargo will be loaded; and

(7) the date or dates on which movement is requested.

(b) Permit form and contents. A permit issued under this subchapter must be in a form approved by the department and at a minimum must include all information required under Transportation Code, §623.215(a) and §623.216.

§28.65. Permit Weight Limits for Axles.

(a) Minimum axle group spacing. For an axle group to be permitted for maximum weight authorized under this section:

(1) an axle group must have a minimum spacing of four feet, measured from center of axle to center of axle, between each axle in the group; and

(2) two or more consecutive axle groups must have a minimum axle spacing of 12 feet, measured from center of the last axle of a group to center of the first axle of the immediately following group.

(b) Maximum permit weight. Maximum permit weight for an axle or axle group is the weight computed by multiplying 650 pounds times the total number of inches of the width of tires on the axle or group or the following applicable axle or axle group weight, whichever is less:

(1) single axle - 25,000 pounds;

(2) two-axle group - 46,000 pounds;

(3) three-axle group - 60,000 pounds;

(4) four-axle group - 70,000 pounds;

(5) five-axle group - 81,400 pounds; or

(6) trunnion axles - 60,000 pounds if:

(A) the trunnion configuration has two axles;

(B) there are a total of 16 tires for the trunnion configuration; and

(C) the trunnion axle, as shown in the following diagram, is 10 feet in width.

Figure: 43 TAC §28.65(b)(6)(C)

(c) Tire load rating. A permit issued under this subchapter does not authorize the vehicle to exceed manufacturer's tire load rating.

(d) Permits for vehicles exceeding permit weight limits. For a vehicle exceeding weight limits provided in this section, a person must apply directly to the Texas Department of Motor Vehicles for an

oversize or overweight permit in accordance with Transportation Code, Chapter 623.

§28.66. Movement Requirements and Restrictions.

(a) Carrying of permit. The original permit issued by the district must be carried in the permitted vehicle.

(b) Prohibition on movement with void permit. A permittee is prohibited from transporting an oversize or overweight load with a void permit. A permit is void if the applicant gives false or incorrect information. A permit becomes void when the permittee fails to comply with the restrictions or conditions stated in the permit or when the permittee changes or alters the information in the permit.

(c) Weather conditions or road work. Movement of a permitted vehicle is prohibited when:

(1) visibility is reduced to less than 2/10 of one mile;

(2) the road surface is hazardous due to weather conditions, such as rain, ice, sleet, or snow; or

(3) highway maintenance or construction work is being performed.

(d) Daylight and night movement restrictions. An oversize permitted vehicle may be moved only during daylight hours. A permitted vehicle that is overweight but not oversize may be moved at any time.

(e) Weight ticket requirement. Any vehicle issued a permit by the district must be weighed on scales that are capable of determining gross vehicle weights and individual axle loads and are certified by the Texas Department of Agriculture or accepted by the United Mexican States.

(f) Speed. The maximum speed for a permitted vehicle is set by Transportation Code, §623.217.

§28.67. Records.

The district shall maintain records that evidence compliance with this subchapter. Those records are subject to audit by department personnel.

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

Filed with the Office of the Secretary of State on May 31, 2013.

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Jeff Graham

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Texas Department of Transportation

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For further information, please call: (512) 463-8683

