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CHAPTER 73. LABORATORIES

25 TAC §73.21

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §73.21, concerning the Newborn Screening Program, without changes to the proposed text as published in the July 5, 2013, issue of the *Texas Register* (38 TexReg 4291), and the section will not be republished.

BACKGROUND AND PURPOSE

The department administers the Newborn Screening Program, which is designed to screen all newborns in the state for certain genetic or heritable disorders. If identified and treated early, serious problems such as developmental delays, intellectual disability, illness, or death can be prevented or ameliorated. The program is structured into two major components. The department's laboratory receives the blood specimens collected from newborns, performs the blood-based testing, and reports the results to submitters of the specimens. If the results for one of the laboratory tests are out of the expected range, the results are also sent to department clinical care coordination staff in the Newborn Screening Program for prompt follow up and intervention. Some testing for other conditions is done at the point-of-care (i.e., by health care professionals caring for the infant, as opposed to department staff). Limited benefits through the department are potentially available to eligible individuals. Benefits include confirmatory testing, medications, vitamins, and dietary supplements (metabolic foods, low-protein foods). The amendments to 25 TAC Chapter 37, which are adopted in this issue of the *Texas Register*, apply to the operations of both of these two main components of the Newborn Screening Program.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). Section 73.21 has been reviewed and the department has determined that §73.21 should be repealed and moved into 25 TAC Chapter 37.

SECTION-BY-SECTION SUMMARY

Section 73.21, related to laboratory specimen submission for newborn screening, is repealed and the content placed in new 25 TAC §37.55 to accommodate the placement of information concerning newborn screening in one chapter of the rules. Certain summary information regarding specimen collection kits from §73.21 of this title has also been included in 25 TAC §37.51 and would specify that specimen collection kits are obtained from the department, and proposed new language would clarify that screening results are reported by the department as required by law.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The repeal is authorized by Health and Safety Code, §33.002, which requires the department to adopt rules necessary to carry out the program, and by Chapter 33 in general; and Government Code, §531.0055(e), and the Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the section implements Government Code, §2001.039.

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

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CHAPTER 139. ABORTION FACILITY REPORTING AND LICENSING

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (Department) adopts amendments to §§139.1, 139.2, 139.4, 139.32, 139.53, 139.56, and 139.57 and new §139.9 and §139.40, concerning the regulation of abortion facilities. The sections are adopted without changes to the proposed text as published in the September 27, 2013, issue of the *Texas Register* (38 TexReg 6536) and, therefore, the sections will not be republished.

BACKGROUND AND JUSTIFICATION

Health and Safety Code, Chapter 245, Texas Abortion Facility Reporting and Licensing Act, requires certain abortion facilities to be licensed by the Department. Health and Safety Code, Chapter 171, the Woman's Right to Know Act, details information to be given to a patient seeking an abortion. The Abortion Facility Reporting and Licensing Rules in 25 Texas Administrative Code (TAC) Chapter 139, implement Health and Safety Code, Chapters 171 and 245.

House Bill (HB) 2, 83rd Legislature, Second Called Session, 2013, effective October 29, 2013, amended Health and

Safety Code, Chapter 171 by adding Health and Safety Code, §171.0031, which specifies requirements of admitting privileges of physicians who perform or induce abortions and requires specific information to be provided to the patient. Health and Safety Code, §245.011 mandates annual reporting to the department on each abortion that is performed in an abortion facility; HB 2 amended the data required to be reported. HB 2 also amended Health and Safety Code, §245.010(a), to require the minimum standards of abortion facilities to be equivalent to the minimum standards of ambulatory surgery centers.

In developing these rules, the department was guided by expressions of legislative intent that accompanied the enactment of HB 2, input of stakeholders, and public comments offered at the meeting of the State Health Services Advisory Council on August 28 and 29, 2013. In particular, the department was guided by the following legislative findings:

(1) substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization;

(2) the state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain;

(3) the compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that an unborn child is capable of feeling pain is intended to be separate from and independent of the compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other. . . .

Act of July 15, 2013, 83rd Leg., 2nd C. S., ch. ____, §1(a)(1)-(3).

The department also was guided by its understanding that the statutory changes enacted in HB 2 were intended by the Legislature to improve the safety of women who seek services from a licensed abortion facility, but particularly women who receive surgical services at a licensed abortion facility. The department also understands that the Legislature determined that patient safety would be improved, in part, by ensuring that a patient of a licensed abortion facility is assured that (1) the physician who treats her or any patient at the facility is capable of attending to her care if she requires hospital care during or after receiving a service at the facility, and (2) the facility is prepared and qualified to meet potential complications resulting from a surgical procedure.

The department understands that the Legislature determined these objectives would principally be accomplished in three ways. First, the Legislature determined that each physician who provides care at a licensed abortion facility must maintain active admitting privileges at a hospital that is within 30 miles of the facility and provides obstetrical or gynecological services. Second, the Legislature concluded that a licensed abortion facility must be qualified to provide care that is "equivalent to" a licensed ambulatory surgical center. Third, the Legislature determined that these objectives would be better assured by submitting licensed abortion facilities to equivalent regulatory oversight.

HB 2's legislative history reveals the Legislature's purposes. Among other things, the Legislature found that:

--Women who choose to have an abortion should receive the same standard of care, including adequate facilities in which

their procedures are performed, any other individual in Texas receives, regardless of the procedure performed. HB 2 seeks to improve the health and safety of a woman who chooses to have an abortion by requiring a physician performing or inducing an abortion to have admitting privileges at a hospital and to provide certain information to the woman.

--In 1992, the Supreme Court ruled in *Casey v. Planned Parenthood* [sic] that states have the right to regulate abortion clinics. In 1997, Texas enforced increased regulations; however, today 30 licensed abortion facilities still operate at a second, lower standard for the most common surgical procedure in Texas performed solely on women. Six Texas abortion facilities meet the standard as ambulatory surgical facilities. In medical practice, Medicare is the national standard for insurance reimbursement. Abortion is an all cash (or limited credit card) business, so abortion facilities have not been subject to the same oversight as other surgical facilities.

--HB 2 requires that the minimum standards for an abortion facility, on and after September 1, 2014, be equivalent to the minimum standards adopted under §243.010 (Minimum Standards) for ambulatory surgical centers. Moving abortion clinics under the guidelines for ambulatory surgical centers will provide Texas women choosing abortion the higher accepted standard of health care. Texas allows no other kind of facilities or practitioners to opt out of the accepted standard of care.

The department derives two principal understandings from the legislative history. First, the department understands that the Legislature was aware of the department's regulation of ambulatory surgical centers, including the operating standards, fire protection and safety requirements, and construction and physical plant standards adopted by the department in Chapter 135. Second, the department understands that the Legislature specifically determined that application of these standards would create the least burdensome set of minimum standards sufficient to improve the safety of patients at a licensed abortion facility.

With these goals in mind, the Legislature passed HB 2 and thereby amended Health and Safety Code, §245.010(a), to require the minimum standards of licensed abortion facilities to be "equivalent to" the minimum standards of ambulatory surgical centers. The phrase "equivalent to" is not defined by HB 2. However, in its common and ordinary meaning, the word "equivalent" is defined to mean, among other things, "equal, as in value, force, or meaning . . . having similar or identical effects" or [b]eing essentially equal, all things considered." *The American Heritage Dictionary of the English Language*, 4th ed., (2006) at 604. Accordingly, the department concludes that the Legislature intended that the minimum standards for licensed abortion facilities be at least equal to the standards applicable to a licensed ambulatory surgical center, in content and effect, and that any exceptions would result in a lesser standard of care for a patient of a licensed abortion facility and thus should not be granted.

SEVERABILITY

The department also understands that the Legislature intended that the separate requirements of HB 2 remain in effect, even if one or more of the provisions, or application of those provisions, is determined to be invalid or unenforceable:

- [I]t is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other. If any application of any provision in this Act to any

person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone.

...

- If any provision of this Act is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

Act of July 15, 2013, 83rd Leg., 2nd C.S., ch. ____, §10(b), (d).

Accordingly, the department adopts the proposed language to ensure the severability of the requirements of these rules consistent with such intent.

SECTION BY SECTION SUMMARY

The amendment to §139.1 is adopted to clarify the purpose of the rules to include implementation of Woman's Right to Know Act, Health and Safety Code, Chapter 171.

The amendment to §139.2 omits the definition of "ambulatory surgical center" (§139.2(8)) to clarify that the rules adopted by reference in Chapter 139 apply to licensed abortion facilities, and requires renumbering of the remaining definitions.

The amendment to §139.4 is adopted to reflect a change in data required by HB 2 to be reported annually to the department by abortion facilities.

Section 139.9 is adopted to ensure that the severability of the requirements of these rules is consistent with the intent of the Legislature and language of HB 2.

Amendments to §139.32 are adopted to clarify the authority of the department to refuse, suspend or revoke a license for an abortion facility and adds the finding of noncompliance with Health and Safety Code, Chapter 171 as grounds for license probation, suspension or revocation.

New §139.40 is adopted to comply with HB 2, which establishes that the minimum standards for an abortion facility must be equivalent to the minimum standards of an ambulatory surgical center, by adopting by reference with certain changes for clarification the relevant rules for ambulatory surgical centers from Chapter 135. The department adopts by reference specific current ambulatory surgical center rules in order to ensure that the minimum standards governing licensed abortion facilities are equivalent to those of ambulatory surgical centers. The department finds that adopting the minimum standards for ambulatory surgical centers to licensed abortion facilities ensures compliance with HB 2 and provides the maximum guidance and consistency in the rules for licensed abortion facilities.

Chapter 135, relating to ambulatory surgical centers is set out below, along with a statement for each rule as to whether it was adopted or not, and the reasoning for its adoption or non-adoption.

25 TAC Chapter 135, Ambulatory Surgical Centers Rules.

Subchapter A. Operating Requirements for ASCs.

§135.1. Scope and Purpose. This rule was not adopted because a sufficient scope and purpose rule already exists in Chapter 139.

§135.2. Definitions. The following definitions were not adopted by reference for the reasons stated:

(1) "Act," which referred to the Ambulatory Surgical Center Licensing Act, and not to the Texas Abortion Facility Licensing and Reporting Act.

(3) "Administrator" is defined in more detail that requires higher qualifications in §139.2(4) and §139.46(2). Furthermore, ambulatory surgical center rules that are adopted require a governing body (§135.4), and §135.6 describes in adequate detail the required administrative functions.

(4) "Advanced practice registered nurse," because Chapter 139 contains a definition of the same term which is more consistent with the Board of Nursing's (which licenses APRNs) definition of the term "advanced practice nurse" which also requires the nurse to have achieved approval by the Board of Nursing based on completion of an advanced higher education program, a standard not yet incorporated in Chapter 135.

(5) "Ambulatory Surgical Center (ASC)," which is a term defined but not used in Chapter 139, and whose inclusion among adopted rules would have caused confusion. The definition also included portions limiting the length of patients stays within the facility that were felt to be inapplicable to licensed abortion facilities.

(8) "Certified registered nurse anesthetist" is defined in exactly the same way in Chapter 139.

(9) "Change of ownership" is defined the same in Chapter 139, with the exception that a requirement for the tax identification number to change in order to qualify as a change in ownership is not present in Chapter 139. This requirement does not create a minimum standard for the protection of the health and safety of patients.

(11) "Department" is defined in exactly the same way in Chapter 139.

(15) "Licensed vocational nurse" is defined in exactly the same way in Chapter 139.

(17) "Person" is defined in exactly the same way in Chapter 139.

(18) "Physician" is defined in exactly the same way in Chapter 139.

(19) "Premises" is defined as a building where a patient receives outpatient surgical services. This was thought to be a source of potential confusion because medical abortions are not surgical procedures.

(20) "Registered nurse" is defined in exactly the same way in Chapter 139.

The following definitions are adopted by reference because they are terms that are used or are anticipated to be used in connection with the ambulatory surgical center rules that are to be adopted, and are not terms whose meaning, without a definition, is clear to stakeholders. Thus, the following definitions are necessary for compliance with HB 2.

(2) "Action plan"--A written document that includes specific measures to correct identified problems or areas of concern; identifies strategies for implementing system improvements; and includes outcome measures to indicate the effectiveness of sys-

tem improvements in reducing, controlling or eliminating identified problem areas.

(6) "Autologous blood units"--Units of blood or blood products derived from the recipient.

(7) "Available"--Able to be physically present in the facility to assume responsibility for the delivery of patient care services within five minutes.

(10) "Dentist"--A person who is currently licensed under the laws of this state to practice dentistry.

(12) "Disposal"--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharge into any waters, including ground waters.

(13) "Extended observation"--The period of time that a patient remains in the facility following recovery from anesthesia and discharge from the postanesthesia care unit, during which additional comfort measures or observation may be provided.

(14) "Health care practitioners (qualified medical personnel)"--Individuals currently licensed under the laws of this state who are authorized to provide services in an ASC.

(16) "Medicare-approved reference laboratory"--A facility that has been certified and found eligible for Medicare reimbursement, and includes hospital laboratories which may be Joint Commission or American Osteopathic Association accredited or nonaccredited Medicare approved hospitals, and Medicare certified independent laboratories.

(21) "Surgical technologist"--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(22) "Title XVIII"--Title XVIII of the United States Social Security Act, 42 United States Code (USC), §§1395 et seq.

The requirements of the following rules from Chapter 135, relating to ambulatory surgical centers, were either adopted or not adopted for the reasons set out below.

Section 135.3, Fees. The requirements of this section were not adopted because HB 2 does not require the adoption of rules relating to licensure fees for licensed abortion facilities.

Section 135.4, Ambulatory Surgical Center (ASC) Operation. The requirements of this section were adopted because Chapter 139 has no identical provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required each licensed abortion facility to be capable of providing a minimum standard of policies and a governing body to set and implement policies and to assume legal responsibility for operation of the facility.

Section 135.5, Patient Rights. The requirements of this section were adopted because Chapter 139 has no identical provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to provide information, privacy, and the opportunity to participate in health care decisions.

Section 135.6, Administration. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. This section complements §135.4 by describing in greater detail the manner in which the governing body of a facility is to function and by indicating some areas on which it is to focus (patient satisfaction, for example).

Section 135.7, Quality of Care. Chapter 139 contains no directly comparable rule, and the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing minimum standard quality of care to their patients.

The requirements of this section supplement the rules in Chapter 139 that address corresponding subject matter (§139.46 and §139.53). Section 135.7 provides additional protection for the patient that is not found in either §139.46 or §139.53, such as requirements that "[p]atient care responsibilities shall be delineated in accordance with recognized standards of practice" and that "[r]eferral to another health care practitioner shall be clearly outlined to the patient and arranged with the accepting health care practitioner prior to transfer."

Section 135.8, Quality Assurance. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing a minimum level of quality assurance to provide for the health and safety of their patients.

The requirements of this section supplement and enhance §139.8 (Quality Assurance), the parallel rule in Chapter 139. Section 135.8 addresses quality assurance issues more extensively and in more detail than §139.8. For example, §135.8 specifically requires that "[a]ssessment techniques shall examine the structure, process, or outcome of care, and shall be assessed prospectively, concurrently, or retrospectively." The department believes that these requirements advance the legislative objective of improving the quality of care provided to patients and making the standards for licensed abortion facilities equivalent to the ASC minimum standards.

Section 135.9, Medical Records. The requirements of this section were adopted because Chapter 139 has no identical provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing a minimum level of medical recordkeeping. This section supplements §139.55 (Clinical Records), the parallel rule in Chapter 139.

While §139.55 is more detailed, it does not contain, for instance, a requirement found in §135.9 that a "single person be designated to be in charge of medical records." The department believes that the requirements of §135.9 enhance the accountability of licensed abortion facilities and the accuracy and complete-

ness of patient records and therefore improve the health and safety of patients.

Section 135.10, Facilities and Environment. The requirements of this section were adopted because Chapter 139 has no identical provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. These requirements supplement §139.48 (Physical and Environmental Requirements) For example, §135.10 contains more detailed provisions concerning hazardous materials and emergency preparedness than §139.48. Section 135.10 primarily focuses on procedures and basic orderliness, such as eliminating hazards that might cause accidents, conducting fire drills, providing for safe evacuation of patients, and the like. Thus, adopting §135.10 makes the minimum standards for licensed abortion facilities equivalent to those for ASCs.

Section 135.11, Anesthesia and Surgical Services. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature intended to require licensed abortion facilities to be implement anesthesia and surgical services using standards equivalent to an ambulatory surgical center. One of the requirements of §135.11(b)(19)--i.e., that a licensed ASC either have a written transfer agreement with a hospital or have all physicians on staff at the ASC maintain admitting privileges at a local hospital--was not adopted because Health and Safety Code, §171.0031 (added by HB 2), provides a more specific standard concerning a physician's responsibility to maintain admitting privileges. The ASC rule, §135.11, offers an ASC the alternative of either requiring all physicians to maintain admitting privileges at a local hospital or maintaining a written transfer agreement. Section 171.0031 allows no such alternative. Instead, it requires a physician who performs an abortion to have admitting privileges at a hospital not further than 30 miles from the location where the abortion is performed or induced.

Section 135.12, Pharmaceuticals Services. The requirements of this section were adopted because Chapter 139 has no identical provision (§139.60(a) only requires a facility to comply with federal and state laws pertaining to the handling of drugs) and because the Legislature determined that provide pharmaceutical services using standards equivalent to an ambulatory surgical center's. These requirements add a significant resource for physician and patient alike and make the licensed abortion facility equivalent to an ASC.

Section 135.13, Pathology and Medical Laboratory Services. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing minimum level of service adequate to meet the needs of the patients and to support an ambulatory surgical center's clinical capabilities.

Section 135.14, Radiology Services. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical cen-

ter. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing minimum level of service adequate to meet the needs of the patients and to support an ambulatory surgical center's clinical capabilities.

Section 135.15, Facility Staffing and Training. The requirements of this section were adopted because Chapter 139 has no identical provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing a minimum level of qualified staff adequate to meet the needs of the patients and to support an ambulatory surgical center's clinical capabilities.

The requirements of this section supplement §139.46 (Licensed Abortion Facility Staffing Requirements and Qualifications), and make the rules for licensed abortion facilities "equivalent to" those of ASCs as required by HB 2.

Section 135.16, Teaching and Publication. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to provide policies concerning teaching and publication services capable of providing a minimum level of service adequate to serve the needs of patients and the community.

Section 135.17, Research Activities. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing minimum level of research activities.

Section 135.18, Unlicensed Ambulatory Surgical Center, was not adopted because §139.3 has adequate provisions for dealing with unlicensed abortion facilities that are not exempted from licensure by Health and Safety Code, Chapter 245.

Section 135.19, Exemptions, was not adopted because the exemptions from licensure as an abortion facility are set forth in Health and Safety Code, §245.004.

Section 135.20, Initial Application and Issuance of License, was not adopted because §§139.21 - 139.25 cover application and issuance of licenses for licensed abortion facilities.

Section 135.21, Inspections, was not adopted because it only required inspections of licensed facilities every three years, whereas present §139.31 requires annual inspections of licensed abortion facilities. Section 139.31 provides greater protection by requiring more frequent (annual) inspections than the three-year minimum intervals prescribed by §135.21, consistent with the department's understanding of HB 2, that its intent is to move licensed abortion facilities under ASC rules where they will provide equivalent standards to those of ASCs, but not to repeal enforcement provisions that apply to licensed abortion facilities.

Section 135.22, Renewal of License, was not adopted because §§139.21 - 139.25, especially §139.23, adequately address re-

newal of licenses for licensed abortion facilities, consistently with the department's understanding of HB 2, that its intent is to move licensed abortion facilities under ASC rules where they will provide equivalent standards to those of ASCs, but not to repeal enforcement provisions that apply to licensed abortion facilities.

Section 135.23, Conditions of Licensure, was not adopted because §§139.21 - 139.25 adequately address conditions of licensure for licensed abortion facilities, consistently with the department's understanding of HB 2, that its intent is to move licensed abortion facilities under ASC rules where they will provide equivalent standards to those of ASCs, but not to repeal enforcement provisions that apply to licensed abortion facilities.

Section 135.24, Enforcement, was not adopted because §§139.31 - 139.33 adequately address enforcement issues, consistently with the department's understanding of HB 2, that its intent is to move licensed abortion facilities under ASC rules where they will provide equivalent standards to those of ASCs, but not to repeal enforcement provisions that apply to licensed abortion facilities.

Section 135.25, Complaints, was not adopted because §139.31(c) adequately addresses complaints, consistently with the department's understanding of HB 2, that its intent is to move licensed abortion facilities under ASC rules so that patients of licensed abortion facilities will benefit from equivalent standards to those of ASCs, but not to repeal enforcement provisions that apply to licensed abortion facilities.

Section 135.26, Reporting Requirements. The requirements of this section were adopted because Chapter 139 has no identical provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing a minimum level of incident reporting to enhance the safety of every facility's patients by allowing by providing accurate and timely input for statistical analysis of adverse incidents and monitoring the frequency of their occurrence.

Section 135.26 adds additional requirements that protect the health and safety of patients, such as the obligation of the facility to report the transfer of a patient to a hospital and to report the development by a patient within 24 hours of discharge of a complication if the complication results in a patient's admission to a hospital. In contrast, the only similar section that applies to licensed abortion facilities, §139.58, requires only the reporting of a woman's death from complications of an abortion.

Section 135.27, Patient Safety Program. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of determining the root cause of adverse events that occur at the facility. Section 135.27 was adopted because it requires the facilities to directly address patient safety by developing and implementing a patient safety program, and by a root cause analysis of adverse events, issues to which no rule in Chapter 139 is entirely dedicated. For example, §135.27 requires facility management to coordinate all patient safety activities, while Chapter 139 does not.

Section 135.28, Confidentiality, was not adopted because more confidentiality is provided to abortion patients and licensed abortion facilities by existing rules in Chapter 139 than by this rule.

Section 135.29, Time Periods for Processing and Issuing a License, was not adopted because §§139.21 - 139.25 adequately address licensure of licensed abortion facilities. Both Chapters 135 and 139 provide a two-year interval for re-application and renewal of licenses.

Subchapter B. Fire Prevention and Safety Requirements.

Section 135.41, Fire Prevention and Safety Requirements. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing a minimum level of fire prevention and safety measures.

Except for some brief and general references in §139.48, Chapter 139 does not address fire prevention, does not require the appointment of a safety officer who is familiar with safety practices in healthcare facilities, and does not forbid the use of extension cords for permanent wiring. Section 135.41 provides for all three and has other safety requirements not found in Chapter 139.

Section 135.42, General Safety. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing minimum level of safety requirements adequate to protect the safety of patients.

Section 135.43, Handling and Storage of Gases, Anesthetics, and Flammable Liquids. The requirements of this section were adopted because Chapter 139 has no identical provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be capable of providing minimum level of safety regimen to ensure the health and safety of its patients.

Subchapter C. Physical Plant and Construction Requirements.

Section 135.51, Construction Requirements for an Existing Ambulatory Surgical Center. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be regulated by the construction standards that provide a minimum level of safety and utility equivalent to that of an ambulatory surgical center.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section has approximately one page of general requirements, such as "A facility shall have a safe and sanitary environment, properly constructed, equipped, and maintained to protect the

health and safety of patients and staff at all times." Section 139.48 does not specify what constitutes proper construction for an existing licensed abortion facility, as does adopted §§135.51 - 135.56.

The adopted rules do not incorporate by reference the provisions of §135.51(a)(1) and (2) that exempt certain ambulatory surgical centers from compliance with the construction standards:

(1) A licensed ambulatory surgical center (ASC) which is licensed prior to the effective date of these rules is considered to be an existing licensed ASC and shall continue, at a minimum, to meet the licensing requirements under which it was originally licensed.

(2) In lieu of meeting the requirements in paragraph (1) of this subsection, an existing licensed ASC may, instead, comply with National Fire Protection Association (NFPA) 101, Life Safety Code 2003 Edition (NFPA 101), Chapter 21, Existing Ambulatory Health Care Occupancies. All documents published by NFPA as referenced in this section may be obtained by writing or calling the NFPA at the following address or telephone number: National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101 or (800) 344-3555.

The department declined to incorporate these provisions for three reasons. First, the plain language of the exemption applies only to an entity that was licensed as an ambulatory surgical center before June 18, 2009, the effective date of the §135.51. Unless a licensed abortion facility was also licensed as an ambulatory surgical center on that date, it would not be eligible for the exemption. Prior to the adoption of HB 2 a licensed abortion facility was permitted to become a licensed ambulatory surgical center, and was thus allowed to utilize any exemptions set out in §135.51. After the adoption of HB 2, all licensed abortion facilities are required to comply with the provisions of that law and Chapter 139. Therefore, the more specific provisions of HB 2, which provides no grandfathering provision, and applies to every licensed abortion facility is the more specific statute with which all licensed abortion facilities must now comply. (The specific statute is thus regarded as an exception to, or a qualification of, any previously enacted general statute on the same subject, which must yield in its scope and effect to the specific provisions of a later statute *Sam Bassett Lumber Co. v. City of Houston*, 145 Tex. 492 (Tex.1947)).

Second, the enactment of HB 2 evidenced the Legislature's intention to place licensed abortion facilities under minimum standards that are equivalent to licensed ambulatory surgical centers. To employ the limited exemption of §135.51 out of context to abortion facilities that were licensed on or before June 18, 2009, would be contrary to the Legislature's specific intent to improve the safety of licensed abortion facilities and contradict the Legislature's unequivocal decision to place licensed abortion facilities under enhanced regulation.

Third, it is well established that where the Legislature has unequivocally expressed its intent, a state agency is not at liberty to craft exceptions where the Legislature did not see fit to supply any. Accordingly, the department determined that it is not authorized to exempt currently licensed abortion facilities from the minimum standards applicable to licensed ambulatory surgical centers through the incorporation of the limited exceptions prescribed by §135.51(a)(1) and (2).

Section 135.52, Construction Requirements for a New Ambulatory Surgical Center. The requirements of this section were

adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be regulated by the construction standards that provide a minimum level of safety and utility equivalent to that of an ambulatory surgical center.

Section 135.53, Elevators, Escalator, and Conveyors. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be regulated by the construction standards that provide a minimum level of safety and utility equivalent to that of an ambulatory surgical center.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section does not contain requirements for elevators, escalators, or conveyors, as does adopted §135.53.

Section 135.54, Preparation, Submittal, Review and Approval of Plans, and Retention of Records. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be regulated by the construction standards that provide a minimum level of safety and utility equivalent to that of an ambulatory surgical center.

Section 135.55, Construction, Inspections, and Approval of Project. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be regulated by the construction standards that provide a minimum level of safety and utility equivalent to that of an ambulatory surgical center.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section has approximately one page of general requirements, such as "A facility shall have a safe and sanitary environment, properly constructed, equipped, and maintained to protect the health and safety of patients and staff at all times." Chapter 139 contains no requirements for inspection and approval of construction projects, as does adopted §135.55.

Section 135.56, Construction Tables. The requirements of this section were adopted because Chapter 139 has no similar provision and because the Legislature determined that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards for a licensed ambulatory surgical center. For purposes of this rule, the department concludes that the Legislature required licensed abortion facilities to be regulated by the construction standards that provide a minimum level of safety and utility equivalent to that of an ambulatory surgical center.

Chapter 139 does not contain tables or drawings of any kind that specify proper construction requirements, so it is not equivalent to rules for ambulatory surgical centers.

Amendments to §139.53 and §139.56 are adopted to specify the admitting privilege requirements of physicians who perform or induce abortions as required by HB 2.

Additional amendments to §139.56 and amendments to §139.57 are adopted to specify the information required by HB 2 to be given to the patient and the requirement for the facility to make available the physician or a staff person with access to the patient's medical records to respond to patient phone calls 24 hours daily as required by Health and Safety Code, §171.0031(a)(2)(A) as amended by HB 2.

COMMENTS

The department has reviewed and prepared responses to comments regarding the proposed rules that were submitted during the comment period and at the State Health Services Council Meetings held on August 28 and 29, 2013.

The department received a total of 19,799 public comments. A total of 5,466 comments, representing approximately 27.6 percent of all comments, contained information that indicates the comments were filed by individuals who reside outside the State of Texas or the United States.

The Texas Alliance for Life, Texas Right to Life, and the Texas Medical Association filed comments in support of the rules. The first two organizations noted that the rules would promote the health and safety of women who seek an abortion in Texas by requiring licensed abortion facilities to comply with the construction and physical plant standards that are now required of ASCs, and by requiring physicians who perform abortions to have admitting privileges at a hospital within 30 miles of the place where the abortions are performed.

The Texas Alliance for Life proposed two changes: (1) that the department amend §139.53 to provide that a physician must be physically present at the abortion facility during the administration of an abortion-inducing drug, and (2) that the rules prohibit a physician from delegating this responsibility.

The Texas Medical Association endorsed the department's "measured approach" in drafting the rules and urged the continued use of "gestational age" as the criterion to estimate the length of a pregnancy. However, if using "gestational age" is not possible, the Texas Medical Association encouraged the department to adopt a rule that defines "probable post-fertilization age."

Response: The department appreciates the comments. The department is working to ensure that the rules will be adopted in time to go into effect January 1, 2014, although, in the case of the changes to make certain standards for ambulatory surgical centers equivalent to those for abortion facilities, abortion facilities are not required to comply with the adopted rules until September 1, 2014.

Regarding the proposed amendment to §139.53, the department notes that the proposed rule addresses matters that are within the practice of medicine and relate to the administration of drugs that are intended to terminate a pregnancy. Proposed §139.53 was intended to implement Section 2 of HB 2, which adds Subchapter D to Health and Safety Code, Chapter 171. This subchapter regulates the distribution, dispensing, and administration of abortion-inducing drugs.

The Texas Medical Board is delegated the authority to regulate the practice of medicine. Occupations Code, §151.003(2). Consistent with this regulatory scheme, Health and Safety Code, §171.062 expressly requires the Texas Medical Board to enforce Subchapter D. In light of this express delegation of authority, and because the Texas Medical Board is delegated principal authority to regulate the practice of medicine in Texas, the department believes that it is not within the department's authority to adopt rules on that subject. The department therefore declines to change the adopted rule to reflect the Texas Alliance for Life's recommendation.

Regarding the Texas Medical Association's recommendation that the department adopt a rule to define the statutory phrase "probable post-fertilization age," the department appreciates the comment but declines to adopt the recommendation for two reasons. First, the department observes that Health and Safety Code, §171.042 (as added by HB 2) employs a common scientific definition of "fertilization" to define the term "post-fertilization age." The department does not believe that the addition of the adjective "probable" creates an ambiguity that requires clarification in the rules.

Second, in the absence of a statutory definition, words and phrases in a statute must be read in context and construed according to the rules of grammar and common usage. Government Code, §311.011(a). In the context of Health and Safety Code, Chapter 171, and in the absence of a statutory definition of the word "probable," the department believes that the Legislature intended the public and the regulated community to resort to the common and ordinary meaning of the word in examining a physician's conduct or a patient's reasonable expectations. See, e.g., *The American Heritage Dictionary of the English Language*, 4th Ed. at 1397 (2006) ("probable" means, inter alia, "Likely to happen or to be true.... Likely but uncertain; plausible").

The department received comments from the American Civil Liberties Union, the American Congress of Obstetricians and Gynecologists, the Center for Reproductive Rights (Texas District), the League of Women Voters of Texas, the National Abortion Foundation, the National Organization for Women, Planned Parenthood of Greater Texas and other Planned Parenthood Entities commenting as one group, 34 Million Friends of the United Nations Population Fund, Rise Up Texas, and Texas Democratic Women. These commenters generally opposed the adoption of some or all of the adopted rules. The department acknowledges these comments and responds below, separately according to the various issues raised by the entire set of commenters.

Numerous comments also were received from interested individuals. The department received comments on topics concerning the substance of the rules, and other comments relating to legal issues and issues concerning the preamble to the proposed rules. The responses to the comments appear by topic. Some comments received included matters that were outside the scope of the proposed rules, including vituperative language and political statements. These comments do not affect the substance or scope of the rule.

The comments related to 14 general categories: (1) a woman's constitutional right to terminate a pregnancy; (2) access to abortion services; (3) the physician's admitting privileges requirement; (4) adoption of ASC construction and physical plant rules; (5) medical necessity for adoption of ASC and admitting privileges requirements; (6) grandfathering licensed abortion facilities regarding ASC rules; (7) exempting facilities where only

medical abortions are performed and waiving the statute for such facilities; (8) abortion facility rules assertedly not "equivalent to" those for ASCs; (9) challenges to statements in the preamble to the proposed rules; (10) retention of annual inspections for licensed abortion facilities; (11) Comments Relating to Disproportionate Impact on Low-Income Women and Women Who Live in Rural Areas; (12) Comments Relating to Assertions That the Department Is Singling Out Abortion Facilities For Punitive Regulation; (13) Comments Relating to Rules Requiring Facilities to Be Prepared to Respond Indefinitely to Abortion Patient Calls; and (14) Comments Relating to Request for Definition of "Admitting Privileges" in Connection with §139.53 and §139.56.

1. Comments Relating to the Right of Women to End a Pregnancy.

Comment: At least one commenter stated that the proposed rules do not show that the department considered women's constitutional right to end a pregnancy.

Response: The department respectfully disagrees. The preamble to the proposed rules quotes in detail the Bill Analysis for HB 2. (38 TexReg 6536) (September 27, 2013, issue); House Comm. on State Affairs, Bill Analysis, Tex. HB 2, 83rd Leg., 2nd C.S. (2013)). The bill analysis refers to the United States Supreme Court case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which recognizes women's right to an abortion, but nevertheless holds that states may regulate abortion clinics.

Various commenters alleged, in very general terms, that the proposed rule would impose various burdens on unidentified clinics, and that the proposed rule could cause some unspecified number of abortion providers to stop providing abortion services in Texas. Some commenters claimed that those results would constitute an "undue burden" under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The department disagrees with these comments for three reasons.

First, the commenters misunderstand the rights at issue. In *Casey*, the Supreme Court recognized the State's profound and legitimate interest in unborn life and its right to reasonably regulate the operation of abortion facilities. The Court held that "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden on a woman's right to terminate a pregnancy." *Id.* at 878. The Court instructed that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability." *Id.* And in reaching those conclusions, the Court emphasized that "[w]hat is at stake is *the woman's right* to make the ultimate decision," *id.* at 877 (emphasis added); no commenter points to any decision that has interpreted the Constitution to afford *abortion providers' rights* to operate particular clinics, to operate those clinics in particular ways, or to maintain particular profit margins.

Second, the comments include only generalized claims that some unspecified number of unidentified clinics might struggle to comply with the rule or close for some undetermined time on account of it. While the department received more than 19,000 comments, the department is not aware of any comment that identified a particular clinic that will permanently shut down; nor is the department aware of any comment that identified a particular reason that a particular clinic would be unable to comply with the rule; and the department is not aware of any comment that identified a particular reason that new clinics

will not open and comply with the rule. To the contrary, the department is aware of reports that at least three new ASCs that plan to open and comply with the rule in Dallas, Houston, and San Antonio by September of 2014. And in all events, the department is not aware of any comments that purport to show how any alleged effect on particular clinics will impact the only right recognized in *Casey*--namely, a woman's right to obtain an abortion. For example, the department is aware of no comments that explain how particular abortion-seeking patients will face unconstitutionally long travel distances, unconstitutionally long wait times, or unconstitutionally high costs for abortion services in any particular part of the State.

Third, even if commenters had provided specific allegations of future harms, the department reasonably could be skeptical of those predictions based on its experience with previous challenges to HB 2. In September 2013, various abortion providers sued to enjoin the department's commissioner from enforcing HB 2's admitting-privileges requirement. In that lawsuit, the abortion providers alleged that particular clinics would be forced to close if the admitting-privileges requirement went into effect. Those allegations proved to be overstated because multiple providers that allegedly would be forced to close nonetheless received admitting privileges and either stayed open or reopened. Not one of the comments received by the department provides any basis to believe that abortion providers would be unable to make similar adjustments and likewise comply with the rule.

The preamble to the proposed rules restated the Legislature's determination that application of certain ASC standards would "create the least burdensome set of minimum standards sufficient to improve the safety of patients of a licensed abortion facility." (38 TexReg 6536) (September 27, 2013 issue). However, as noted previously, the department has examined whether the requirements of the ASC standards in Chapter 135 that the department proposed to integrate into Chapter 139 establish substantial obstacles to a woman's right to elect to terminate a pregnancy. The department understands that the standards may negatively impact some current licensees that elect not to comply with the requirements of the adopted rules, but the department also believes that the Legislature carefully and thoroughly considered these issues in determining that ASC standards were appropriate and necessary to ensure the safety of patients who seek abortion services. In light of this unequivocal expression of legislative intent, the department is not, through the adoption of these rules, at liberty to craft exceptions where the Legislature did not see fit to supply any. See *Public Utilities Com'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988); *Spears v. City of San Antonio*, 223 S.W. 166,169 (Tex.1920); *Stubbs v. Lowrey's Heirs*, 253 S.W.2d 312, 313 (Tex.Civ.App.--Eastland 1952, writ ref'd n.r.e). The department also considered that the Legislature did not require licensed abortion facilities to become licensed as ambulatory surgical centers and established in HB 2 a grace period for compliance until September 1, 2014, more than a year after the bill's passage. From these events, the department inferred that the Legislature did not intend for the grandfathering provision of Chapter 135 to extend to abortion facilities licensed under Chapter 245 of the Health and Safety Code. (38 TexReg 6537) (September 27, 2013 issue)

In summary, the department believes that its preamble to the proposed rules and its selection of only a portion of the ASC rules for adoption demonstrate careful consideration of (1) the rights of women to end a pregnancy, and (2) legislative intent in the enactment of HB 2 to impose the least burdensome standards

sufficient to improve the safety of patients of a licensed abortion facility.

2. Comments Relating to Adequate Access to Abortion Services.

Comment: A number of commenters expressed concern that the adopted rules would limit access to abortion facilities. The commenters stated that many licensed abortion facilities will close if they are required to comply with the ASC rules for construction and physical plant standards and ensure that physicians who perform abortions at their facilities have admitting privileges at a hospital located within 30 mile of the facility. The commenters stated the impact would be particularly acute in rural areas of the state that are remote from large cities.

Response: As explained previously, generalized allegations of inadequate access are unhelpful and insufficient to show that old facilities actually will close, that new facilities will not open, or that any particular woman will be unable to access abortion services.

In 2011, all 72,000+ reported abortions in Texas were performed in only 18 counties. (Department of State Health Services, 2011 Vital Statistics Annual Report, Table 34: Induced Termination of Pregnancy by Age and County of Residence 2011); DSHS response to Public Information Act request Feb. 2, 2011 regarding addresses of all facilities where abortions are performed. March 1, 2011) Patients included women from all but six Texas counties, with more than 1,100 patients' county of residence not reported. (*Id.*)

The department can only infer from the existing geographic distribution of facilities and the number of abortions performed despite that distribution that even if a number of facilities were to close, the adverse impact on Texas women seeking an abortion, if any, would be relatively small.

Specific ASC construction and physical plant rules and physician admitting privilege requirements are addressed elsewhere Parts 4 and 3, respectively, of this Preamble. In general, the department believes that both requirements will significantly improve the quality of abortion care for women, in the first case by providing a safer and more comfortable working environment for staff and patients, thus enabling staff to perform its work better. Many of the ASC physical plant requirements are intended to provide space for health-related functions and goods that relate specifically to the health and safety of patients, such as ample room in the hallways for gurneys and staff, and storage for medical goods and clean linens. In the case of the admitting privileges requirement, the department anticipates that the requirement will enhance continuity of care as opposed to a woman being left to find follow-up care in emergency rooms with a different physician, and will improve the quality of care by requiring physicians who perform abortions to have hospital credentials.

3. Comments Relating to Admitting Privileges Requirement.

Comment: Some commenters opposed §139.53(c)(1) - (2), which require a physician who performs abortions to have admitting privileges at a hospital which provides obstetrical and gynecological services and is located no farther than 30 miles from the place where the abortion is performed. These commenters stated that the requirement is unnecessary because often the hospital chosen by a patient for her follow-up treatment is one close to her home, not necessarily one close to where the abortion is performed. Commenters also assert that admitting privileges for a physician who performs abortions may be difficult to obtain, that obtaining such privileges often

requires months, and that the result of this requirement will be the closure of some facilities and the resultant denial of abortion services to women in the affected areas. They urged that the department not adopt such rules.

Response: The department disagrees. The department is charged with enforcing Chapter 171 of the Health and Safety Code, including §171.0031 as amended by HB 2, the section that contains the provisions opposed by these commenters. The provisions of §171.0031 in question are expressed as conditions precedent to a physician's performing an abortion. ("[A] physician must. . ."). Government Code, §311.016(3).

HB 2's plain language requires a physician who performs abortions to have active admitting privileges at a hospital which provides obstetrical or gynecological services and is located no farther than 30 miles from the place where the abortion is performed.

Section 139.53(c)(1) and (2) clarify that the department will, as the Legislature directed, enforce the statutory requirements by requiring the abortion facilities it licenses to require compliance by the physicians who perform abortions there.

The department understands that the principal objective of the admitting privileges requirement is not to restrict a woman's choice of provider of follow-up care, but to ensure safety and continuity of care by a treating physician in cases that require emergency hospital care. Furthermore, the proposed rules do not limit a woman's ability to seek follow-up care wherever she chooses.

While commenters stress the safety of abortion procedures, the department is aware that it is likely that complications from abortions are underreported. Furthermore, the department cannot overlook the fact that more than 70,000 such procedures are performed each year in Texas. Reported complications of medical abortions, which the commenters believe are the safest, are estimated in medical literature of which the department is aware, at 5-8% of medical abortions. (Re: Overall complication rates: U.S. Food and Drug Administration. Mifeprex Medication Guide. 2009).

Re: Heavy bleeding and failure to remove all products of conception: American Congress of Obstetricians and Gynecologists. Medical Management of Abortion. ACOG Practice Bulletin No. 67. Obstetrics and Gynecology. 2005;106:871-82. Texas Medical Disclosure Panel. List A, Procedures Requiring Full Disclosure of Specific Risks and Hazards; 2012. Royal College of Obstetricians and Gynaecologists (RCOG); The Care of Women Requesting Induced Abortion. London (England): Royal College of Obstetricians and Gynaecologists (RCOG); 2011 Nov. 130 p. (Evidence-based Clinical Guideline; no. 7). *Note: An evidence review of the guideline is available in the U.S. Health and Human Services, Agency for Healthcare Research and Quality National Guideline Clearinghouse.*

Therefore, applying a conservative estimate of 5%, more than 3,500 Texas patients of abortion facilities will experience complications.

4. Comments Relating to ASC Construction and Physical Plant Rules.

Comment: Some commenters addressed specifically the minimum space and plant arrangement requirements in §135.52(d)(1)(G)(i), requiring 30 square feet per operating room to be set aside for a general storage room; §135.52(d)(3)(A), a requirement for a minimum clear floor area of 80 square

feet in each examination room (but examination rooms are not required); §135.52(d)(9)(B)(i) - (ii), free space requirements for post-operative recovery suites and rooms, multi-bed and private; §135.52(d)(9)(E)(i), space requirements for extended observing room, which are not required; §135.52(d)(10)(B)(i) - (ii), requirement for a minimum of one patient station per operating room and spatial requirements; §135.52(d)(13)(A), a requirement for surgical staff dressing rooms; §135.52(d)(15)(A), clear space minimums for operating rooms (but no clear requirement for an operating room); §135.52(d)(15)(B)(iv) concerning scrub sinks and a viewing window; and the width requirement for doors and corridors, as well as that rule's requirement for swing type doors. Comment was made suggesting the elimination of §135.52(g)(5)(C)(iv) and Table 1 of §135.56(a) because there is no health or safety consideration for requiring a particular room temperature at a licensed abortion facility. Some commenters also objected to the application of off-street parking requirements contained in §135.52(b)(2). The commenters stated that these requirements would not improve patient care and hence are not medically necessary.

The commenters also expressed concern that a large number of licensed abortion facilities would close because they could not or would not meet the construction and physical plant rules, resulting in limited access to abortion for Texas women.

Response: The portions of these comments concerning facility closures are addressed separately under the headings "Adequate Access to Abortion Care" and "Comments Relating to Disproportionate Impact on Low-Income Women and Women Who Live in Rural Areas." Regarding the adopted ASC construction and physical plant rules generally, the department recognizes that some licensed abortion facilities may not be financially capable of complying with these requirements. However, because the physical and financial conditions of licensed abortion facilities will vary, the department cannot accurately estimate the impact of the adopted rules on licensees.

The department nevertheless believes that the Legislature recognized these potential consequences but also considered the state's vital interest in preserving potential life and improving patient safety, and concluded that the ASC standards would not unduly burden a woman's right to an abortion. In light of that legislative determination, the department believes that the adopted ASC construction and physical plant rules reasonably implement the Legislature's directive.

The department believes that higher construction and physical plant design standards for abortion facilities will improve the facilities' response to complications in those facilities by ensuring that the facility is prepared and qualified to address both routine procedures and adverse events when they inevitably do occur. As noted under Topic 3 above, the department is aware that some patients will suffer complications, and for many, if not most or all facilities, the number doing so annually is significant.

As noted in the responses below to comments concerning medical necessity, the true issue is not whether each adopted requirement is medically necessary; it is whether the adopted construction and physical plant requirements reasonably improve the health and safety of women who seek abortion services without creating a substantial obstacle for a woman seeking an abortion. The Legislature determined that the ASC standards would do so. The adoption of requirements from the ASC rules is intended to make licensed abortion facilities more safe, indirectly by providing minimal amenities for staff and patients, and directly

by providing as clean and spacious working environment as was deemed reasonably feasible.

Each ASC construction requirement is a response to an issue, such as ample space in hallways for gurneys and attendants, that can reasonably be anticipated to preserve or improve patients' health and welfare, directly or indirectly. For instance, the off-street parking requirements provide safe access to the facility for patients, people who accompany them, visitors, and facility staff, and the HVAC (temperature and humidity) requirements of §135.52(g)(5)(C)(iv) and Table 1 of §135.56(a) help prevent accumulations of mold and pathogens in the facility as well as provide for comfort of patients and staff alike.

Therefore, the department believes that the requirements proposed for adoption not only fulfill HB 2's mandate to adopt standards for construction and physical plant design for licensed abortion facilities that are equivalent to those for ASCs, but also will improve the health and safety of patients at licensed abortion facilities without placing an undue burden on women seeking abortion services.

5. Comments Relating to Medical Necessity for Adoption of ASC and Admitting Privileges Requirements.

Comment: A number of commenters oppose the adoption of ambulatory surgical center standards (see §139.40) or the admitting privilege requirement (see §139.53 and §139.56). These commenters asserted that there is no medical necessity to apply ASC construction and plant standards to licensed abortion facilities, with several asserting that abortion is an extremely safe procedure, citing kinds of cases they assert are less safe than procedures that physicians are allowed to perform in their offices.

Some commenters wrote that the lack of medical necessity is especially true of facilities that provide only medical abortions, because no surgical and little infection risk exists in such procedures. Some commenters urged that abortion is no longer usually a surgical procedure and that requirements that are appropriate for ASCs are inappropriate for abortion facilities, especially those at which only medical abortions are performed.

Response: First, the department observes that the presence or absence of medical necessity does not govern the department's duty to adopt rules. These arguments are more appropriately directed to the Legislature, which is responsible in the first instance to establish state policy to govern elective abortions.

The Legislature determined that the operating standards for licensed abortion facilities were insufficient to protect the health and safety of patients and that the state's legitimate interest in protecting potential life outweighed a licensed abortion facility's desire to avoid improvements to assure patient health and safety. Moreover, the terms "medical necessity" and "medically necessary" do not appear in Health and Safety Code, Chapter 245, which authorizes regulation of abortion facilities, nor in Health and Safety Code, Chapter 171, which refers to informed consent and other issues related to abortion and abortion facilities.

Likewise, neither "medical necessity" nor "medically necessary" appear in the licensed abortion facility rules, 25 TAC Chapter 139. In the reporting rule section, there are two instances where a physician is instructed to certify that an abortion was necessary to save the mother's life. In Health and Safety Code, §245.016 there is one similar occurrence of the word "necessary." Accordingly, because the Legislature did not exercise its prerogative to incorporate a medical necessity requirement in either HB 2 or

prior legislation, the department believes that it would be inappropriate to impose one in the adopted rules.

Concerning comparisons with procedures performed by physicians in their offices, the department regulates only healthcare facilities, not physicians. Despite the commenters' belief in the relative safety of abortion, the department is aware of reports in medical literature that abortions are underreported. (Obstet Gynecol. 2005 Oct;106 (4):684-92. Abstract: Underreporting of pregnancy-related mortality in the United States and Europe. Deneux-Tharoux C, Berg C, Bouvier-Colle MH, Gissler M, Harper M, Nannini A, Alexander S, Wildman K, Breart G, Buekens P. Institut National de la Santé et de la Recherche Medicale U 149, Epidemiological Research Unit on Perinatal and Women's Health, Paris, France. Fam Plann. Perspect. 1998 May-Jun;30(3):128-33, 138; Alan Guttmacher Institute, New York, USA. Abstract: Measuring the extent of abortion underreporting in the 1995 National Survey of Family Growth. Fu H, Darroch JE, Henshaw SK, Kolb E.)

The department infers from those reports that complications and mortality whose initial cause is abortion may also be underreported. These reports cast doubt on the statistics relied on by opponents of the rules and the degree of safety of the abortion procedure.

In addition, the department is aware of medical literature that places the incidence of reported complications of medical abortions that occur in the first trimester and should be the safest at 5-8%. (U.S. Food and Drug Administration. Mifeprex Medication Guide. 2009. Re: Heavy bleeding and failure to remove all products of conception: American Congress of Obstetricians and Gynecologists. Medical management of abortion. ACOG Practice Bulletin No. 67. Obstetrics and Gynecology. 2005;106:871-82. Texas Medical Disclosure Panel. List A, Procedures Requiring Full Disclosure of Specific Risks and Hazards. 2012. Royal College of Obstetricians and Gynaecologists (RCOG). The care of women requesting induced abortion. London (England): Royal College of Obstetricians and Gynaecologists (RCOG); 2011 Nov. 130 p. (Evidence-based Clinical Guideline; no. 7). *Note: An evidence review of the guideline is available in the U.S. Health and Human Services, Agency for Healthcare Research and Quality National Guideline Clearinghouse.*

If a facility performed 3,000 abortions per year, it could expect 150 of its patients each year--approximately three per week--to suffer serious complications from an abortion, many of which ultimately require surgery. While it may be true, as some commenters suggest, that follow-up surgery for these complications often can and will be done at surgical facilities other than the abortion clinic, the department believes that the Legislature determined it is reasonable to anticipate that a significant number of patients with complications will want to have them treated at the same clinic where they arose. Presumably the patients originally chose that clinic at least in part for its relative convenience to them.

Therefore, the department believes that it is wise to adopt a proactive approach that requires enhanced precautions to enhance patient safety without placing an undue burden on women who seek services at the regulated facilities.

6. Comments Relating to Grandfathering Licensed Abortion Facilities.

Comment: A number of commenters suggested that the rules should extend a provision from Chapter 135 (§135.21(a)(1) and (2)) to grandfather existing licensed abortion facilities so that

they would not be required to comply with construction and design standards imposed on ASCs. They urge that, by failing to adopt this grandfathering provision, the department has imposed stricter standards on abortion facilities than on ASCs rather than making the standards "equivalent to" those for ASCs.

Response: The department disagrees. As noted in the Section-by-Section Summary of the provisions of Chapter 135, Subsection C in this Preamble, HB 2 gives the department no authority to exempt any licensed abortion facility from its provisions, nor to waive the application of its provisions or the rules adopted pursuant to HB 2 to particular facilities. Nor does any other provision of Health and Safety Code, Chapter 245 grant the department such authority. Therefore, the department has no authority to exempt by rule or grant waivers for "medical-only" providers from the provisions of HB 2 or the rules adopted pursuant to HB 2.

7. Comments Relating to Exempting Facilities Where Only Medical Abortions Are Performed and Waiving the Statute for Such Facilities.

Comment: Regarding the adoption of ASC construction and plant rules for licensed abortion facilities, some commenters suggested that facilities that perform only medical abortions be exempted by rule from these requirements. The commenters reasoned that if a facility performs only medical procedures, it should not be required to comply with the ASC rules, which, according to the commenters, were designed only for clinics where surgery is performed.

Similarly, some commenters urged that facilities that provide only medical abortions be granted waivers from the application of the requirements regarding the adoption of ASC construction and plant rules for licensed abortion facilities. These commenters believe that if a facility performs only medical procedures, it should not be required to comply with the ASC rules. Some commenters state that waivers can be issued on a case-by-case basis that would be better tailored to the needs of the community in which the facility is located than a statute that is the same for all licensed facilities in Texas.

Response: HB 2 gives the department no authority to exempt any licensed abortion facility from its provisions or to waive the application of its provisions or the rules adopted pursuant to HB 2, to particular facilities. No other provision of Health and Safety Code, Chapter 245 or any other statute that grants the department rulemaking authority also grants the department the power to waive statutory provisions or exempt licensed abortion facilities from complying with statutes by rule, with the sole exception of Health and Safety Code, §241.06(c), which applies only to licensed hospitals. The department infers that the legislature would have, if that was its intent, written into HB 2 a waiver provision. It did not do so; therefore, the department has no authority to exempt by rule or grant waivers for "medical-only" providers from the provisions of HB 2 or the rules adopted pursuant to HB 2.

8. Comments Relating to Abortion Facility Rules Assertedly Not "Equivalent to" Those for ASCs.

Comment: Some commenters asserted that the adopted rules are not "equivalent to" those of ASCs, and question the department's proposal to adopt the rules as being outside the department's authority granted by HB 2.

Others stated that by adopting many ASC requirements from 25 TAC Chapter 135 and retaining most abortion facility rules that

existed before HB 2 was passed, the department is exceeding its authority and is adopting a set of rules that are, as a whole, more strict than those for ASCs, and not "equivalent to" ASC rules. These commenters note that each other type of health facility has only one set of rules that regulate the licensed facilities, and assert that the department has singled out licensed abortion facilities for excessive and burdensome regulation.

Response: The department disagrees. Adopting rules by reference is a common procedure, with the result being one set of rules containing provisions that it lacked before the adoption by reference. 1 TAC §91.40. In this case, HB 2 required the addition of a number of rules that are "equivalent to" rules identified by the five topic areas listed in Health and Safety Code, §243.010. The department determined that the most appropriate method to achieve the intent that the rules for licensed abortion facilities in 25 TAC Chapter 139 be "equivalent to" those in Chapter 135 for ASCs listed by topic in Health and Safety Code, §243.010 is to select the appropriate rules from Chapter 135 and adopt them by reference.

Regarding the department's authority to adopt ASC rules and retain abortion facility rules, the department's rulemaking authority is not limited to that provided by HB 2. The department also has rulemaking authority under Health and Safety Code, Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion; under Health and Safety Code, §245.010 as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities; and under Government Code, §531.0055 and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The department observes that HB 2 did not direct the department to replace all its pre-existing rules with those for ASCs. Nor did HB 2 repeal any part of Health and Safety Code, Chapter 245, the pre-existing statutes governing abortion facilities. Thus, the department also has rulemaking authority under other statutes that allows it discretion to adopt rules necessary to implement the intent of HB 2 as the department understands it. That many rules in Chapter 139 were retained or that some few of the adopted rules may be more stringent for ASCs than similar rules for other facilities does not mean that the department has exceeded its authority by adopting them.

Finally, the department understands HB 2 to intend to enhance the existing abortion facilities regulations in part by extending the regulatory scheme for licensed abortion facilities to include construction and physical plant design, in order to enhance the health and safety of patients of those facilities without unduly burdening a woman seeking to obtain an abortion in Texas. The department is required to carry out that intent.

9. Comments Relating to Challenged Statements in the Preamble to the Proposed Rules.

Comment: A few commenters stated that the preamble to the proposed rules contained factual errors. Firstly, there was objection to the statement in the proposal preamble that "Texas allows no other procedure to opt out of the accepted standard of care." Commenters asserted that licensed abortion facilities are, in fact, well-regulated under existing state law and departmental practice, and do not operate at a lower standard than other fa-

cilities or at a standard of care lower than that applied to other medical procedures.

Secondly, one commenter asserted that the preamble statement "[T]oday 38 licensed abortion facilities still operate at a second, lower standard for the most common surgical procedure in Texas performed solely on women[.]" is false because licensed abortion facilities have a safety record that demonstrates a high standard of care and Texas licensed abortion facilities are already extensively regulated under existing state statutes and rules.

Thirdly, at least one commenter stated that the proposal preamble's statement that "[W]omen who choose to have an abortion should receive the same standard of care any other individual in Texas receives, regardless of the surgical procedure performed[.]" is false for the same reasons recited concerning the previous two comments.

One of the commenters supported this objection by writing that "abortion providers in Texas absolutely follow the standard of care" because they conform to unidentified regulatory standards and, according to the commenter, have an exemplary safety record. These comments referred to procedures that physicians are allowed to perform in their offices or outpatient facilities without state regulation and without a requirement that these procedures be done under the rules for ASCs. The commenter asserted that many of these unregulated procedures are more dangerous than abortions.

Response: The department notes that all three of the statements objected to are taken verbatim from Bill Analysis. Tex. HB 2, 83rd Leg., 2nd C.S. (2013); (38 TexReg 6537) (September 27, 2013 issue). These comments are more appropriately addressed in the first instance to the Legislature. However, the department will respond to the comments as they relate to the adopted rules.

The department disagrees that any of the statements quoted by the commenters are false. When read in context, it becomes clear that the phrase "standard of care" in the bill analysis was not referring to the standard of care applicable to a licensed physician, but generally to the quality of care that all consumers of healthcare should reasonably expect to receive in a licensed healthcare facility.

The portion of the preamble to the rules proposed for licensed abortion facilities dedicated to the "standard of care" contains four paragraphs. The sentence to which objection is made is the final sentence of the portion. The reference to "standard of care" first occurs in the first sentence of that portion. That first sentence is quoted from the Bill Analysis for HB 2, and reads: "Women who choose to have an abortion should receive the same standard of care any other individual in Texas receives, regardless of the surgical procedure performed."

The third paragraph recites the requirement of HB 2 that the minimum standards for abortion facilities, on and after September 1, 2014, be equivalent to the minimum standards for ambulatory surgical centers.

The fourth and last paragraph quoted from the Bill Analysis reads as follows:

Moving abortion clinics under the guidelines for ambulatory surgical centers will provide Texas women choosing abortion the highest standard of health care. Texas allows no other procedure to opt out of the accepted standard of care.

Thus, the "standard of care" that the Legislature referred to is one that generally is applicable to healthcare facilities, which the department regulates, not to individual physicians, whom the department has no authority to regulate. That standard is derived from the Medicare standard, which applies to facilities but is also recognized by physicians and other healthcare professionals. Compliance with it is a necessary condition for reimbursement for services that are paid for by Medicare and by Medicaid. The preamble to the proposed rules correctly states that licensed abortion facilities "opt[ed] out" of the higher standard enforced by Medicare in the sense that licensed abortion facilities chose not to pursue licensure as ASCs, and that licensed abortion facilities, as noted above, are paid by cash or credit card and are thus not subject to the Medicare (and Medicaid) standard.

10. Comments Relating to Retention of Annual Inspections for Licensed Abortion Facilities.

Comment: Some commenters opposed retaining the requirement in Chapter 139 for annual inspections (§139.31(b)(1)) instead of adopting the 3-year inspection standard for ASCs (§135.21).

Response: The department disagrees. This section of the ASC rules relating to inspection was not adopted because it only requires inspections of licensed facilities every three years, whereas present §139.31 requires annual inspections of licensed abortion facilities. Section 139.31 provides greater protection by requiring more frequent (annual) inspections than the three-year minimum intervals prescribed by §135.21.

Further, as noted previously, the department believes that abortion facilities operate primarily on a self-pay basis and therefore are not subject to oversight by the Centers for Medicare and Medicaid Services, so that they should be inspected more frequently than facilities which are subject to such oversight, to ensure that minimum standards are being met and to better protect the health and safety of patients as required by HB 2.

As previously noted, medical literature suggests that abortions are underreported, raising a concern that morbidity and mortality resulting from abortions is also underreported. The department believes that applying a significantly less frequent ASC survey rate to licensed abortion facilities would jeopardize the health and safety of patients at those facilities.

Furthermore, annual inspections are reasonable given (1) the high priority that the Legislature has placed on improving the health and safety of women who receive abortion services, and (2) the department's understanding that the Legislature intended licensed abortion facilities to comply with minimum standards that at least equal to those applicable to a licensed ambulatory surgical center.

Given these factors, the department believes that in some areas such as frequency of inspections, more stringent standards for licensed abortion facilities are useful means of protecting the health and safety of patients by better implementing HB 2 and enforcing the rules for licensed abortion facilities. The department believes also that, while more frequent inspections may create a small additional burden on facilities, they create no burden at all on women who seek an abortion.

11. Comments Relating to Disproportionate Impact on Low-Income Women and Women Who Live in Rural Areas.

Comment: Commenters expressed concern that facility closures resulting from the rules would have a more severe adverse impact on low-income women and those living in rural areas of the

state than others. A premise of the commenters' position is that abortion and preventive care services are available for smaller fees than a hospital or ASC must charge. Primarily, two provisions of the proposed rules may cause extensive facility closures, according to the commenters: they are the ASC construction and physical plant rules (adopted by reference in §139.40) and the admitting privileges requirement (§139.53 and §139.56).

The commenters anticipate that all or most of the facility closures would occur in Lubbock, the Rio Grande Valley, El Paso, Beaumont and Fort Worth, leaving facilities operating only in Dallas, Houston, Austin, and San Antonio, where the large local populations can support licensed facilities even if those facilities charge more than licensed abortion facilities.

Commenters state that if licensed abortion facilities operated in only the largest cities, all located along I-35 from Dallas to San Antonio plus Houston on I-10, then women who live south of I-10 or west of I-35 would be required to travel relatively long distances to a licensed abortion facility. Nor are ASCs where abortions are performed located outside the I-35 and I-10 corridors, and none are south of Austin. For this reason, the commenters assert that the financial and logistical difficulties of traveling 500 miles or more (e.g., from El Paso to San Antonio).

Commenters also point out that many women who lack the means or ability to be away from their jobs or families will choose to have possibly illicit abortions in Mexico, where they assert abortions are performed unsafely.

Response: The department disagrees. As noted previously (in Comments Relating to the Adoption of ASC Construction and Physical Plant Rules), the department believes the proposed construction and physical plant requirements will improve the outcomes for women seeking abortion. The same is true for the rules requiring admitting privileges. (See response under Comments Relating to Admitting Privileges Requirement.) The department believes that neither rule creates an obstacle that prevents any Texas woman from obtaining an abortion for several reasons: (1) it is unlikely that all licensed abortion facilities will close; (2) abortions by licensed physicians can still be obtained at ASCs and some hospitals, so the lack of a nearby licensed abortion facility, though challenging, is not an absolute bar to even a low-income or rural-based woman; and (3) any facility's decision to close is purely an economic one, not a direct result of the rules, because the rules do not require any facility to close rather than comply.

Finally, if the demand for abortions in low-income areas of the state and areas remote from Texas's large cities is as great as commenters urge, one or more providers would find it profitable (or a non-profit would be able to operate within its means) by locating an ASC designed, built, and operated mainly to provide abortions and reproductive care at low prices at a place chosen to minimize the travel distance for a disadvantaged patient population.

12. Comments Relating to Assertions That the Department Is Singling Out Abortion Facilities For Punitive Regulation.

Comment: Several commenters wrote that the proposed rules evidence the department's intent to punitively adopt excessively burdensome rules that only apply to licensed abortion facilities. Among the rule changes they suggest exhibit punitive regulation are:

(1) selectively leaving in place abortion facility rules that are more stringent than the comparable ASC rules, such as the annual mandatory inspection requirement (§139.31(b)(1));

(2) declining to adopt §135.2(19), a definition of "premises" that included a reference to surgery, allegedly so that it could apply the ASC rules to medical-only facilities;

(3) applying two sets of rules, Chapters 135 and 139, to licensed abortion facilities; and

(4) exceeding the "equivalent to" requirement of HB 2 in favor of more stringent rules for licensed abortion facilities.

Response: The department acknowledges the comments, but disagrees, and declines to alter the proposed rules to remedy any alleged punitive intent.

As noted in the Section-By-Section Summary, the department agrees that on several occasions it chose not to adopt an ASC rule where there was already an abortion facility rule that implemented a more stringent requirement, such as the annual inspections versus three years (and not mandatory) for ASC inspections. Doing otherwise would not have given effect to the intent of HB 2, which was to enhance the level of regulation of licensed abortion facilities so that the effect of the new rule set would be equivalent to that of ASC rules on ASCs, a higher standard and more safety for patients of licensed abortion facilities. HB 2 required the adoption of some ASC rules, or rules equivalent to them in their effect on licensed abortion facilities, but did not require or authorize the repeal of Chapter 139 rules.

Licensed abortion facilities are unique in that they are not subject to Medicare inspection because, unlike almost all other licensed facilities, they operate on a cash and credit card basis. Abortion facilities are also unique among Texas medical facilities in that they are places where death is intentionally caused. In such facilities, it is reasonable to anticipate higher staff burnout and turnover rates, with the resultant lack of experienced caregivers as compared to other kinds of facilities. Thus, differing requirements for the different facilities are required in order to achieve rules that have an effect on licensed abortion facilities that is "equivalent to" the effect of the ASC rules on ASCs. If the Legislature had intended for the two rule sets to be identical, it could easily have required the department to do so.

The department notes that it did not always choose against abortion facilities and in favor of more stringent regulation of them. As examples, it proposes to keep in effect:

(1) \$5,000 license fee (§139.22(a)(1) - (3)) versus the \$5,200 ASC license fee (§135.3(a));

(2) §139.31(c)(2), which requires that complaints be in writing and signed by the complainant versus §135.25(b), which allows anonymous complaints by telephone.

Regarding §135.2(19), its definition of "premises" was not adopted, but not in order to evade any prohibition against the department's applying ASC rules to medical-only facilities as some commenters suggest. The application of ASC rules was required by HB 2, which did not create an exception for medical-only facilities in Health and Safety Code, §245.010(a) as amended by HB 2. Instead, the department did not adopt §135.2(19) because its reference to "premises" as places "where surgery is performed" was an inappropriate and confusing description of abortion facilities, in which the procedure may be either medical or surgical.

The department believes its selection of rules for adoption under HB 2 is even-handed, appropriate to the intent of HB 2, is not based on any intent to punish or single out licensed abortion facilities for excessive regulation, and does not pose a substantial obstacle to a woman who seeks an abortion in Texas.

13. Comment Relating to Rules Requiring Facilities to Be Prepared to Respond Indefinitely to Abortion Patient Calls.

Comment: At least one commenter stated that §§139.56(a)(2)(A) and 139.57(a)(2)(A) are unduly burdensome, unnecessarily extensive, and often impractical and unworkable. The comment specifies as excessive regulation the requirement that the patient's medical record must, by implication, be available to the physician or qualified staff person 24 hours a day, as well as the absence of a termination date for the responsibility to respond to patient calls with her medical records accessible.

Response: The department disagrees. The rule simply restates Health and Safety Code, §171.0031(a)(2)(A), as amended by HB 2.

The rules allow a staff person as well as a physician to respond to calls. Therefore, the duties may be rotated among facility staff. With the advent of electronic medical records, access to patient records should not cause a problem other than protecting patient confidentiality. The rules specify that the responding staff member have access to only the patient's "relevant medical records," not her entire medical history. Presumably, these records would not be voluminous, so that paper copies may be compiled and given to the responder, so long as patient confidentiality is protected. Nor do the rules require an instant answer to the patient's questions, so a reasonable time to search on a computer or through paper files is implied.

No time is specified after which a duty person is not required for 24-hour coverage of follow-up calls because complications, for instance scarred or weakened tissue that tears, can first present symptoms many months after an abortion.

14. Comments Relating to Request for Definition of "Admitting Privileges" in Connection with §139.53 and §139.56.

Comment: At least one commenter requested that the department define what "admitting privileges" mean. The commenter stated that the term is vague because different hospitals define it differently and it has no single, clearly articulated meaning that is commonly accepted in the medical community.

Response: The department acknowledges the comment. It has considered the issue, and believes that defining what admitting privileges are is not practical for the reason the commenter offers: there is no single, accepted definition in common use. If the department were to adopt a definition, it would incidentally affect many facilities and physicians whose admitting privileges might be acceptable in substance, but did not fit the department's definition. The department anticipates enforcing this rule by inspecting each facility's copies of the admitting privileges of each physician who performs abortions there, to determine whether each physician has such privileges at a qualifying hospital. Thus, the exact wording of the privileges will not be an issue, as it would be if there were a single definition for all admitting privileges issued across Texas.

FISCAL NOTE

Renee Clack, Director, Health Care Quality Section, has determined that for each year of the first five years that the sections

will be in effect, there will not be fiscal implications to state or local governments as a result of enforcing and administering the sections as adopted. For purposes of this fiscal note, the department assumes that some of the 30 currently licensed abortion clinics will attempt to comply with the newly adopted standards. Assuming all 30 licensees were to attempt to comply, the department has reviewed its capacity to inspect licensed facilities and to enforce these new provisions and has determined that the additional inspection and enforcement can be absorbed within existing resources.

PUBLIC BENEFIT

In addition, Ms. Clack has determined that for each year of the first five years the sections are in effect, the public benefit that is anticipated as a result of adopting and enforcing these rules will be to enhance the protection of the health and safety of patients that receive services in licensed abortion facilities. This will be accomplished because as a result of these rules, a licensed abortion facility must be equivalent to the minimum standards adopted under Health and Safety Code, §243.010, for ambulatory surgical centers.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§139.1, 139.2, 139.4, 139.9

STATUTORY AUTHORITY

The amendments and new rule are authorized by Health and Safety Code, Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055 and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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

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Lisa Hernandez
General Counsel
Department of State Health Services
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For further information, please call: (512) 776-6972



SUBCHAPTER C. ENFORCEMENT

25 TAC §139.32

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055 and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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SUBCHAPTER D. MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES

25 TAC §§139.40, 139.53, 139.56, 139.57

STATUTORY AUTHORITY

The new rule and amendments are authorized by Health and Safety Code, Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055 and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

ance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055 and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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

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Lisa Hernandez

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Department of State Health Services

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 41. PRACTICE AND PROCEDURE

The Texas Department of Insurance, Division of Workers' Compensation (Division) adopts the repeal of §41.50, concerning Carrier's Address; §41.101, concerning Purpose; §41.105, concerning Definitions; §41.110, concerning Availability; §41.115, concerning Inspection; §41.120, concerning Duplication and Related Services; §41.125, concerning Duplicating Charges; §41.130, concerning Certified Copies; §41.135, concerning Subpoenas for Confidential Records; §41.140, concerning Record Checks; §41.150, concerning Publications; and §41.160, concerning Annual Review of Charges.

The repeal of §41.50 and Chapter 41, Subchapter B, §§41.101, 41.105, 41.110, 41.115, 41.120, 41.125, 41.130, 41.135, 41.140, 41.150, and 41.160 is adopted without changes to the proposed repeal as published in the July 5, 2013, issue of the *Texas Register* (38 TexReg 4292) and the text of the repealed sections will not be published. No comments were received and there was not a request for a public hearing submitted to the Division.

In accordance with Government Code §2001.033, this preamble contains a summary of the factual basis for the repeal.

The repeal of §41.50 is necessary because it is redundant. Section 41.50, concerning Carrier's Address, was adopted effective November 20, 1977 (2 TexReg 4315). It provides that unless otherwise approved by the board, all notices and communications to insurance carriers will be addressed to the carrier at an address designated by the carrier as its Texas mailing address. Section 41.60, concerning Communication to Insurance Carriers, was adopted November 11, 1983 (8 TexReg 4491). Section 41.60 supersedes §41.50 because it was adopted almost

six years after §41.50 and is more specific. Section 41.60 provides that unless otherwise required by statute or a board rule all notices and other communications to insurance carriers will be sent either to an address designated by the insurance carrier as its principal Texas mailing address or to its designated Austin representative.

The repeal of Subchapter B is necessary because its sections are outdated and have been replaced by other statutory and regulatory provisions. The statutes and rules cited in this adoption order are not an exhaustive list of all the statutes and rules that apply and that have superseded these repealed rules. The issues addressed by Subchapter B pertain to confidentiality provisions and open records which are currently addressed by other statutes and rules including, Government Code Chapter 552, known as the Texas Public Information Act; Labor Code §§402.081, 402.083 - 402.088, 402.090, 402.091, 402.092, 413.0513, and 413.0514; 1 TAC Chapter 63, concerning Public Information; 1 TAC Chapter 70, concerning Cost of Copies of Public Information; and 28 TAC §108.1, concerning Charges for Copies of Public Information.

Because §§41.50, 41.101, 41.105, 41.110, 41.115, 41.120, 41.125, 41.130, 41.135, 41.140, 41.150, and 41.160 are unnecessary they are repealed.

The adoption of the repeal of §41.50 and Chapter 41, Subchapter B, will eliminate unnecessary sections.

The Division did not receive any comments on the proposed repeal.

SUBCHAPTER A. COMMUNICATIONS

28 TAC §41.50

The repeal is adopted pursuant to Labor Code §§402.0111, 402.00116, and 402.061. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code. Section 402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce Labor Code Title 5, and other laws applicable to the Division or Commissioner. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of Title 5, Labor Code.

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

Filed with the Office of the Secretary of State on December 16, 2013.

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Dirk Johnson

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

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For further information, please call: (512) 804-4703



SUBCHAPTER B. ACCESS TO BOARD RECORDS

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 139. ABORTION FACILITY REPORTING AND LICENSING

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§139.1, 139.2, 139.4, 139.32, 139.53, 139.56, and 139.57 and new §139.9 and §139.40, concerning the regulation of abortion facilities.

BACKGROUND AND PURPOSE

Health and Safety Code, Chapter 245, Texas Abortion Facility Reporting and Licensing Act, requires certain abortion facilities to be licensed by the department. Health and Safety Code, Chapter 171, the Woman's Right to Know Act, details information to be given to a patient seeking an abortion. The Abortion Facility Reporting and Licensing rules in 25 Texas Administrative Code Chapter 139 implement Health and Safety Code, Chapters 171 and 245.

House Bill (HB) 2, 83rd Legislature, Second Called Session (2nd C.S.), 2013, amended Health and Safety Code, Chapter 171 by adding Health and Safety Code, §171.0031, which specifies requirements of admitting privileges of physicians who perform or induce abortions and requires specific information to be provided to the patient. Health and Safety Code, §245.011 mandates annual reporting to the department on each abortion that is performed in an abortion facility; HB 2 amended the data required to be reported. HB 2 also amended Health and Safety Code, §245.010(a), to require the minimum standards of abortion facilities to be equivalent to the minimum standards of ambulatory surgery centers in Chapter 135 of this title.

In developing these proposed rules, the department was guided by expressions of legislative intent that accompanied the enactment of HB 2, input of stakeholders, and public comments offered at the meetings of the State Health Services Advisory Council on August 28 and 29, 2013. In particular, the department was guided by the following legislative findings:

(1) substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization;

(2) the state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain;

(3) the compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that an unborn child is capable of feeling pain is intended to be separate from and independent of the compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other. . . .

Act of July 15, 2013, 83rd Leg., 2nd C.S., ch. ____, §1(a)(1) - (3).

The department also was guided by its understanding that the statutory changes enacted in HB 2 were intended by the Legislature to improve the safety of women who seek services from a licensed abortion facility, but particularly women who receive

surgical services at a licensed abortion facility. The department also understands that the Legislature determined that patient safety would be improved, in part, by ensuring that a patient of a licensed abortion facility is assured that (1) the physician who treats her or any patient at the facility is capable of attending to her care if she requires hospital care during or after receiving a service at the facility, and (2) the facility is prepared and qualified to meet potential complications resulting from a surgical procedure.

The department understands that the Legislature determined these objectives would principally be accomplished in three ways. First, the Legislature determined that each physician who provides care at a licensed abortion facility must maintain active admitting privileges at a hospital that is within 30 miles of the facility and provides obstetrical or gynecological services. Second, the Legislature concluded that a licensed abortion facility must be qualified to provide care that is "equivalent to" a licensed ambulatory surgical center. Third, the Legislature determined that these objectives would be better assured by submitting licensed abortion facilities to equivalent regulatory oversight.

The department relies on the Bill Analysis to HB 2 for these purposes:

--Women who choose to have an abortion should receive the same standard of care any other individual in Texas receives, regardless of the surgical procedure performed. HB 2 seeks to increase the health and safety of a woman who chooses to have an abortion by requiring a physician performing or inducing an abortion to have admitting privileges at a hospital and to provide certain information to the woman.

--In 1992, the Supreme Court ruled in *Casey v. Planned Parenthood* [sic] that states have the right to regulate abortion clinics. In 1997, Texas enforced increased regulations; however, today 38 licensed abortion facilities still operate at a second, lower standard for the most common surgical procedure in Texas performed solely on women. Six Texas abortion facilities meet the standard as ambulatory surgical facilities. In medical practice, Medicare is the national standard for insurance reimbursement. Abortion is an all cash (or limited credit card) business, so abortion facilities have not been subject to the same oversight as other surgical facilities.

HB 2 requires that the minimum standards for an abortion facility, on and after September 1, 2014, be equivalent to the minimum standards adopted under §243.010 (Minimum Standards) for ambulatory surgical centers.

Moving abortion clinics under the guidelines for ambulatory surgical centers will provide Texas women choosing abortion the highest standard of health care. Texas allows no other procedure to opt out of the accepted standard of care.

House Comm. on State Affairs, Bill Analysis, Tex. HB 2, 83rd Leg., 2nd C.S. (2013).

The department derives two principal understandings from these passages. First, the department understands that the Legislature was aware of the department's regulation of ambulatory surgical centers, including the operating standards adopted by the department in Chapter 135. Second, the department understands that the Legislature specifically determined that application of these standards would create the least burdensome set of minimum standards sufficient to improve the safety of patients at a licensed abortion facility.

HB 2 also amended Health and Safety Code, §245.010(a), to require the minimum standards of licensed abortion facilities to be "equivalent to" the minimum standards of ambulatory surgery centers. The phrase "equivalent to" is not defined by HB 2. However, in its common and ordinary meaning, the word "equivalent" is defined to mean, among other things, "equal, as in value, force, or meaning . . . having similar or identical effects" or "[b]eing essentially equal, all things considered." *The American Heritage Dictionary of the English Language*, 4th ed., (2006) at 604. Accordingly, the department believes that the Legislature intended that the minimum standards for a licensed abortion facility be at least equal to the standards applicable to a licensed ambulatory surgical center, either in content or in effect, and that any exceptions would result in a lesser standard of care for a patient of a licensed abortion facility and thus should not be granted.

SCOPE OF THE PROPOSED RULES

As noted in the Bill Analysis, the department understands that the Legislature determined that the health and safety of patients of licensed abortion facilities will be improved by "moving abortion clinics under the guidelines for ambulatory surgical centers." But rather than require all licensed abortion facilities to be licensed as ambulatory surgical centers, the Legislature instead directed the department to determine and adopt rules that ensure the minimum standards for licensed abortion facilities are "equivalent to" the minimum standards for ambulatory surgical centers.

The current minimum standards for licensed abortion facilities are codified in the following provisions of Chapter 139:

- §139.4. Annual Reporting Requirements for All Abortions Performed.
- §139.5. Additional Reporting Requirements for Physicians.
- §139.8. Quality Assurance.
- §139.41. Policy Development and Review.
- §139.42. Delegation of Authority and Organizational Structure.
- §139.43. Personnel Policies.
- §139.44. Orientation, Training, and Demonstrated Competency.
- §139.45. Personnel Records.
- §139.46. Licensed Abortion Facility Staffing Requirements and Qualifications.
- §139.47. Licensed Abortion Facility Administration.
- §139.48. Physical and Environmental Requirements.
- §139.49. Infection Control Standards.
- §139.50. Disclosure Requirements.
- §139.51. Patient Rights at the Facility.
- §139.52. Patient Education/Information Services.
- §139.53. Medical and Clinical Services.
- §139.54. Health Care Services.
- §139.55. Clinical Records.
- §139.56. Emergency Services.
- §139.57. Discharge and Follow-up Referrals.
- §139.58. Reporting Requirements.

§139.59. Anesthesia Services.

§139.60. Other State and Federal Compliance Requirements.

The minimum standards for licensed ambulatory surgical centers are codified throughout Chapter 135 and address all aspects of the operation of a licensed ambulatory surgical center, including the construction, safety, and physical maintenance of the facility. The department therefore believes that the minimum standards for a licensed abortion facility that are relevant to surgical services must be equal to the standards that the department adopts for an ambulatory surgical center except in instances where the standards for an ambulatory surgical center are redundant of current requirements under Chapter 139 or in instances where Chapter 139 prescribes more stringent qualifications or safety requirements.

The department accordingly has determined that it is appropriate and necessary to examine all of the provisions of Chapter 135 to determine whether a licensed abortion facility should be required to meet an equivalent standard of Chapter 135. Where a requirement of Chapter 135 is relevant to a surgical service, the department considered it for adoption by reference into Chapter 139. By the same measure, where a provision of Chapter 135 did not pertain to either an operating, safety or qualification requirement, the equivalent provision of Chapter 135 was not adopted by reference into Chapter 139. For example, the provisions of Chapter 135 relating to fees for ambulatory surgical centers are not adopted by reference.

Similarly, some definitions or parts of definitions of terms that are codified in Chapter 135 were excluded from the proposed rules because the excluded language would have resulted either in redundancy, confusion, or the extension of exceptions that were applicable to certain licensed ambulatory surgical centers. Because the Legislature did not require licensed abortion facilities to become licensed as ambulatory surgical centers, the department does not understand the Legislature to have intended to extend these exceptions to an abortion facility licensed pursuant to Health and Safety Code, Chapter 245 or Chapter 139 unless it was previously licensed as an ambulatory surgical center under Health and Safety Code, Chapter 243 or Chapter 135 and otherwise qualified for such exceptions.

SEVERABILITY

The department also understands that the Legislature intended that the separate requirements of HB 2 remain in effect, even if one or more of the provisions, or application of those provisions, is determined to be invalid or unenforceable:

- [I]t is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone.

. . . .

- If any provision of this Act is found by any court to be unconstitutionally vague, then the applications of that provision that do

not present constitutional vagueness problems shall be severed and remain in force.

Act of July 15, 2013, 83rd Leg., 2nd C.S., ch. ____, §10(b), (d).

Accordingly, the department proposes language to ensure the severability of the requirements of these proposed rules consistent with such intent.

SECTION-BY-SECTION SUMMARY

The proposed rule changes implement HB 2 or were required to be modified because of statutory changes in HB 2.

The department recognizes that minimum standards for licensed abortion facilities are required by HB 2 to be equivalent to the minimum standards for ambulatory surgical centers as stated by Health and Safety Code, §243.010(a) for the following aspects of their operation:

- (1) the construction and design, including plumbing, heating, lighting, ventilation, and other design standards necessary to ensure the health and safety of patients;
- (2) the qualifications of the professional staff and other personnel;
- (3) the equipment essential to the health and welfare of the patients;
- (4) the sanitary and hygienic conditions within the center and its surroundings; and
- (5) a quality assurance program for patient care.

The proposed rule changes specifically address the following:

The amendment to §139.1 is proposed to clarify the purpose of the rules to include implementation of Woman's Right to Know Act, Health and Safety Code, Chapter 171.

The amendment to §139.2 omits the definition of "ambulatory surgical center" for clarification, and requires renumbering of the remaining definitions.

The amendment to §139.4 is proposed to reflect a change in data required by HB 2 to be reported annually to the department by abortion facilities.

New §139.9 is proposed to ensure the severability of the requirements of these proposed rules is consistent with the intent of the Legislature and language of HB 2.

Amendments to §139.32 are proposed to clarify the authority of the department to refuse, suspend or revoke a license for an abortion facility and adds the finding of noncompliance with Health and Safety Code, Chapter 171 as grounds for license probation, suspension or revocation.

New §139.40 is proposed to comply with HB 2, which establishes that the minimum standards for an abortion facility must be equivalent to the minimum standards of an ambulatory surgical center, by adopting by reference with certain changes for clarification the relevant rules for ambulatory surgical centers from Chapter 135. The department adopts by reference specific current ambulatory surgical center rules in order to ensure that the minimum standards governing licensed abortion facilities are equivalent to those of ambulatory surgical centers. The department finds that adopting the minimum standards for ambulatory surgical centers to licensed abortion facilities ensures compliance with HB 2 and provides the maximum guidance and consistency in the rules for regulated facilities.

25 TAC Chapter 135, Ambulatory Surgical Centers Rules.

Subchapter A. Operating Requirements for ASCs.

§135.1, Scope and Purpose, this rule was not adopted because a sufficient scope and purpose rule already exists in Chapter 139, and because HB 2 does not require the adoption of rules defining the scope and purpose of Chapter 139.

§135.2, Definitions, the following definitions were not adopted by reference.

(1) "Act," which referred to the Ambulatory Surgical Center Licensing Act, and not to the Texas Abortion Facility Licensing and Reporting Act.

(3) "administrator," is defined in more detail that requires higher qualification in §139.2(4) and §139.46(2). Furthermore, ambulatory surgical center rules that are adopted require a governing body (§135.4), and §135.6 describes in adequate detail the required administrative functions.

(4) "advance practice registered nurse," not adopted because Chapter 139 contains a definition of the same term which requires the nurse to have achieved approval by the Board of Nursing based on completion of an advanced higher education program, a standard not required in Chapter 135.

(5) "ASC," which is a term defined but not used in Chapter 139, and whose inclusion among adopted rules would have caused confusion. The definition also included portions limiting the length of patients stays within the facility that were felt to be inapplicable to licensed abortion facilities.

(8) "certified registered nurse anesthetist" is defined in exactly the same way in Chapter 139.

(9) "change of ownership" is defined the same in Chapter 139, with the exception that a requirement for the tax identification number to change in order to qualify as a change in ownership is not present in Chapter 139. This requirement does not fall within the minimum standards required by HB 2.

(11) "department" is defined in exactly the same way in Chapter 139.

(15) "licensed vocational nurse" is defined in exactly the same way in Chapter 139.

(17) "person" is defined in exactly the same way in Chapter 139.

(18) "physician" is defined in exactly the same way in Chapter 139.

(19) defines "premises" as a building where a patient receives outpatient surgical services. This was thought to be a source of potential confusion because medical abortions are not surgical procedures.

(20) "registered nurse" is defined in exactly the same way in Chapter 139.

The following definitions in §135.2 were adopted by reference because they are terms that were used or anticipated to be used in the ambulatory surgical center rules that were to be adopted, and are not terms whose meaning, without a definition, is clear to stakeholders. Thus, the following definitions are necessary for compliance with HB 2.

(2) Action plan--A written document that includes specific measures to correct identified problems or areas of concern; identifies strategies for implementing system improvements; and includes outcome measures to indicate the effectiveness of sys-

tem improvements in reducing, controlling or eliminating identified problem areas.

(6) Autologous blood units--Units of blood or blood products derived from the recipient.

(7) Available--Able to be physically present in the facility to assume responsibility for the delivery of patient care services within five minutes.

(10) Dentist--A person who is currently licensed under the laws of this state to practice dentistry.

(12) Disposal--The discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste (whether containerized or uncontainerized) into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharge into any waters, including ground waters.

(13) Extended observation--The period of time that a patient remains in the facility following recovery from anesthesia and discharge from the postanesthesia care unit, during which additional comfort measures or observation may be provided.

(14) Health care practitioners (qualified medical personnel)--Individuals currently licensed under the laws of this state who are authorized to provide services in an ASC.

(16) Medicare-approved reference laboratory--A facility that has been certified and found eligible for Medicare reimbursement, and includes hospital laboratories which may be Joint Commission or American Osteopathic Association accredited or nonaccredited Medicare approved hospitals, and Medicare certified independent laboratories.

(21) Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(22) Title XVIII--Title XVIII of the United States Social Security Act, 42 United States Code (USC), §§1395 et seq.

The following rules from Chapter 135, relating to ambulatory surgical centers, were adopted or not adopted for the reasons set out.

Section 135.3, Fees, was not adopted because HB 2 does not require the adoption of rules relating to licensure fees for licensed abortion facilities.

Section 135.4, Ambulatory Surgical Center (ASC) Operation, was adopted because it almost exclusively focuses on requiring a governing body for the facility and describing the functions of that body, which was thought to add more protection for the health and safety of women than the current rules for licensed abortion facilities, which require only a medical consultant and do not require a governing body.

Section 135.5, Patient Rights, was adopted because it directly affects patient care and contains rights that do not appear in a similarly titled licensed abortion facilities rule, §139.51.

Section 135.6, Administration, was adopted because it lays out the manner in which the governing body is to function by indicating some areas on which it is to focus. Chapter 139 contains no directly comparable rule.

Section 135.7, Quality of Care, was adopted as a supplement to §139.8 (Quality Assurance), the parallel rule in Chapter 139.

Section 135.8, Quality Assurance, was adopted as a supplement to §139.8 (Quality Assurance), the parallel rule in Chapter 139.

Section 135.9, Medical Records, was adopted as a supplement to §139.55 (Clinical Records), the parallel rule in Chapter 139. While §139.55 is more detailed, it does not contain, for instance, a requirement found in §135.9 that a "single person be designated to be in charge of medical records."

Section 135.10, Facilities and Environment, was adopted as a supplement to §139.48 (Physical and Environmental Requirements). For example, §135.10 contains more detailed provision concerning hazardous materials and emergency preparedness than §139.48.

Section 135.11, Anesthesia and Surgical Services, was adopted as a supplement to §139.54 and §139.59. For example, §135.11 addresses surgical services, which are not separately addressed in Chapter 139.

Section 135.11(b)(19) was not adopted because it conflicts with or at least confuses the provision of HB 2 Section 2 that requires a physician who performs an abortion to have admitting privileges at a hospital not further than 30 miles from the location where the abortion is performed or induced.

Section 135.12, Pharmaceuticals Services, was adopted because Chapter 139 has no similar provision concerning drugs except §139.60(a), which does not contain the same provisions as §135.12.

Section 135.13, Pathology and Medical Laboratory Services, was adopted because Chapter 139 has no similar provision, and pathology and medical laboratory services can improve patient health and safety. Therefore, HB 2 requires the adoption of §135.13 as a minimum standard to promote the health and safety of patients.

Section 135.14, Radiology Services, was adopted because Chapter 139 has no similar provision, and radiological services can improve patient health and safety. By adopting by reference the language of §135.14, it does not require a licensed abortion facility to provide such services except "when appropriate to meet the needs of the patients and adequately support" the facility's capabilities.

Section 135.15, Facility Staffing and Training, was adopted to supplement §139.46 (Licensed Abortion Facility Staffing Requirements and Qualifications) in order to make the rules for licensed abortion facilities "equivalent to" those of ASCs as required by HB 2.

Section 135.16, Teaching and Publication, was adopted because Chapter 139 contains no similar provision and in order to make the rules for licensed abortion facilities "equivalent to" those of ASCs as required by HB 2 in matters regarding minimum standards applicable to licensed abortion facility patients.

Section 135.17, Research Activities, was adopted because Chapter 139 contains no similar provision and in order to make the rules for licensed abortion facilities "equivalent to" those of ambulatory surgical centers as required by HB 2 in matters regarding minimum standards applicable to licensed abortion facility patients.

Section 135.18, Unlicensed Ambulatory Surgical Center, was not adopted because §139.3 has adequate provisions for dealing with unlicensed abortion facilities that are not exempted from licensure by Health and Safety Code, Chapter 245. HB 2 does not require the adoption of rules that provide standards and procedures for granting, denying, suspending, and revoking a license for licensed abortion facilities.

Section 135.19, Exemptions, was not adopted because the exemptions from licensure as an abortion facility are set forth in Health and Safety Code, §245.004. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting and denying a license.

Section 135.20, Initial Application and Issuance of License, was not adopted because §§139.21 - 139.25 cover application and issuance of licenses for licensed abortion facilities. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting or denying a license.

Section 135.21, Inspections, was not adopted because it only required inspections of licensed facilities every three years, whereas present §139.31 requires annual inspections of licensed abortion facilities. Thus, §135.21 is not directly related to minimum standards for the health and safety of patients of licensed abortion facilities, and, to the extent it may be considered to be related to those concerns, §139.31 provides greater protection by requiring more frequent (annual) inspections than the three-year minimum intervals prescribed by §135.21. Furthermore, HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for sanctioning a licensee.

Section 135.22, Renewal of License, was not adopted because §§139.21 - 139.25, especially §139.23, adequately address renewal of licenses for licensed abortion facilities. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting or denying a license and licensure fees.

Section 135.23, Conditions of Licensure, was not adopted because §§139.21 - 139.25 adequately address conditions of licensure for licensed abortion facilities. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting, denying, suspending, and revoking a license and licensure fees.

Section 135.24, Enforcement, was not adopted because §§139.31 - 139.33 adequately address enforcement issues. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for enforcement.

Section 135.25, Complaints, was not adopted because §139.31(c) adequately addresses complaints. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for handling complaints.

Section 135.26, Reporting Requirements, was adopted, because it adds additional requirements that protect the health and safety of patients, such as the obligation of the facility to report the transfer of a patient to a hospital and to report the development by a patient within 24 hours of discharge of a complication if they result in a patient's admission to a hospital. In contrast, §139.58 requires only the reporting of a woman's death from complications of an abortion.

Section 135.27, Patient Safety Program, was adopted because it requires the facilities to directly address patient safety, an issue to which no rule in Chapter 139 is entirely dedicated. For example, §135.27 requires facility management to coordinate all patient safety activities, while Chapter 139 does not.

Section 135.28, Confidentiality, was not adopted because more confidentiality is provided to abortion patients and licensed abortion facilities by existing rules in Chapter 139 than by this rule.

Section 135.29, Time Periods for Processing and Issuing a License, was not adopted because §§139.21 - 139.25 adequately address licensure of licensed abortion facilities. Both Chapters 135 and 139 provide a two-year interval for re-application and renewal of licenses. HB 2 does not require the adoption of rules for licensed abortion facilities that provide standards and procedures for granting, denying, suspending, and revoking a license and licensure fees.

Subchapter B. Fire Prevention and Safety Requirements.

Section 135.41, Fire Prevention and Safety Requirements, was adopted because, except for some brief and general references in §139.48, Chapter 139 does not address fire prevention, does not require the appointment of a safety officer who is familiar with safety practices in healthcare facilities, and does not forbid the use of extension cords for permanent wiring. Section 135.41 provides for all three and has other safety requirements not found in Chapter 139.

Section 135.42, General Safety, was adopted because it contains detailed requirements for facilities concerning patient safety that do not appear in the present Chapter 139, which contains no rule exclusively devoted to patient safety. In contrast, §135.42 requires the appointment of a safety officer; requires safety policies and procedures for each department or service and that those policies and procedures be implemented and enforced; and requires an emergency communication system that operates on power independent of the facility's power source.

Section 135.43, Handling and Storage of Gases, Anesthetics, and Flammable Liquids, was adopted because it contains detailed requirements for facilities concerning handling and storage of gases, anesthetics, and flammable liquids that do not appear in the present Chapter 139, which contains no rule exclusively devoted to these matters.

Section 135.43 requires that facility premises be kept free from accumulations of combustible materials not necessary for immediate operation of the facility, a requirement not in Chapter 139. Section 135.43 also details precautions to be taken concerning flammable gases, nonflammable gases, alcohol-based hand rubs, and gasoline-powered equipment that are not found in Chapter 139.

Subchapter C. Physical Plant and Construction Requirements.

Section 135.51, Construction Requirements for an Existing Ambulatory Surgical Center, was adopted because HB 2, by citing to Health and Safety Code, §243.010, requires the adoption of rules for licensed abortion facilities that "must contain minimum standards . . . for (1) the construction and design, including plumbing, heating, lighting, ventilation, and other design standards necessary to ensure the health and safety of patients." Chapter 139 does not contain similarly detailed construction requirements.

The text of §135.51(a)(1) and a reference in (2) was not adopted by reference in order to eliminate a grandfathering provision in §135.51(a)(1) and a reference in §135.51(a)(2). Adoption of that subsection would have precluded application of the requirements in Subchapter C of Chapter 135 to existing licensed abortion facilities, in contradiction of the stated intent of HB 2.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section has approximately one page of general requirements, such as "A facility shall have a safe and sanitary environment, properly constructed, equipped, and maintained to protect the

health and safety of patients and staff at all times." Section 139.48 does not specify what constitutes proper construction for an existing licensed abortion facility, as does adopted §§135.51 - 135.56.

Section 135.52, Construction Requirements for a New Ambulatory Surgical Center, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for patients of ambulatory surgical centers.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section has approximately one page of general requirements, such as "A facility shall have a safe and sanitary environment, properly constructed, equipped, and maintained to protect the health and safety of patients and staff at all times." Section 139.48 does not specify what constitutes proper construction for a new licensed abortion facility, as does adopted §135.52.

Section 135.53, Elevators, Escalator, and Conveyors, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for patients of ambulatory surgical centers.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section does not contain requirements for elevators, escalators, or conveyors, as does adopted §135.53.

Section 135.54, Preparation, Submittal, Review and Approval of Plans, and Retention of Records, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for patients of ambulatory surgical centers. Chapter 139 does not contain requirements for preparation, submittal, review and approval of plans, and retention of records, as does adopted §135.54.

Section 135.55, Construction, Inspections, and Approval of Project, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for patients of ambulatory surgical centers.

Chapter 139 presently contains only one section that addresses "Physical and Environmental Requirements," §139.48. That section has approximately one page of general requirements, such as "A facility shall have a safe and sanitary environment, properly constructed, equipped, and maintained to protect the health and safety of patients and staff at all times." Chapter 139 contains no requirements for inspection and approval of construction projects, as does adopted §135.55.

Section 135.56, Construction Tables, was adopted because HB 2 requires that the minimum standards for construction and design of licensed abortion facilities be "equivalent to" those for ambulatory surgical centers. Chapter 139 does not contain tables or drawings of any kind that specify proper construction requirements, so it is not equivalent to rules for ambulatory surgical centers.

Amendments to §139.53 and §139.56 are proposed to specify the admitting privilege requirements of physicians who perform or induce abortions as required by HB 2.

Additional amendments to §139.56 and amendments to §139.57 are proposed to specify the information required by HB 2 to be given to the patient.

FISCAL NOTE

Renee Clack, Director, Health Care Quality Section, has determined that for each year of the first five years that the sections will be in effect, there will not be fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS AND ECONOMIC COSTS TO PERSONS

Ms. Clack has also determined that there may be an adverse economic impact on small businesses or micro-businesses and to persons who are required to comply with the sections as proposed. These costs may include, but are not limited to, architectural modifications such as new construction or renovation costs related to the requirement for an abortion facility to have a surgical suite, a pre-operative patient holding area, a post-operative recovery suite, and other physical plant and life safety code requirements. The cost to a licensed abortion facility or a person cannot be determined by the department due to the unique physical layouts and circumstances associated with each individual facility, and the significant number of variables that must be taken into consideration when comparing the new standards to existing abortion facilities.

It is estimated that approximately 25 currently licensed for-profit abortion facilities that are small or micro-businesses that may be affected by these requirements because they do not currently meet the standards required for ambulatory surgical centers. The cost to a small or micro-business licensed as an abortion facility or provider cannot accurately be projected by the department due to the unique physical layouts and circumstances associated with each small or micro-business licensed abortion facility, and the significant number of variables that must be taken into consideration when comparing the new standards to existing licensed abortion facilities.

Because HB 2 requires that all licensed abortion facilities meet standards equivalent to those set out in Health and Safety Code, §243.010 there are no legal alternatives to provide flexibility for small or micro-businesses for the department to consider. The express objective of the statute governing abortion facilities is to ensure that every licensed abortion facility in the state meet the same minimum health and safety standards for the protection of public health. Consequently, any variance from state law would not be consistent with the health, safety, and welfare of the state.

IMPACT ON LOCAL EMPLOYMENT

There is no anticipated impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Clack has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of adopting and enforcing these rules will be implementation of HB 2 for the purpose of enhanced protection of the health and safety of patients of licensed abortion facilities, by requiring that the minimum standards for a licensed abortion facility must be equivalent to the minimum standards adopted under Health and Safety Code, §243.010 for ambulatory surgical centers.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure

and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Allison Hughes, Health Facilities Rules Coordinator, Health Care Quality Section, Division of Regulatory Services, Department of State Health Services, P.O. Box 149347, Mail Code 2822, Austin, Texas 78714-9347, (512) 834-6775 or by email to allison.hughes@dshs.state.tx.us. Please specify "Comments on abortion facility licensing rules" in the subject line. The department intends by this section to invite public comment on each of the standards that is incorporated by reference, as well as the amended abortion facility rules. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

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

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §§139.1, 139.2, 139.4, 139.9

STATUTORY AUTHORITY

The amendments and new rule are authorized by Health and Safety Code, Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendments and new rule affect Government Code, Chapter 531; and Health and Safety Code, Chapters 171, 245 and 1001.

§139.1. Purpose and Scope.

(a) Purpose. The purpose of this chapter is to implement the Texas Abortion Facility Reporting and Licensing Act, Health and Safety Code, Chapter 245, which provides the Department of State

Health Services with the authority to establish rules governing the licensing and regulation of abortion facilities and to establish annual reporting requirements for each abortion performed. This chapter also implements the Woman's Right to Know Act, Health and Safety Code, Chapter 171.

(b) (No change.)

§139.2. Definitions.

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

(1) - (7) (No change.)

~~[(8) Ambulatory surgical center--An ambulatory surgical center licensed under Health and Safety Code, Chapter 243.]~~

~~(8)~~ [(9)] Applicant--The owner of an abortion facility which is applying for a license under the Act. For the purpose of this chapter, the word "owner" includes nonprofit organization.

~~(9)~~ [(10)] Certified registered nurse anesthetist (CRNA)--A registered nurse who has current certification from the Council on Certification of Nurse Anesthetists and who is currently authorized to practice as an advanced practice registered nurse by the Texas Board of Nursing.

~~(10)~~ [(11)] Change of ownership--A sole proprietor who transfers all or part of the facility's ownership to another person or persons; the removal, addition, or substitution of a person or persons as a partner in a facility owned by a partnership; or a corporate sale, transfer, reorganization, or merger of the corporation which owns the facility if sale, transfer, reorganization, or merger causes a change in the facility's ownership to another person or persons.

~~(11)~~ [(12)] Condition on discharge--A statement on the condition of the patient at the time of discharge.

~~(12)~~ [(13)] Critical item--All surgical instruments and objects that are introduced directly into the bloodstream or into other normally sterile areas of the body.

~~(13)~~ [(14)] Decontamination--The physical and chemical process that renders an inanimate object safe for further handling.

~~(14)~~ [(15)] Department--The Department of State Health Services.

~~(15)~~ [(16)] Director--The director of the Patient Quality Care Unit of the department or his or her designee.

~~(16)~~ [(17)] Disinfection--The destruction or removal of vegetative bacteria, fungi, and most viruses but not necessarily spores; the process does not remove all organisms but reduces them to a level that is not harmful to a person's health. There are three levels of disinfection:

(A) high-level disinfection--kills all organisms, except high levels of bacterial spores, and is effected with a chemical germicide cleared for marketing as a sterilant by the United States Food and Drug Administration;

(B) intermediate-level disinfection--kills mycobacteria, most viruses, and bacteria with a chemical germicide registered as a "tuberculocide" by the United States Environmental Protection Agency (EPA); and

(C) low-level disinfection--kills some viruses and bacteria with a chemical germicide registered as a hospital disinfectant by the EPA.

~~(17)~~ [(18)] Education and information staff--A professional or nonprofessional person who is trained to provide information

on abortion procedures, alternatives, informed consent, and family planning services.

(18) [(49)] Facility--A licensed abortion facility as defined in this section.

(19) [(20)] Fetus--An individual human organism from fertilization until birth.

(20) [(21)] Health care facility--Any type of facility or home and community support services agency licensed to provide health care in any state or is certified for Medicare (Title XVIII) or Medicaid (Title XIX) participation in any state.

(21) [(22)] Health care worker--Any person who furnishes health care services in a direct patient care situation under a license, certificate, or registration issued by the State of Texas or a person providing direct patient care in the course of a training or educational program.

(22) [(23)] Hospital--A facility that is licensed under the Texas Hospital Licensing Law, Health and Safety Code, Chapter 241, or if exempt from licensure, certified by the United States Department of Health and Human Services as in compliance with the conditions of participation for hospitals in Title XVIII, Social Security Act (42 United States Code, §§1395 et. seq.).

(23) [(24)] Immediate jeopardy to health and safety--A situation in which there is a high probability that serious harm or injury to patients could occur at any time or already has occurred and may well occur again, if patients are not protected effectively from the harm or if the threat is not removed.

(24) [(25)] Inspection--An on-site inspection by the department in which a standard-by-standard evaluation is conducted.

(25) [(26)] Licensed abortion facility--A place licensed by the department under Health and Safety Code, Chapter 245, where abortions are performed.

(26) [(27)] Licensed mental health practitioner--A person licensed in the State of Texas to provide counseling or psychotherapeutic services.

(27) [(28)] Licensed vocational nurse (LVN)--A person who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.

(28) [(29)] Licensee--A person or entity who is currently licensed as an abortion facility.

(29) [(30)] Medical abortion--The use of a medication or combination of medications to induce an abortion, with the purpose of terminating the pregnancy of a woman known to be pregnant. Medical abortion does not include forms of birth control.

(30) [(31)] Medical consultant--A physician who is designated to supervise the medical services of the facility.

(31) [(32)] Nonprofessional personnel--Personnel of the facility who are not licensed or certified under the laws of this state to provide a service and shall function under the delegated authority of a physician, registered nurse, or other licensed health professional who assumes responsibility for their performance in the licensed abortion facility.

(32) [(33)] Noncritical items--Items that come in contact with intact skin.

(33) [(34)] Notarized copy--A copy attached to a notarized affidavit which states that the attached copy(ies) are true and correct copies of the original documents.

(34) [(35)] Patient--A pregnant female on whom an abortion is performed, but shall in no event be construed to include a fetus.

(35) [(36)] Person--Any individual, firm, partnership, corporation, or association.

(36) [(37)] Physician--An individual licensed by the Texas Medical Board and authorized to practice medicine in the State of Texas.

(37) [(38)] Physician assistant--A person licensed as a physician assistant by the Texas Physician Assistant Board.

(38) [(39)] Plan of correction--A written strategy for correcting a licensing violation. The plan of correction shall be developed by the facility, and shall address the system(s) operation(s) of the facility as the system(s) operation(s) apply to the deficiency.

(39) [(40)] Post-procedure infection--An infection acquired at or during an admission to a facility; there shall be no evidence that the infection was present or incubating at the time of admission to the facility. Post-procedure infections and their complications that may occur after an abortion include, but are not limited to, endometritis and other infections of the female reproductive tract, laboratory-confirmed or clinical sepsis, septic pelvic thrombophlebitis, and disseminated intravascular coagulopathy.

(40) [(41)] Pregnant unemancipated minor certification form--The document prepared by the Department of State Health Services and used by physicians to certify the medical indications supporting the judgment for the immediate abortion of a pregnant minor.

(41) [(42)] Pre-inspection conference--A conference held with department staff and the applicant or his or her representative to review licensure standards, inspection documents, and provide consultation prior to the on-site licensure inspection.

(42) [(43)] Professional personnel--Patient care personnel of the facility currently licensed or certified under the laws of this state to use a title and provide the type of service for which they are licensed or certified.

(43) [(44)] Quality assurance--An ongoing, objective, and systematic process of monitoring, evaluating, and improving the appropriateness, and effectiveness of care.

(44) [(45)] Quality improvement--An organized, structured process that selectively identifies improvement projects to achieve improvements in products or services.

(45) [(46)] Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing as a registered nurse.

(46) [(47)] Semicritical items--Items that come in contact with nonintact skin or mucous membranes. Semicritical items may include respiratory therapy equipment, anesthesia equipment, bronchoscopes, and thermometers.

(47) [(48)] Standards--Minimum requirements under the Act and this chapter.

(48) [(49)] Sterile field--The operative area of the body and anything that directly contacts this area.

(49) [(50)] Sterilization--The use of a physical or chemical procedure to destroy all microbial life, including bacterial endospores.

(50) [(51)] Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity that includes initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(51) [(52)] Surgical abortion--The use of instruments, aspiration, and/or suction to induce an abortion, with the purpose of terminating the pregnancy of a woman known to be pregnant.

(52) [(53)] Third trimester certification form--The document prepared by the Department of State Health Services and used by physicians to certify the medical indications supporting the judgment for the abortion of a viable fetus during the third trimester of pregnancy.

(53) [(54)] Third trimester--A gestational period of not less than 26 weeks (following last-menstrual period (LMP)).

(54) [(55)] Unemancipated minor--A minor who is unmarried and has not had the disabilities of minority removed under the Family Code, Chapter 31.

§139.4. Annual Reporting Requirements for All Abortions Performed.

(a) - (b) (No change.)

(c) The report must include:

(1) - (5) (No change.)

(6) the probable post-fertilization age of the unborn child [period of gestation] based on the best medical judgment of the attending physician at the time of the procedure;

(7) - (16) (No change.)

(d) - (h) (No change.)

§139.9. Severability.

(a) The 83rd Legislature, in enacting House Bill 2 during its Second Session (2013), confirmed its intent that the provisions and the applications of the Health and Safety Code relating to the licensure and operation of abortion facilities were intended to be separately enforceable, if any of these separate provisions or the application of those provisions was determined unconstitutional, invalid, or unenforceable.

(b) Consistent with the intent of the Legislature, the department intends, that with respect to the application of this chapter to each woman who seeks or obtains services from a facility licensed under this chapter, every provision, section, subsection, sentence, clause, phrase, or word in this chapter and each application of the provisions of this chapter remain severable from every other provision, section, subsection, sentence, clause, phrase, word, or application of this chapter.

(c) The department further intends that if the application of any provision of this chapter is determined by a court of competent jurisdiction to impose an impermissible or undue burden on any pregnant woman or group of pregnant women, the application of the chapter to those women will be severed from the remaining applications of the chapter that do not impose an undue burden, and those remaining applications of this chapter will remain in force and unaffected, consistent with the intent of the Legislature.

(d) Accordingly, to the extent that any parts or applications of this chapter or this section are enjoined, the department may enforce the parts and applications of this chapter that do not violate the Constitution or impose an undue burden on women seeking abortions.

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

Filed with the Office of the Secretary of State on September 16, 2013.

TRD-201304011

Lisa Hernandez

General Counsel

Department of State Health Services

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



SUBCHAPTER C. ENFORCEMENT

25 TAC §139.32

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The amendment affects Government Code, Chapter 531; and Health and Safety Code, Chapters 171, 245 and 1001.

§139.32. License Denial, Suspension, Probation, or Revocation.

(a) - (b) (No change.)

(c) The department may deny a person a license or suspend or revoke an existing license on the grounds that the person has been convicted of a felony or misdemeanor that directly relates to the duties and responsibilities of the ownership or operation of a facility.

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

(3) The following felonies and misdemeanors directly relate to the duties and responsibilities of the ownership or operation of a licensed abortion facility because these criminal offenses demonstrate impaired ability to own or operate a facility:

(A) a misdemeanor violation of Health and Safety Code, Chapter 171 or Chapter 245;

(B) - (G) (No change.)

(4) - (5) (No change.)

(d) - (j) (No change.)

(k) If the department finds that a licensed abortion facility is in repeated noncompliance with Health and Safety Code, Chapter 171 or Chapter 245, or rules adopted under this chapter, but the noncompliance does not in any way involve the health and safety of the public or an individual, the department may schedule the facility for probation rather than suspending or revoking the facility's license.

(l) The department may suspend or revoke the license of a licensed abortion facility that does not correct items that were in noncompliance or that does not comply with Health and Safety Code,

Chapter 171 or Chapter 245, or rules adopted under this chapter within the applicable probation period.

(m) - (r) (No change.)

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

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Lisa Hernandez

General Counsel

Department of State Health Services

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SUBCHAPTER D. MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES

25 TAC §§139.40, 139.53, 139.56, 139.57

STATUTORY AUTHORITY

The new rule and amendments are authorized by Health and Safety, Code Chapter 171, as amended by HB 2, concerning requirements for a physician who performs an abortion and the use of abortion-inducing drugs; by Health and Safety Code, §245.010, as amended by HB 2, concerning rules and minimum standards for the licensing and regulation of abortion facilities required to obtain a license under the chapter, clarification of the authority of the department to refuse, suspend or revoke a license for an abortion facility and add the finding of noncompliance with Health and Safety Code, Chapter 171, as grounds for license probation, suspension or revocation, and a change to the data required to be reported annually; and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rule and amendments affect Government Code, Chapter 531; and Health and Safety Code, Chapters 171, 245 and 1001.

§139.40. Adoption by Reference of Ambulatory Surgical Centers Rules.

(a) Effective September 1, 2014, the department adopts by reference the following sections of Chapter 135 of this title (relating to Ambulatory Surgical Centers) that were in effect on January 1, 2014:

(1) Subchapter A (relating to Operating Requirements for Ambulatory Surgical Centers):

(A) The following definitions are incorporated by reference:

- (i) §135.2(2) (defining "Action plan");
- (ii) §135.2(6) (defining "Autologous blood units");
- (iii) §135.2(7) (defining "Available");
- (iv) §135.2(10) (defining "Dentist");

(v) §135.2(12) (defining "Disposal");

(vi) §135.2(13) (defining "Extended observation");

(vii) §135.2(14) (defining "Health care practitioners");

(viii) §135.2(16) (defining "Medicare");

(ix) §135.2(21) (defining "Surgical technologist");

(x) §135.2(22) (defining "Title XVIII");

(B) The following sections relating to ambulatory surgical centers operating requirements:

(i) §135.4 (relating to Ambulatory Surgical Center (ASC) Operation), except as specifically noted in subsection (d)(2) of this section;

(ii) §135.5 (relating to Patient Rights);

(iii) §135.6 (relating to Administration);

(iv) §135.7 (relating to Quality of Care);

(v) §135.8 (relating to Quality Assurance);

(vi) §135.9 (relating to Medical Records);

(vii) §135.10 (relating to Facilities and Environment);

(viii) §135.11(a) and (b)(1) - (18) (relating to Anesthesia and Surgical Services);

(ix) §135.12 (relating to Pharmaceutical Services);

(x) §135.13 (relating to Pathology and Medical Laboratory Services);

(xi) §135.14 (relating to Radiology Services);

(xii) §135.15 (relating to Facility Staffing and Training);

(xiii) §135.16 (relating to Teaching and Publication);

(xiv) §135.17 (relating to Research Activities);

(xv) §135.26 (relating to Reporting Requirements); and

(xvi) §135.27 (relating to a Patient Safety Program);

(2) Subchapter B (relating to Fire Prevention and Safety Requirements):

(A) §135.41 (relating to Fire Prevention and Protection);

(B) §135.42 (relating to General Safety); and

(C) §135.43 (relating to Handling and Storage of Gases, Anesthetics, and Flammable Liquids); and

(3) Subchapter C (relating to Physical Plant and Construction Requirements):

(A) §135.51 (relating to Construction Requirements for an Existing Ambulatory Surgical Center), except as specifically noted in subsection (d)(3) of this section;

(B) §135.52 (relating to Construction Requirements for a New Ambulatory Surgical Center);

(C) §135.53 (relating to Elevators, Escalators, and Conveyors);

(D) §135.54 (relating to Preparation, Submittal, Review and Approval of Plans, and Retention of Records);

(E) §135.55 (relating to Construction, Inspections, and Approval of Project); and

(F) §135.56 (relating to Construction Tables).

(b) As required by §4 of House Bill 2, passed in the Second Session, 83rd Legislature, 2013, the department intends by this adoption of rules to impose minimum standards for the health and safety of a patient of a licensed abortion facility, and that those minimum standards be equivalent to the minimum standards adopted under Health and Safety Code, §243.010, for ambulatory surgical centers.

(c) The minimum standards adopted by reference under this section are not applicable to a licensed abortion facility before September 1, 2014.

(d) Interpretive conventions. For purposes of this chapter:

(1) The words "ambulatory surgical center" and "ASC" and their plural forms in the rules that are adopted by reference in subsection (a) of this section are understood to mean "licensed abortion facility" or "licensed abortion facilities," as appropriate, for purposes of this chapter.

(2) The text of §135.4(c)(11)(B) that reads "or all physicians performing surgery at the ASC shall have admitting privileges at a local hospital" is not adopted by reference into this chapter.

(3) The text of §135.51(a)(1) and the portion of the text of §135.51(a)(2) that reads, "In lieu of meeting the requirements in paragraph (1) of this subsection," are not adopted by reference into this chapter.

(e) If the application of any particular rule that is incorporated by reference from Chapter 135 of this title is found by a state or federal court to violate the Constitution or impose an "undue burden" on women seeking abortions, the department shall continue to enforce the remaining incorporated rules that do not violate the Constitution or impose an "undue burden" on women seeking abortions, and shall continue to enforce all rules incorporated by reference from Chapter 135 of this title against abortion facilities for whom the application of such rules does not violate the Constitution or impose an "undue burden" on women seeking abortions.

§139.53. Medical and Clinical Services.

(a) - (b) (No change.)

(c) Requirements of a physician. A physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that:

(1) is located not further than 30 miles from the location at which the abortion is performed or induced; and

(2) provides obstetrical or gynecological health care services.

§139.56. Emergency Services.

(a) A licensed abortion facility shall have a readily accessible written protocol for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital. The facility shall ensure that the physicians who practice at the facility:

(1) have active admitting privileges at a hospital that provides obstetrical or gynecological health care services and is located not further than 30 miles from the abortion facility; [or have a working arrangement with a physician(s) who has admitting privileges at a local hospital in order to ensure the necessary back up for medical complications.]

(2) provide the pregnant woman with:

(A) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or the facility at which the abortion was performed or induced with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the performance or induction of the abortion or ask health-related questions regarding the abortion; and

(B) the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated.

(b) - (c) (No change.)

§139.57. Discharge and Follow-up Referrals.

(a) A licensed abortion facility shall develop and implement written discharge instructions which shall include:

(1) (No change.)

(2) a statement of the facility's plan to respond to the patient in the event the patient experiences any of the complications listed in the discharge instructions to include:

(A) a telephone number by which the patient may reach the physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed or induced with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the performance or induction of the abortion or ask health-related questions regarding the abortion;

(B) the name and telephone number of the nearest hospital to the home of the patient at which an emergency arising from the abortion would be treated;

[(A) the mechanism by which the patient may contact the facility on a 24-hour basis by telephone answering machine or service, or by direct contact with an individual;]

[(B) the facility's requirement that every reasonable effort be made and documented to respond to the patient within 30 minutes of the patient's call;]

(C) - (D) (No change.)

(3) (No change.)

(b) - (c) (No change.)

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

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Lisa Hernandez

General Counsel

Department of State Health Services

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CHAPTER 416. MENTAL HEALTH
COMMUNITY-BASED SERVICES

SUBCHAPTER A. MENTAL HEALTH REHABILITATIVE SERVICES

25 TAC §§416.1 - 416.17

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §§416.1 - 416.17, concerning mental health (MH) rehabilitative services.

BACKGROUND AND PURPOSE

The new sections stipulate the requirements for providing MH rehabilitative services. In addition, the proposed subchapter addresses the requirement in Health and Safety Code, §533.0354, that the provision of mental health services for adults with bipolar disorder, schizophrenia, or clinically severe depression, and for children with serious emotional illnesses be accomplished using disease management practices.

The requirements for providing MH rehabilitative services described in the proposed subchapter are based on the department's mental health service delivery system and the Medicaid State Plan. This model promotes the uniform provision of services that are based on clinical evidence and recognized best practices. In addition, the model promotes effective MH rehabilitative services by utilizing person-specific information that identifies an individual's mental health care needs, matches those needs to a particular type(s) of rehabilitative service, and evaluates the effectiveness of the service provided.

Government Code, §2001.039, requires that each state agency review and consider for reoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 419.451 - 419.459 and 419.461 - 419.470 have been reviewed and the department has determined that reasons continue to exist for readopting some of the sections. These rules are being repealed and proposed in new Chapter 416 because rules on this subject are needed as more particularly described in the section-by-section summary.

SECTION-BY-SECTION SUMMARY

The repeal of §§419.451 - 419.459 and 419.461 - 419.470 allows update to the rules concerning MH rehabilitative services and placement in new Chapter 416 for better correlation within the Texas Administrative Code, which is published in this same issue of the *Texas Register*.

Throughout the subchapter, the term "treatment plan" is replaced with "recovery plan" and the term "severe mental illness" is replaced with "serious mental illness."

Section 416.1 sets forth the purpose of the subchapter and adds the following list of services, which comprise MH rehabilitative services, to include crisis intervention services; medication training and support services; psychosocial rehabilitative services; skills training and development services; and day programs for acute needs to promote clarity.

New §416.2 sets forth the subchapter's application to providers of MH rehabilitative services and adds language clarifying that the subchapter applies to MH rehabilitative services funded through Medicaid or a general revenue contract with the department.

New §416.3 revises, adds, and deletes definitions that are used in the subchapter. Definitions that are proposed for reoption are the terms "adolescent," "adult," "business day," "CFR," "child," "day," "individual," "in-vivo," "Medicaid provider," "nursing

services," "physician," "primary caregiver," "problem-solving," "QMHP or qualified mental health professional," and "therapeutic team."

Revised or new definitions for terms that are included are "APRN or advanced practice registered nurse," "authorization period," "CFP or certified family partner," "crisis," "CSSP or community services specialist," "CSU or crisis stabilization unit," "department," "direct clinical supervision," "face-to-face," "group," "health risk factors," "IMD or institution for mental diseases," "LAR or legally authorized representative," "LMFT or licensed marriage and family therapist," "licensed medical staff member," "LPC or licensed professional counselor," "LOC or level of care," "LPHA or licensed practitioner of the healing arts," "LVN or licensed vocational nurse," "mental health (MH) rehabilitative services," "medical necessity or medically necessary," "mental health disorder," "on-site," "PA or physician assistant," "peer provider," "pharmacist," "provider," "psychologist," "recovery," "recovery plan or treatment plan," "resilience," "RN or registered nurse," "SED or serious emotional disturbance," "serious mental illness," "staff member," "uniform assessment," and "utilization management guidelines."

Definitions for the terms "master's level professional" and "mental illness" are not being proposed and have been deleted.

New §416.4 consistent with contract requirements adds experience and training requirements for staff members who provide supervision and oversight for staff members and subcontractors who provide MH rehabilitative services, including CFPs. Prohibitions against discrimination and retaliation are revised to include when services are denied and adds sexual orientation to the list of characteristics.

New §416.5 adds clarifying language concerning the eligibility requirements for receiving MH rehabilitative services medical necessity and services provided under arrangement.

New §416.6 updates references within this section, adds the requirement that an LPHA must determine and document medical necessity.

New §416.7 sets forth the standards for providing crisis intervention services, updates references within this section, and adds minor clarifying language.

New §416.8 sets forth the standards for medication training and support services within the context of resilience and disease management; updates the reference to the department's approved patient and family education materials that are available on the department's Internet web site; and adds the guidance that an individual understand the concepts of recovery and resilience within the context of serious mental illness. Under conditions, language clarifying eligible adults and their LARs may receive this service and that these services may be provided individually or in a group; and allows certified family partners (CFPs) to provide this service.

New §416.9 sets forth the standards for psychosocial rehabilitative services; adds language to clarify that behavioral and cognitive interventions provided by the therapeutic team build on strengths and focus on restoring the individual's ability to develop and maintain relationships; and adds clarifying language to housing related and medication related services.

New §416.10 sets forth the standards for skills training and development services; clarifies that the LAR on behalf of an adult may receive these services; adds that these services may be used to increase the LAR's or primary caregiver's understand-

ing of and ability to respond to the individual's needs identified in the uniform assessment or documented in the recovery plan; and allows CFPs to provide these services.

New §416.11 sets forth the standards for day programs for acute needs.

New §416.12 sets forth documentation requirements; adds that documentation must include the goal or objective addressed, modality, and method used to provide services; adds signature and credential notation requirements for CFPs; add documentation required by the department approved curricula, protocol, or practice use to provide services; and adds that the outcome of any service provided must be documented; adds language to clarify that a licensed practitioner of the healing arts must document medical necessity.

New §416.13 sets forth the standards for staff member training and adds competency standards. The section is rewritten to include training requirements specific to providing rehabilitative services and general training requirements that are also in Chapter 412, Subchapter G, Mental Health Community Services Standards are deleted.

New §416.14 sets forth the criteria for billable and non-billable activities. Under billable activities, the section adds that under certain circumstances services provided to an LAR, on behalf of a Medicaid-eligible adult, may be Medicaid reimbursable and that under certain circumstances services provided to an LAR or primary caregiver, on behalf of a Medicaid-eligible child or adolescent, may be Medicaid reimbursable. Under non-billable activities, the section adds that rehabilitative services provided via electronic media and crisis services provided to individuals who do not have a serious mental illness are not Medicaid reimbursable.

New §416.15 sets forth the Medicaid provider participation requirements.

New §416.16 describes the processes for fair hearings and reviews. The section adds a notification requirement that any individual who has not applied for or who is not eligible for Medicaid whose request for services is not acted upon with reasonable promptness, or whose MH rehabilitative services have been terminated, suspended, or reduced have a right to a review and appeal in accordance with department rules.

New §416.17 revises the list of guidelines that are referenced in the subchapter and adds Internet addresses to provide online access.

FISCAL NOTE

Mike Maples, Assistant Commissioner for Mental Health and Substance Abuse Services, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Maples has also determined that the proposed rules will have no adverse economic impact on small businesses or micro-businesses. This was determined by interpretation that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

The rules have direct application only to local mental health authorities, none of which meet the definition of small or micro-business under the Government Code, §2006.001. Therefore, an

economic impact statement and regulatory flexibility analysis for small businesses are not required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There is no anticipated economic cost to persons required to comply with the sections as proposed. There is no anticipated impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Maples 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 is to provide local mental health authorities with standards for providing rehabilitative services that are consistent with the Medicaid State Plan and resilience and recovery practices.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Janet Fletcher, Adult Mental Health Program Services, Department of State Health Services, Mail Code 2018, P.O. Box 149347, Austin, Texas 78714-9347, telephone (512) 467-5425 or by email to MHSARules@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §533.0345, which requires the department to develop standards of care for the services provided by local mental health authorities; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

The new sections affect Government Code, §531.0055; and Health and Safety Code, §§534.053, 534.058, and 1001.075.

§416.1. Purpose.

The purpose of this subchapter is to describe the requirements for providing mental health (MH) rehabilitative services that includes the following:

- (1) crisis intervention services;
- (2) medication training and support services;
- (3) psychosocial rehabilitative services;
- (4) skills training and development services; and
- (5) day programs for acute needs.

§416.2. Application.

This subchapter applies to providers of MH rehabilitative services funded through Medicaid, or a general revenue contract with the department.

§416.3. Definitions.

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

- (1) Adolescent--An individual who is at least 13 years of age, but younger than 18 years of age.
- (2) Adult--An individual who is 18 years of age or older.
- (3) APRN or Advanced practice registered nurse--A staff member who is a registered nurse approved by the Texas Board of Nursing as a clinical nurse specialist in psychiatric/mental health or nurse practitioner in psychiatric/mental health, in accordance with Texas Occupations Code, Chapter 301. The term is synonymous with "advanced nurse practitioner."
- (4) Authorization period--The duration for which the provider has obtained authorization in accordance with §416.6(a) of this title (relating to Service Authorization and Recovery Plan).
- (5) Business day--Any day except a Saturday, Sunday, or legal holiday listed in Texas Government Code, §662.021.
- (6) CFP or Certified family partner--A person who:
 - (A) is 18 years of age or older;
 - (B) has received:
 - (i) a high school diploma; or
 - (ii) a high school equivalency certificate issued in accordance with the laws applicable to the issuing agency;
 - (C) has at least one year of lived experience raising a child or adolescent with an emotional or mental health issues as a parent or LAR;
 - (D) has at least one year of experience navigating a child-service system (e.g., mental health, juvenile justice, social security, or special education) as a parent or LAR; and
 - (E) has successfully completed the certified family partner (CFP) training and passed the certification examination recognized by the department.
- (7) CFR--The Code of Federal Regulations.
- (8) Child--An individual who is at least three years of age, but younger than 13 years of age.
- (9) Crisis--A situation in which:

(A) an individual presents an immediate danger to self or others;

(B) an individual's mental or physical health is at risk of serious deterioration; or

(C) an individual believes that he or she presents an immediate danger to self or others or that his or her mental or physical health is at risk of serious deterioration.

(10) CSSP or community services specialist--A staff member who, as of August 30, 2004:

(A) received:

(i) a high school diploma; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state;

(B) has had three continuous years of documented full-time experience in the provision of MH rehabilitative services; and

(C) has demonstrated competency in the provision and documentation of MH rehabilitative services in accordance with this subchapter and the MH Rehabilitative Services Billing Guidelines.

(11) CSU or crisis stabilization unit--A crisis stabilization unit licensed under the Texas Health and Safety Code, Chapter 577; and Chapter 134 of this title (relating to Private Psychiatric Hospitals and Crisis Stabilization Units).

(12) Day--Calendar day, unless otherwise specified.

(13) Department--The Department of State Health Services.

(14) Direct clinical supervision--An LPHA's or QMHP's interaction with a staff member who delivers MH rehabilitative services to ensure that MH rehabilitative services are clinically appropriate and in compliance with this subchapter by:

(A) conducting a documented meeting with the staff member at regularly scheduled intervals; and

(B) conducting documented observations of the staff member providing MH rehabilitative services at a frequency determined by the supervisor based on the staff member's skill level.

(15) Face-to-face--A contact with an individual that occurs within the physical presence of another person. Face-to-face does not include contacts made through the use of electronic media.

(16) Group--A face-to-face service delivery modality involving at least one staff member and:

(A) two to eight adults; or

(B) two to six children or adolescents and may include their LARs or primary caregivers, which do not count toward the group size limit.

(17) Health risk factors--Circumstances that contribute to the premature death and disabling chronic diseases such as heart disease, diabetes and cancers. They include, but are not limited to, substance abuse or addiction, high blood pressure, tobacco use, high blood glucose, use of and side effects of some neuroleptic medications, physical inactivity, overweight and obesity, and unsafe sex.

(18) IMD or institution for mental diseases--Based on 42 CFR §435.1009, a hospital, nursing facility, or other institution of more than 16 beds that is primarily engaged in providing diagnosis, treatment, or care of individuals with serious mental illness, including medical attention, nursing care, and related services.

(19) Individual--A person seeking or receiving MH rehabilitative services.

(20) In vivo--The individual's natural environment (e.g., the individual's residence, work place, or school).

(21) LAR or legally authorized representative--A person authorized by law to act on behalf of an adult, child, or adolescent with regard to a matter described in this subchapter, including, but not limited to, a parent, guardian, or managing conservator.

(22) LMFT or Licensed marriage and family therapist--An individual who is licensed as a licensed marriage and family therapist by the Texas State Board of Examiners of Marriage and Family Therapists in accordance with Texas Occupations Code, Chapter 502.

(23) Licensed medical staff member--A staff member who is:

(A) a physician (MD) or (DO);

(B) a physician assistant (PA);

(C) an APRN;

(D) a registered nurse (RN);

(E) an LVN; or

(F) a pharmacist.

(24) LPC or Licensed professional counselor--A person who is licensed as a licensed professional counselor by the Texas State Board of Examiners of Professional Counselors in accordance with Texas Occupations Code, Chapter 503.

(25) LOC or level of care--A designation given to the department's standard sets of mental health services, based on the uniform assessment and utilization management guidelines referenced in §416.17 of this title (relating to Guidelines), which specify the type, amount, and duration of MH rehabilitative services to be provided to an individual.

(26) LPHA or licensed practitioner of the healing arts--This term shall have the meaning set forth in the §412.303 of this title (relating to Definitions).

(27) LVN or licensed vocational nurse--A staff member who is licensed as a vocational nurse by the Texas Board of Nursing in accordance with Texas Occupations Code, Chapter 301.

(28) Mental health (MH) rehabilitative services--Services that:

(A) are individualized, age-appropriate training and instructional guidance that restore an individual's functional deficits due to serious mental illness or SED;

(B) are designed to improve or maintain the individual's ability to remain in the community as a fully integrated and functioning member of that community; and

(C) consist of the following services:

(i) crisis intervention services;

(ii) medication training and support services;

(iii) psychosocial rehabilitative services;

(iv) skills training and development services; and

(v) day programs for acute needs.

(29) Medicaid provider--A Medicaid-enrolled provider with which the department has a Medicaid provider agreement to provide MH rehabilitative services under the State's Medicaid Program.

(30) Medical necessity or medically necessary--A clinical determination made by an LPHA that services:

(A) are reasonable and necessary for the treatment of a serious mental illness; or to improve, maintain, or prevent deterioration of functioning resulting from such a disorder;

(B) are provided in accordance with accepted standards of practice in behavioral health care;

(C) are furnished in the most appropriate and least restrictive setting in which services can be safely provided;

(D) are at the most appropriate level or amount of service that can be safely provided; and

(E) could not have been omitted without adversely affecting the individual's mental and/or physical health or the quality of care rendered.

(31) Mental health disorder--Health conditions involving changes in thinking, mood, and/or behaviors that are associated with distress or impaired functioning. When mental health disorders are more severe, they are called serious mental illnesses, which includes anxiety disorder, attention-deficit/hyperactivity disorder, depressive and other mood disorders, eating disorders, schizophrenia, and others.

(32) Nursing services--Services provided or delegated by an RN acting within the scope of his or her practice, as described in Texas Occupations Code, Chapter 301.

(33) On site--At a location operated by a provider or a person or entity under arrangement with the provider.

(34) PA or Physician assistant--A staff member who is licensed as a physician assistant by the Texas State Board of Physician Assistant Examiners in accordance with Texas Occupations Code, Chapter 204.

(35) Peer provider--A staff member who:

(A) has received:

(i) a high school diploma; or

(ii) a high school equivalency certificate issued in accordance with the law of the issuing state; and

(B) has at least one cumulative year of receiving mental health services for a disorder that is treated in the target population for Texas.

(36) Pharmacist--A staff member who is licensed as a pharmacist by the Texas State Board of Pharmacy in accordance with Texas Occupations Code, Chapter 558.

(37) Physician--A staff member who is:

(A) licensed as a physician by the Texas Medical Boards in accordance with Texas Occupations Code, Chapter 155 (Medical Doctor or Doctor of Osteopathy); or

(B) authorized to perform medical acts under an institutional permit at a Texas postgraduate training program approved by the Accreditation Council on Graduate Medical Education, the American Osteopathic Association, or the Texas Medical Board.

(38) Primary caregiver--A person 18 years of age or older who has actual care, control, and possession of a child or adolescent.

(39) Problem-solving--The use of specific steps and strategies to analyze and evaluate a problematic situation in order to determine a course of action to resolve the problematic situation.

(40) Provider--An entity with which the department has a contractual agreement to provide MH Rehabilitative Services, including a Medicaid provider.

(41) Psychologist--A staff member who is licensed as a psychologist by the Texas State Board of Examiners of Psychologists in accordance with Texas Occupations Code, Chapter 501.

(42) QMHP-CS or qualified mental health professional-community services--A staff member who meets the definition of a QMHP-CS set forth in §412.303 of this title (relating to Definitions).

(43) Recovery--A process of change through which individuals improve their health and wellness, live a self-directed life, and strive to reach their full potential.

(44) Recovery plan or treatment plan--A written plan developed with the individual and, as required, the LAR and a QMHP-CS that specifies the individual's recovery goals, objectives, and strategies/interventions in conjunction with the uniform assessment that guides the recovery process and fosters resiliency as further described in §412.322(e) of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization).

(45) Resilience--The ability to cope with and recover from adversity and stress.

(46) RN or registered nurse--A staff member who is licensed as a registered nurse by the Texas Board of Nursing in accordance with Texas Occupations Code, Chapter 301.

(47) SED or Serious emotional disturbance--A diagnosed mental health disorder that substantially disrupts a child's or adolescent's ability to function socially, academically, and emotionally.

(48) Serious mental illness--An illness, disease, disorder, or condition (other than a sole diagnosis of epilepsy, dementia, substance use disorder, or intellectual or developmental disability) that:

(A) substantially impairs an individual's thought, perception of reality, emotional process, development, or judgment; or

(B) grossly impairs an individual's behavior as demonstrated by recent disturbed behavior.

(49) Staff member--Personnel of a provider including a full-time or part-time employee, contractor, intern, or volunteer.

(50) Therapeutic team--A group of staff members who work together in a coordinated manner for the purpose of providing comprehensive mental health services to an individual.

(51) Uniform assessment--An assessment adopted by the department that is used for recommending an approved level of care (LOC).

(52) Utilization management guidelines--Guidelines developed by the department that suggest the type, amount, and duration of mental health services for each LOC.

§416.4. General Requirements for Providers of MH Rehabilitative Services.

(a) Compliance with MH community standards. In addition to complying with this subchapter, a provider must also comply with Chapter 412, Subchapter G of this title (relating to Mental Health Community Services Standards) in the provision of MH rehabilitative ser-

vices, as described in §412.304(a)(4) and (b) of this title (relating to Responsibility for Compliance).

(b) Staff supervision and oversight. A provider must develop policies and procedures in accordance with this subchapter for the supervision and oversight of staff members who provide MH rehabilitative services. Staff members who provide supervision must have experience in providing rehabilitative services and training in supervising rehabilitative services. The MH rehabilitative services provided by a:

(1) CFP must be directly supervised by a staff member who is credentialed as a QMHP-CS at minimum and who must have at least one year experience in the department-approved recovery and resilience protocol;

(2) peer provider must be under the direct clinical supervision of an LPHA;

(3) CSSP must be clinically supervised by a QMHP-CS;

(4) QMHP-CS must be clinically supervised by at least another QMHP-CS; and

(5) QMHP-CS supervisor of another QMHP-CS must be clinically supervised by an LPHA.

(c) Subcontract for providing services.

(1) A provider may choose to have any MH rehabilitative service provided by a person or entity through a subcontract.

(2) A provider must ensure that, if MH rehabilitative services are provided through a subcontract, then the subcontractor complies with all applicable federal and state laws, rules, and regulations, and any provider manuals and policy clarification letters promulgated by the department.

(d) Prohibitions against discrimination and retaliation.

(1) A provider may not discriminate against or deny services to an individual based on race, color, national origin, religion, sex, sexual orientation, age, disability, co-occurring disorder, or political affiliation.

(2) A provider must ensure that an individual's refusal of any service offered by the provider does not preclude the individual from accessing a needed MH rehabilitative service.

§416.5. Eligibility.

An individual is eligible for MH rehabilitative services if:

(1) the individual:

(A) is a resident of the State of Texas;

(B) is an adult with a serious mental illness or a child or adolescent with a serious emotional disturbance (SED); and

(C) qualifies for an LOC; and

(2) a determination that such services are medically necessary has been made by an LPHA who is:

(A) an employee of the department;

(B) an employee of an entity designated to make such determinations on behalf of the department; or

(C) a contractor of an entity designated to make such determinations on behalf of the department, if the LPHA is not otherwise employed by or contracting with an entity providing MH rehabilitative services through a subcontract.

§416.6. Service Authorization and Recovery Plan.

(a) Prerequisites to providing services. With the exception of crisis intervention services:

(1) the provider must obtain prior authorization from the department or its designee for the MH rehabilitative services to be provided in accordance with the uniform assessment, which is referenced in §416.17 of this title (relating to Guidelines); and the utilization management guidelines, which are referenced in §416.17 of this title; and

(2) an LPHA must determine whether the need for MH rehabilitative services meets the definition of medical necessity.

(b) Recovery planning.

(1) In collaboration with the individual or LAR, develop a recovery plan in accordance with §412.322(e) of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization) that also includes a list of the type(s) of MH rehabilitative services authorized in accordance with subsection (a)(1) of this section.

(2) A provider must develop the recovery plan required by paragraph (1) of this subsection within 10 days after the authorization date.

(c) Documenting medical necessity for crisis intervention services.

(1) An LPHA must, within two business days after crisis intervention services are provided:

(A) determine whether the crisis intervention services met the definition of medical necessity; and

(B) if the crisis intervention services were determined to meet medical necessity, document the medical necessity for such services.

(2) A provider is not required to develop a recovery plan for providing crisis intervention services.

(d) Reauthorization of MH rehabilitative services.

(1) Prior to the expiration of the authorization period or depleting the amount of services authorized:

(A) the provider must make a determination of whether the individual continues to need MH rehabilitative services; and

(B) an LPHA must determine whether the continuing need for MH rehabilitative services meets the definition of medical necessity.

(2) If the determination is that the individual continues to need MH rehabilitative services and that such services are medically necessary, the provider must:

(A) request another authorization from the department or its designee for the same type and amount of MH rehabilitative service previously authorized; or

(B) submit a request to the department or its designee, with documented clinical reasons for such request, to change the type or amount of MH rehabilitative services previously authorized if:

(i) the provider determines that the type or amount of MH rehabilitative services previously authorized is inappropriate to address the individual's needs; and

(ii) the criteria described in the utilization management guidelines for changing the type or amount of MH rehabilitative services has been met.

(e) Recovery plan review.

(1) In collaboration with the individual or LAR or primary caregiver, the provider must, review the recovery plan to determine if the plan adequately assists the individual in achieving recovery through the identified goals, objectives, and needs:

(A) at intervals set forth in the utilization management guidelines;

(B) as clinically indicated; and

(C) at the request of the individual, LAR, or primary caregiver.

(2) At the time the recovery plan is reviewed, the provider must:

(A) solicit active participation of the individual and LAR or primary caregiver of a child or adolescent regarding the services received to date and whether the services received have led to improvement and/or if there are other services to address unmet needs; and

(B) document such input.

(f) Revisions to the recovery plan. If, after review of the recovery plan the provider determines that the recovery plan does not adequately address the needs of the individual, the provider must, as appropriate:

(1) revise the content of the recovery plan; or

(2) must document medical necessity if there is a change in an LOC; and

(3) request authorization for a change in the type or amount of the MH rehabilitative services authorized consistent with subsection (d)(2) of this section.

§416.7. Crisis Intervention Services.

(a) Description. Crisis intervention services are interventions provided in response to a crisis in order to reduce or manage symptoms of serious mental illness or SED and to prevent admission of an individual to a more restrictive environment. Crisis intervention services consist of the following interventions:

(1) an assessment of dangerousness of the individual to self or others;

(2) the coordination of emergency care services in accordance with §412.314 of this title (relating to Access to Mental Health Community Services);

(3) behavior skills training to assist the individual in reducing distress and managing symptoms;

(4) problem-solving;

(5) reality orientation to help the individual identify and manage his or symptoms of serious mental illness or SED; and

(6) providing instruction, structure, and emotional support to the individual in adapting to and coping with immediate stressors.

(b) Conditions.

(1) Crisis intervention services may be provided to:

(A) an adult; or

(B) a child or adolescent.

(2) Crisis intervention services must be provided one-to-one.

(3) Crisis intervention services may be provided:

(A) on site; or

(B) in vivo.

(4) Crisis intervention services must be provided by a QMHP-CS at a minimum.

(5) Crisis intervention services may not be provided to an individual who is currently admitted to a CSU.

(6) Crisis intervention services may be provided to an individual without first obtaining authorization from the department, or its designee, in accordance with §416.6 of this title (relating to Service Authorization and Recovery Plan).

(7) Crisis intervention services may be provided without a recovery plan described in §416.6 of this title.

§416.8. Medication Training and Support Services.

(a) Description. Medication training and support services consist of education and guidance about medications and their possible side effects. The department has reviewed and approved the use of the materials that are available on the department's internet site at: <http://www.dshs.state.tx.us/mhsa/patient-family-ed/> and other materials which have been formally reviewed and approved by the department, to assist an individual in:

(1) understanding the nature of an adult's serious mental illness or a child's or adolescent's SED;

(2) understanding the concepts of recovery and resilience within the context of the serious mental illness;

(3) understanding the role of the individual's prescribed medications in reducing symptoms and increasing or maintaining the individual's functioning;

(4) identifying and managing the individual's symptoms and potential side effects of the individual's medication;

(5) learning the contraindications of the individual's medication;

(6) understanding the overdose precautions of the individual's medication; and

(7) learning self-administration of the individual's medication.

(b) Conditions.

(1) Medication training and support services may be provided to:

(A) an eligible adult;

(B) an eligible child or adolescent; or

(C) the LAR or primary caregiver of an eligible adult, child, or adolescent.

(2) Medication training and support services provided to an adult may be provided:

(A) individually; or

(B) in a group.

(3) Medication training and support services provided to a child or adolescent may be provided:

(A) individually; or

(B) in a group.

(4) Medication training and support services provided to an LAR or primary caregiver may be provided:

(A) individually; or

(B) in a group, except that the adult, child or adolescent may also be present.

(5) Medication training and support services may be provided:

(A) on site; or

(B) in vivo.

(6) Medication training and support services provided to an adult or LAR must be provided by:

(A) a QMHP-CS;

(B) a CSSP;

(C) a peer provider; or

(D) a licensed medical staff member.

(7) Medication training and support services provided to a child, adolescent, LAR, or primary caregiver must be provided by:

(A) a QMHP-CS;

(B) a CSSP;

(C) a CFP; or

(D) a licensed medical staff member.

(8) Medication training and support services may not be provided to an individual who is currently admitted to a CSU.

(c) Frequency and duration. The provision of medication training and support services must be in accordance with the amount and duration for which the provider has obtained authorization in accordance with §416.6 of this title (relating to Service Authorization and Recovery Plan).

§416.9. Psychosocial Rehabilitative Services.

(a) Description. Psychosocial rehabilitative services are social, behavioral, and cognitive interventions provided by members of an individual's therapeutic team that build on strengths and focus on restoring the individual's ability to develop and maintain social relationships, occupational or educational achievement, and other independent living skills that are affected by or the result of a serious mental illness in adults. Psychosocial rehabilitative services may also address the impact of co-occurring disorders upon the individual's ability to reduce symptomology and increase daily functioning. Psychosocial rehabilitative services that include, but are not limited to, the following component services:

(1) independent living services;

(2) coordination services;

(3) employment related services;

(4) housing related services;

(5) medication related services; and

(6) crisis related services.

(b) Conditions.

(1) Psychosocial rehabilitative services:

(A) may only be provided to an eligible adult;

(B) may be provided individually or in a group;

(C) may be provided on site or in vivo;

(D) must be provided by a member of the individual's therapeutic team; and

(E) may not be provided to an individual who is currently admitted to a CSU.

(2) The therapeutic team must be constituted and organized in a manner that ensures that:

(A) the team includes a sufficient number of staff to adequately address the rehabilitative needs of individuals assigned to the team;

(B) team members are appropriately credentialed to provide the full array of component services;

(C) team members have regularly scheduled team meetings either in person or by teleconference; and

(D) every member of the team is knowledgeable of the needs and of the services available to the specific individuals assigned to the team.

(3) Independent living services, coordination services, employment related services, and housing related services, as described in subsection (c)(1) - (4) of this section, must be provided by:

(A) a QMHP-CS;

(B) a CSSP; or

(C) a peer provider.

(4) Medication related services, as described in subsection (c)(5) of this section, must be provided by licensed medical personnel.

(5) Crisis related services, as described in subsection (c)(6) of this section, must be provided by a QMHP-CS.

(6) As part of providing the coordination services described in subsection (c)(2) of this section, a QMHP-CS must conduct the uniform assessment at intervals specified by the department to determine the type, amount, and duration of MH rehabilitative services.

(c) Components of psychosocial rehabilitative services. Psychosocial rehabilitative services include, but are not limited to, the following.

(1) Independent living services assist an individual in acquiring the most immediate, fundamental functional skills needed to enable the individual to reside in the community and avoid more restrictive levels of treatment or reducing behaviors or symptoms that prevent successful functioning in the individual's environment of choice. Such services include training in symptom management, personal hygiene, nutrition, food preparation, exercise, money management and community integration activities.

(2) Coordination services are training activities that assist an individual in improving his or her ability to gain and coordinate access to necessary care and services appropriate to the needs of the individual. Coordination services include, but are not limited to, instruction and guidance in such areas as:

(A) assessment--identifying strengths and areas of need across life domains;

(B) recovery planning--prioritizing needs and establishing life and treatment goals, selecting interventions, developing and revising recovery plans that include wellness, relapse prevention, and crisis plans;

(C) access--identifying potential service providers and support systems across all life domains (e.g., medical, social, educa-

tional, substance use), initiating contact with providers and support systems including advocacy groups;

(D) coordination--setting appointments, arranging transportation, facilitating communication between providers; and

(E) advocacy--

(i) asserting treatment needs, requesting special accommodations, evaluating provider effectiveness and compliance with the agreed upon recovery plan; and

(ii) requesting improvements and modifications to ensure maximum benefit from the services and supports.

(3) Employment related services provide supports and skills training that are not job-specific and focus on developing skills to reduce or manage the symptoms of serious mental illness that interfere with an individual's ability to make vocational choices or obtain or retain employment. Such services consist of:

(A) instruction in dress, grooming, socially and culturally appropriate behaviors, and etiquette necessary to obtain and retain employment;

(B) training in task focus, maintaining concentration, task completion, and planning and managing activities to achieve outcomes;

(C) instruction in obtaining appropriate clothing, arranging transportation, utilizing public transportation, accessing and utilizing available resources related to obtaining employment, and accessing employment-related programs and benefits (e.g., unemployment, workers' compensation, and Social Security);

(D) interventions or supports provided on or off the job site to reduce behaviors or symptoms of serious mental illness that interfere with job performance or that interfere with the development of skills that would enable the individual to obtain or retain employment; and

(E) interventions designed to develop natural supports on or off the job site to compensate for skill deficits that interfere with job performance.

(4) Housing related services develop an individual's strengths and abilities to manage the symptoms of the individual's serious mental illness that interfere with the individual's capacity to obtain or maintain tenure in independent integrated housing. Such services consist of:

(A) skills training related to:

(i) home maintenance and cleanliness;

(ii) problem-solving with the individual's landlord and neighbors, mortgage lender, or homeowners association; and

(iii) maintaining appropriate interpersonal boundaries; and

(B) supportive contacts with the individual to reduce or manage the behaviors or symptoms related to the individual's serious mental illness that interfere with maintaining independent integrated housing.

(5) Medication related services provide training regarding an individual's medication adherence. Such services consist of training in:

(A) the importance of the individual taking the medications as prescribed;

(B) the self-administration of the individual's medication;

(C) determining the effectiveness of the individual's medications;

(D) identifying side-effects of the individual's medications; and

(E) contraindications for medications prescribed.

(6) Crisis related services respond to an individual in crisis in order to reduce symptoms of serious mental illness or SED and to prevent admission of the individual to a more restrictive environment.

(d) Frequency and duration. The provision of psychosocial rehabilitative services must be in accordance with the amount and duration for which the provider has obtained authorization in accordance with §416.6 of this title (relating to Service Authorization and Recovery Plan).

§416.10. Skills Training and Development Services.

(a) Description.

(1) Skills training and development services is training provided to an eligible individual or the LAR or primary caregiver of an eligible adult, child, or adolescent. Such training:

(A) addresses serious mental illness or SED and symptom-related problems that interfere with the individual's functioning and living, working, and learning environment;

(B) provides opportunities for the individual to acquire and improve skills needed to function as appropriately and independently as possible in the community; and

(C) facilitates the individual's community integration and increases his or her community tenure.

(2) Skills training and development services consist of teaching an individual the following skills:

(A) skills for managing daily responsibilities (e.g., paying bills, attending school, and performing chores);

(B) communication skills (e.g., effective communication and recognizing or change problematic communication styles);

(C) pro-social skills (e.g., replacing problematic behaviors with behaviors that are socially and culturally appropriate or developing interpersonal relationship skills necessary to function effectively with family, peer, teachers, or other people in the community);

(D) problem-solving skills;

(E) assertiveness skills (e.g., resisting peer pressure, replacing aggressive behaviors with assertive behaviors, and expressing one's own opinion in a manner that is socially appropriate);

(F) social skills and expanding the individual social support network, (e.g., selection of appropriate friends and healthy activities);

(G) stress reduction techniques (e.g., progressive muscle relaxation, deep breathing exercises, guided imagery, and selected visualization);

(H) anger management skills (e.g., identification of antecedents to anger, calming down, stopping and thinking before acting, handling criticism, avoiding and disengaging from explosive situations);

(I) skills to manage the symptoms of serious mental illness or SED and to recognize and modify unreasonable beliefs, thoughts and expectations;

(J) skills to identify and utilize community resources and informal supports;

(K) skills to identify and utilize acceptable leisure time activities (e.g., identifying pleasurable leisure time activities that will foster acceptable behavior); and

(L) independent living skills (e.g., money management, accessing and using transportation, grocery shopping, maintaining housing, maintaining a job, and decision making).

(3) Skills training and development services consist of:

(A) assisting the child or adolescent in learning the skills described in paragraph (2) of this subsection; and

(B) increasing the LAR's or primary caregiver's understanding of and ability to respond to the individual's needs identified in the uniform assessment or documented in the recovery plan.

(b) Conditions.

(1) Skills training and development services may be provided to:

(A) an eligible adult;

(B) an eligible child or adolescent; or

(C) the LAR or primary caregiver of an individual.

(2) Skills training and development services provided to an individual, LAR, or primary caregiver of a child or adolescent may be provided:

(A) individually; or

(B) in a group.

(3) Skills training and development services may be provided:

(A) on site; or

(B) in vivo.

(4) Skills training and development services provided to an individual must be provided according to curricula approved by the department.

(5) Skills training and development services provided to an adult or LAR must be provided by:

(A) a QMHP-CS;

(B) a CSSP; or

(C) a peer provider.

(6) Skills training and development services provided to a child or adolescent, LAR, or primary caregiver must be provided by:

(A) a QMHP-CS;

(B) a CSSP; or

(C) a CFP.

(7) Skills training and development services may not be provided to an individual who is currently admitted to a CSU.

(c) Frequency and Duration. The provision of skills training and development services must be in accordance with the amount and duration for which the provider has obtained authorization in accor-

dance with §416.6 of this title (relating to Service Authorization and Recovery Plan).

§416.11. Day Programs for Acute Needs.

(a) Description. Day programs for acute needs provide short term, intensive treatment to an individual who requires multidisciplinary treatment in order to stabilize acute psychiatric symptoms or prevent admission to a more restrictive setting. Day programs for acute needs:

(1) are provided in a highly structured and safe environment with constant supervision;

(2) ensure an opportunity for frequent interaction between an individual and staff members;

(3) are services that are goal oriented and focus on:

(A) reality orientation;

(B) symptom reduction and management;

(C) appropriate social behavior;

(D) improving peer interactions;

(E) improving stress tolerance;

(F) the development of coping skills; and

(4) consist of the following component services:

(A) psychiatric nursing services;

(B) pharmacological instruction;

(C) symptom management training; and

(D) functional skills training.

(b) Conditions.

(1) Day programs for acute needs:

(A) may only be provided to eligible adults;

(B) may be provided in a setting with any number of individuals; and

(C) may be provided:

(i) on site; or

(ii) in a short-term, crisis-resolution oriented residential treatment setting that is not:

(I) a general medical hospital;

(II) a psychiatric hospital; or

(III) an IMD.

(2) Except as provided by paragraphs (4) and (5) of this subsection, day programs for acute needs must be provided by:

(A) a QMHP-CS;

(B) a CSSP; or

(C) a peer provider.

(3) Day programs for acute needs must, at all times:

(A) have a sufficient number of staff members to ensure safety and program adequacy; and

(B) at a minimum include:

(i) one RN for every 16 individuals at the day program's location;

(ii) one physician to be available by phone, with a response time not to exceed 15 minutes;

(iii) two staff members who are QMHP-CSs, CSSPs, or peer providers at the day program's location;

(iv) one additional QMHP-CS who is not assigned full-time to another day program to be physically available, with a response time not to exceed 30 minutes; and

(v) additional QMHP-CSs, CSSPs, or peer providers at the day program's location sufficient to maintain a ratio of one staff member to every four individuals.

(4) Psychiatric nursing services, as described in subsection (c)(1) of this section, must be provided by an RN at the day program's location.

(5) Pharmacological instruction, as described in subsection (c)(2) of this section, must be provided by a licensed medical personnel.

(c) Components of day programs for acute needs.

(1) Psychiatric nursing services consist of:

(A) a nursing assessment;

(B) the coordination of medical activities (e.g., referrals to specialists and scheduling medical laboratory tests);

(C) the administration of medication;

(D) laboratory specimen collections and screenings (e.g., the Abnormal Involuntary Movement Scale);

(E) emergency medical interventions as ordered by a physician; and

(F) other nursing services.

(2) Pharmacological instruction is training to an individual that addresses medication issues related to the crisis precipitating the provision of day programs for acute needs. Such medication issues consist of:

(A) the role of the individual's medications in stabilizing acute psychiatric symptoms or preventing admission to a more restrictive setting;

(B) the identification of substances that reduce the effectiveness of the individual's medications;

(C) appropriate interventions to reduce side effects of the medications; and

(D) the self-administration of the individual's medication.

(3) Symptom management training assists an individual in recognizing and reducing her or his symptoms and includes training the individual on:

(A) the identification of thoughts, feelings, or behaviors that indicate the onset of acute psychiatric symptoms;

(B) developing coping strategies to address the symptoms;

(C) ways to avoid symptomatic episodes;

(D) identification of external circumstances that trigger the onset of the acute psychiatric symptoms; and

(E) relapse prevention strategies.

(4) Functional skills training assists an individual in acquiring the skills needed to enable the individual to continue to reside in the

community and avoid more restrictive levels of treatment and includes training the individual on:

- (A) personal hygiene;
- (B) nutrition;
- (C) food preparation;
- (D) money management;
- (E) socially and culturally appropriate behavior; and
- (F) accessing and participating in community activities.

(d) Frequency and duration. The provision of day programs for acute needs must be in accordance with the amount and duration for which the provider has obtained authorization in accordance with §416.6 of this title (relating to Service Authorization and Recovery Plan).

§416.12. Documentation Requirements.

(a) MH rehabilitative services documentation. A rehabilitative services provider must document the following for all MH rehabilitative services:

- (1) the name of the individual to whom the service was provided;
- (2) the type of service provided;
- (3) the specific goal or objective addressed, modality, and method used to provide the service;
- (4) the date the service was provided;
- (5) the begin and end time of the service;
- (6) the location where the service was provided;
- (7) the signature of the staff member providing the service and a notation of their credential (e.g., a QMHP-CS, a pharmacist, a CSSP, a CFP, or a peer provider);
- (8) any pertinent event or behavior relating to the individual's treatment which occurs during the provision of the service;
- (9) any pertinent information required to be documented by the curricula, protocol, or practice approved by the department; and
- (10) the outcome or response, as applicable:
 - (A) for crisis intervention service, the outcome of the crisis;
 - (B) for psychosocial coordination services, the outcome of the services;
 - (C) for day programs for acute needs, the progress or lack of progress in stabilizing the individual's acute psychiatric symptoms; or
 - (D) for all other services, the individual's response, including the progress or lack of progress in achieving recovery plan goals and objectives.

(b) Crisis services documentation. In addition to the requirements described in subsection (a) of this section, when providing crisis services, a provider must document the information required by §412.321(e) of this title (relating to Crisis Services).

(c) Medical necessity documentation. An LPHA must document that MH rehabilitative services are medically necessary when the services are authorized and reauthorized.

(d) Frequency of documentation.

(1) Day programs for acute needs. For day programs for acute needs, the documentation required by subsection (a)(1) - (9) and (10)(C) of this section must be made daily.

(2) Programs other than day programs for acute needs. For MH rehabilitative services other than day programs for acute needs, the documentation required by subsection (a)(1) - (9) and (10)(A), (B), and (D) of this section must be made after each face-to-face contact that occurs to provide the MH rehabilitative service.

(3) Medical necessity. An LPHA must document medical necessity in accordance with §416.6 of this title (relating to Service Authorization and Recovery Plan).

(4) Retention. A provider must retain documentation in compliance with applicable federal and state laws, rules, and regulations.

§416.13. Staff Member Competency and Training.

(a) General competency of staff members. In accordance with §412.316 of this title (relating to Competency and Credentialing), a provider must ensure the competency of staff members prior to providing services.

(b) MH rehabilitative services training and competency of staff members. A provider must ensure that staff members providing MH rehabilitative services receive initial training and ensure the competency of a staff member who provides or supervises the provision of MH rehabilitative services in the following areas:

- (1) the nature of serious mental illness and SED;
- (2) the concepts of recovery and resilience;
- (3) the department-approved curricula, protocol, or practice;
- (4) the rehabilitative practice techniques found in curricula, program practices, and protocols; and
- (5) the prevalence of health risk factors.

(c) Additional training related to children and adolescents. A staff member who routinely provides or supervises the provision of MH rehabilitative services to a child or adolescent must receive training and demonstrate competency as required by subsection (b) of this section and in the following areas:

- (1) the aspects of a child's or adolescent's growth and development (including physical, emotional, cognitive, educational and social) and the treatment needs of a child and adolescent; and
- (2) the department's approved skills training curricula, protocol, or practice guidelines.

(d) Except for the direct clinical supervision of a peer provider, which must be provided by an LPHA, the clinical supervision of the provision of MH rehabilitative services must be provided by a staff member who is, at minimum, a QMHP-CS.

(e) Approved curricula. If a staff member provides MH rehabilitative services through a department-approved curricula, protocol, or practice guideline, the staff member must be trained in the implementation of the curriculum, protocol, or practice guideline.

(f) Follow-up training. In addition to the training required in subsection (a) of this section, staff members may be required to receive additional training as determined by the department.

(g) Training documentation. A provider must document that a staff member has successfully completed the training and has demonstrated competencies in the areas described in subsection (a) of this section.

§416.14. Medicaid Reimbursement.

(a) Billable and non-billable activities.

(1) A Medicaid provider may only bill for medically necessary MH rehabilitative services that are provided face-to-face to:

(A) a Medicaid-eligible individual;

(B) the LAR of a Medicaid-eligible adult (on behalf of the adult); or

(C) the LAR or primary caregiver of a Medicaid-eligible child or adolescent (on behalf of the child or adolescent).

(2) The cost of the following activities are included in the Medicaid MH rehabilitative services reimbursement rate(s) and may not be directly billed by the Medicaid provider:

(A) developing and revising the recovery plan and interventions that are appropriate to an individual's needs;

(B) staffing and team meetings to discuss the provision of MH rehabilitative services to a specific individual;

(C) monitoring and evaluating outcomes of interventions, including contacts with a person other than the individual;

(D) documenting the provision of MH rehabilitative services;

(E) a staff member traveling to and from a location to provide MH rehabilitative services;

(F) all services provided within a day program for acute needs that are delivered by a staff member, including services delivered in response to a crisis or an episode of acute psychiatric symptoms; and

(G) administering the uniform assessment to individuals who are receiving psychosocial rehabilitative services.

(b) Non-reimbursable activities.

(1) The department will not reimburse a Medicaid provider for any MH rehabilitative services provided to an individual who is:

(A) a resident of an intermediate care facility for persons with an intellectual or developmental disability as described in 42 CFR §440.150;

(B) a resident in an IMD;

(C) an inmate of a public institution as defined in 42 CFR §435.1009;

(D) a resident in a Medicaid-certified nursing facility unless the individual has been determined through a pre-admission screening and annual resident review assessment to be eligible for the specialized service of MH rehabilitative services;

(E) a patient in a general medical hospital; or

(F) not Medicaid-eligible.

(2) With the exception of crisis intervention services and psychosocial rehabilitative services that are being provided to resolve a crisis situation, the department will not reimburse a Medicaid provider for any combination of MH rehabilitative services delivered in excess of eight hours per individual per day. In addition, the department will not reimburse a Medicaid provider for more than:

(A) two hours per individual per day of medication training and support services;

(B) four hours per individual per day of psychosocial rehabilitative services when the psychosocial rehabilitative services are being provided in non-crisis situations;

(C) four hours per individual per day of skills training and development services; and

(D) six hours per individual per day of day programs for acute needs.

(3) The department will not reimburse a Medicaid provider for:

(A) an MH rehabilitative service that is not included in the individual's recovery plan (except for crisis intervention services documented in accordance with §416.6(b) of this title (relating to Service Authorization and Recovery Plan)) and psychosocial rehabilitative services provided in a crisis situation;

(B) an MH rehabilitative service that is not authorized in accordance with §416.6 of this title (except for crisis intervention services documented in accordance with §416.6(b) of this title);

(C) an MH rehabilitative service provided in excess of the amount authorized in accordance with §416.6(a)(1) of this title;

(D) an MH rehabilitative service provided outside of the duration authorized in accordance with §416.6(b) of this title;

(E) a psychosocial rehabilitative service provided to an individual receiving MH case management services in accordance with Chapter 412, Subchapter I of this title (relating to MH Case Management);

(F) an MH rehabilitative service that is not documented in accordance with §416.12 of this title (relating to Documentation Requirements);

(G) an MH rehabilitative service provided to an individual who does not meet the eligibility criteria as described in §416.5 of this title (relating to Eligibility);

(H) an MH rehabilitative service provided to an individual who does not have a current uniform assessment (except for crisis intervention services documented in accordance with §416.6(b) of this title);

(I) an MH rehabilitative service provided to an individual who is not present, awake, and participating during such service;

(J) an MH rehabilitative service that is provided via electronic media;

(K) a crisis service provided to an individual who does not have a serious mental illness; and

(L) any other activity or service identified as non-reimbursable in the department's MH Rehabilitative Services Billing Guidelines, referenced in §416.17 of this title (relating to Guidelines).

(c) Services provided same time and same day.

(1) If a Medicaid provider provides more than one MH rehabilitative service to an individual at the same time and on the same day, the Medicaid provider may bill for only one of the services provided.

(2) A Medicaid provider may bill for a MH rehabilitative service provided to a child or adolescent's LAR or primary caregiver at the same time and on the same day the child or adolescent is receiving another MH rehabilitative service only if the staff member providing the service to the LAR or primary caregiver is different from the staff member providing the service to the child or adolescent.

(d) Services provided before a fair hearing. If the provision of a MH rehabilitative service is continued prior to a fair hearing decision being rendered, as required by 1 TAC §357.7 (relating to Agency and

Designee Responsibilities), the Medicaid provider may bill for such service.

§416.15. Medicaid Provider Participation Requirements.

(a) Qualifications. To become a Medicaid provider of MH rehabilitative services, an entity must:

(1) be established as a community mental health center in accordance with Texas Health and Safety Code, §534.001, that:

(A) provides services comparable to MH rehabilitative services and the services described in the Texas Health and Safety Code, §534.053(a)(1) - (7);

(B) is in compliance with Chapter 412, Subchapter G of this title (relating to Mental Health Community Services Standards);

(C) conducts criminal history clearances on all contractors delivering MH rehabilitative services and all employees and applicants of the Medicaid provider to whom an offer of employment is made and ensures that individuals do not come in contact with and are not provided services by an employee or contractor of the Medicaid provider (or employee or contractor of contractors delivering MH rehabilitative services under a contract with the Medicaid provider) who has a conviction for any of the criminal offenses listed in Texas Health and Safety Code, §250.006, or for any criminal offense that the Medicaid provider has determined to be a contraindication to employment; and

(D) has a Medicaid provider agreement with the department to provide MH rehabilitative services; or

(2) be a corporation incorporated or registered to do business in the State of Texas that:

(A) has completed an application evidencing that it:

(i) provides services comparable to MH rehabilitative services and the services described in the Texas Health and Safety Code, §534.053(a)(1) - (7);

(ii) is in compliance with Chapter 412, Subchapter G, of this title;

(iii) has demonstrated a history of providing, as well as the capacity to continue to provide, services to individuals required to submit to mental health treatment;

(I) under the Texas Code of Criminal Procedure, Article 17.032 (relating to Release on Personal Bond of Certain Mentally Ill Defendants), or Article 42.12 §11(d) (relating to Community Supervision); and

(II) under the Texas Health and Safety Code, Chapter 573 (relating to Emergency Detention) and Chapter 574 (relating to Court-Ordered Mental Health Services); and

(iv) conducts criminal history clearances on all contractors delivering MH rehabilitative services and all employees and applicants of the corporation to whom an offer of employment is made and ensures that individuals do not come in contact with and are not provided services by an employee or contractor of the corporation (or employee or contractor of contractors delivering MH rehabilitative services under a contract with the corporation) who has a conviction for any of the criminal offenses listed in Texas Health and Safety Code, §250.006, or for any criminal offense that the corporation has determined to be a contraindication to employment;

(B) has had its application information confirmed by an on-site visit by the department;

(C) has had its application approved by the department; and

(D) has signed a Medicaid provider agreement with the department to provide MH rehabilitative services.

(b) Compliance. A Medicaid provider must:

(1) comply with all applicable federal and state laws, rules, and regulations, and any Medicaid provider manuals and policy clarification letters promulgated by the department;

(2) document and bill for reimbursement of MH rehabilitative services in the manner and format prescribed by the department;

(3) allow the department access to all individuals and individuals' records;

(4) maintain capacity to provide those services that are described in Texas Health and Safety Code, §534.053(a)(1) - (7); and

(5) maintain capacity to provide services to individuals required to submit to mental health treatment:

(A) under the Texas Code of Criminal Procedure, Article 17.032 (relating to Release on Personal Bond of Certain Mentally Ill Defendants), or Article 42.12 §11(d) (relating to Community Supervision); and

(B) under the Texas Health and Safety Code, Chapter 573 (relating to Emergency Detention) and Chapter 574 (relating to Court-Ordered Mental Health Services).

§416.16. Fair Hearings and Reviews.

(a) Right of Medicaid-eligible individual to request a fair hearing. Any Medicaid-eligible individual whose request for eligibility for MH rehabilitative services is denied or is not acted upon with reasonable promptness, or whose MH rehabilitative services have been terminated, suspended, or reduced by the department is entitled to a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules).

(b) Notice. The Medicaid provider must notify the department or its designee if the provider has reason to believe that an individual's MH rehabilitative services should be denied, reduced or terminated.

(c) Right of non-Medicaid eligible individual to request a review. Any individual who has not applied for or is not eligible for Medicaid whose request for eligibility for MH rehabilitative services is not acted upon with reasonable promptness, or whose MH rehabilitative services have been terminated, suspended, or reduced by a local mental health authority or its contractor is entitled to the right of review and notification in accordance with the department's rules concerning such matters for non-Medicaid-eligible individuals.

§416.17. Guidelines.

The following guidelines are referenced in this subchapter. For information about obtaining copies of the guidelines contact the Department of State Health Services, Mental Health Program Services Section, Mail Code 2018, P.O. Box 149347, Austin, Texas 78714-9347, (512) 467-5427 or access them electronically.

(1) The uniform assessment guidelines are available at: <http://www.dshs.state.tx.us/mhprograms/RDMAssess.shtm>.

(2) The utilization management guidelines for adults and children are available at: <http://www.dshs.state.tx.us/mhprograms/RDMClinGuide>.

(3) Patient and family education resources are available at <http://www.dshs.state.tx.us/mhsa/patient-family-ed/>.

(4) Medicaid MH Rehabilitative Services Billing Guidelines are available at: <http://www.dshs.state.tx.us/mhsa/rdm/billing/>.

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

Filed with the Office of the Secretary of State on September 16, 2013.

TRD-201304010

Lisa Hernandez
General Counsel

Department of State Health Services

Earliest possible date of adoption: October 27, 2013

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



CHAPTER 419. MENTAL HEALTH SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

SUBCHAPTER L. MENTAL HEALTH REHABILITATIVE SERVICES

25 TAC §§419.451 - 419.459, 419.461 - 419.470

(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 Department of State Health Services or in the Texas Register office, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§419.451 - 419.459 and 419.461 - 419.470, concerning mental health (MH) rehabilitative services.

BACKGROUND AND PURPOSE

The rules are being repealed and proposed as new Chapter 416 of this title and stipulate the requirements for providing MH rehabilitative services. In addition, the proposed new chapter addresses the requirement in Health and Safety Code, §533.0354, that the provision of mental health services for adults with bipolar disorder, schizophrenia, or clinically severe depression, and for children with serious emotional illnesses be accomplished using disease management practices.

The requirements for providing MH rehabilitative services described in the proposed chapter are based on the department's mental health service delivery system and the Medicaid State Plan. This model promotes the uniform provision of services that are based on clinical evidence and recognized best practices. In addition, the model promotes effective MH rehabilitative services by utilizing person-specific information that identifies an individual's mental health care needs, matches those needs to a particular type(s) of rehabilitative service, and evaluates the effectiveness of the service provided.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 419.451 - 419.459 and 419.461 - 419.470 have been reviewed and the department has determined that reasons continue to exist for readopting some of

the sections because rules on this subject are needed as more particularly described in the section-by-section summary.

SECTION-BY-SECTION SUMMARY

The repeal of §§419.451 - 419.459 and 419.461 - 419.470 allows update to the rules concerning MH rehabilitative services and placement in new Chapter 416 for better correlation within the Texas Administrative Code, which is published in this same issue of the *Texas Register*.

FISCAL NOTE

Mike Maples, Assistant Commissioner for Mental Health and Substance Abuse Services, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Maples has also determined that the proposed rules will have no adverse economic impact on small businesses or micro-businesses. This was determined by interpretation that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

The rules have direct application only to local mental health authorities, none of which meet the definition of small or micro-business under the Government Code, §2006.001. Therefore, an economic impact statement and regulatory flexibility analysis for small businesses are not required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There is no anticipated economic cost to persons required to comply with the sections as proposed. There is no anticipated impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Maples 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 is to provide local mental health authorities with standards for providing rehabilitative services that are consistent with the Medicaid State Plan and resilience and recovery practices.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Janet Fletcher, Adult Mental Health Program Services, Department of State Health Services, Mail Code 2018, P.O. Box 149347, Austin, Texas 78714-9347, telephone (512) 467-5425 or by email to MHSARules@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §533.0345, which requires the department to develop standards of care for the services provided by local mental health authorities; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the sections implements Government Code, §2001.039.

The repeals affect Government Code, §531.0055; and Health and Safety Code, §§534.053, 534.058, and 1001.075.

- §419.451. *Purpose.*
- §419.452. *Application.*
- §419.453. *Definitions.*
- §419.454. *General Requirements for Providers of MH Rehabilitative Services.*
- §419.455. *Eligibility.*
- §419.456. *Service Authorization and Treatment Plan.*
- §419.457. *Crisis Intervention Services.*
- §419.458. *Medication Training and Support Services.*
- §419.459. *Psychosocial Rehabilitative Services.*
- §419.461. *Skills Training and Development Services.*
- §419.462. *Day Programs for Acute Needs.*
- §419.463. *Documentation Requirements.*
- §419.464. *Staff Member Training.*
- §419.465. *Medicaid Reimbursement.*
- §419.466. *Medicaid Provider Participation Requirements.*
- §419.467. *Fair Hearings.*
- §419.468. *Guidelines.*
- §419.469. *References.*
- §419.470. *Distribution.*

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

Filed with the Office of the Secretary of State on September 16, 2013.

TRD-201304004
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: October 27, 2013
For further information, please call: (512) 776-6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER E. TEXAS WINDSTORM INSURANCE ASSOCIATION

DIVISION 10. ELIGIBILITY AND FORMS

28 TAC §§5.4920 - 5.4926

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

The Texas Department of Insurance (TDI) proposes the repeal of 28 TAC §§5.4920 - 5.4926, concerning the Texas Windstorm Insurance Association's Alternative Eligibility Program. The repeal is necessary because Senate Bill 1702, 83rd Legislature, 2013 (Regular Session), effective June 14, 2013, repealed Insurance Code §2210.260, which provided the statutory support for the program.

FISCAL NOTE. C.H. Mah, associate commissioner, Property and Casualty Section, Regulatory Policy Division, has determined that during each year of the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local government as a result of repealing the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Mah has also determined that for each year of the first five years the repeal of the sections is in effect, there is no anticipated economic cost to persons who are required to comply with the proposed repeal. There is no anticipated difference in cost of compliance between small and large businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. Under Government Code §2006.002(c), TDI has determined that this proposed repeal will not have an adverse economic effect on small or micro business carriers because it is a repeal of rules that no longer have statutory support and TDI is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. TDI has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you wish to comment on this proposal you must do so in writing no later than 5:00 p.m. on October 28, 2013 to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comment to Sam Nelson, Director of

Inspections, Property and Casualty Section, MC-105-5G, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of §§5.4920 - 5.4926 is proposed to comply with Insurance Code §§2210.008, 2210.151, and 36.001. Section 2210.151 provides that the commissioner of insurance shall adopt by rule a plan of operation to provide Texas windstorm and hail insurance in a catastrophe area. Section 2210.008 and §36.001 provide that the commissioner of insurance may adopt any rules necessary and appropriate to implement TDI's powers and duties under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed repeal affects the following statutes: Insurance Code §2210.260

§5.4920. *Alternative Eligibility Program.*

§5.4921. *Requirements for Obtaining and Renewing Alternative Eligibility Program Coverage.*

§5.4922. *Alternative Certification.*

§5.4923. *How to Obtain an Alternative Certification.*

§5.4924. *Qualifying Components.*

§5.4925. *Notice.*

§5.4926. *Alternative Eligibility Forms.*

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

Filed with the Office of the Secretary of State on September 12, 2013.

TRD-201303915

Sara Waitt

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: October 27, 2013

For further information, please call: (512) 463-6327



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER NN. FIREWORKS TAX

34 TAC §3.1281

The Comptroller of Public Accounts proposes an amendment to §3.1281, concerning fireworks tax. This section is being amended to implement Senate Bill 1, Article 14, 82nd Legislature, 2011, First Called Session and to reflect policy clarification.

Subsection (a)(1) is added to provide a definition for consignment sales. The remaining paragraphs are renumbered accordingly.

Subsection (c) is amended to reflect the new name of §3.286 of this title, which was amended effective July 11, 2010.

Subsection (d) is added to explain and clarify the sales tax collection responsibility of sellers making consignment sales. The remaining subsections are relettered accordingly.

Subsection (g), formerly subsection (f), is reworded to reflect that additional language is included under the heading relating to when a report is timely.

Subsection (g)(3) - (5) is added to specify due dates for tax returns and payments.

Subsection (i), formerly subsection (h), is reworded to add information relating to late filing fees.

Subsection (i)(4) is added to implement Senate Bill 1, Article 14, 82nd Legislature, 2011, First Called Session, which repealed Tax Code, §151.7031 and added §151.703(d), both effective October 1, 2011. The repealed statutory language imposed a \$50 filing penalty on a person for each report filed after the due date, when the person had failed to file a timely report on two or more previous occasions. New Tax Code, §151.703(d) imposes a \$50 penalty for each time a person fails to file a report on or before the due date without regard to whether or not the person has previously failed to file a timely report.

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 changes in law and comptroller policy regarding late filing penalties. 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 Teresa G. Bostick, Manager, Tax Interpretations & Publications Division, P.O. Box 13528, Austin, Texas 78711-3528. 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.

This amendment implements Tax Code, §151.703(d).

§3.1281. *Fireworks 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) Consignment sale--An arrangement where a consignee pays a distributor only for items that the consignee sells and returns any unsold items.

(2) [(+)] Fireworks--Any composition or device that is designed to produce a visible or audible effect by combustion, explosion, deflagration, or detonation that is classified as Division 1.4G explosives by the United States Department of Transportation in 49 C.F.R. Part 173 as of September 1, 1999. Examples of fireworks include items that are commonly known as firecrackers, bottle rockets, Roman candles, and shooting stars.

(3) [(2)] Retail sale--Any sale of fireworks directly to the public.

(4) [(3)] Sales tax--The tax imposed by Tax Code, Chapter 151.

(b) Imposition. A 2.0% tax is imposed on the retail sale of fireworks in Texas. The fireworks tax imposed under Tax Code, Chapter 161, is in addition to any state and local sales taxes that are due on the retail sale of fireworks.

(c) Collection. Each seller must collect the fireworks tax from the purchaser on the total price of each retail sale of fireworks in Texas. The fireworks tax is collected in the same manner as sales tax. See §3.286 of this title (relating to Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, Collection and Exemption Rules, and Criminal Penalties) for information on the collection and remittance of sales tax.

(d) Consignment sales. For Texas tax purposes, distributors who make consignment sales of fireworks are considered the sellers of the fireworks and are responsible for reporting and remitting the sales and fireworks taxes due on all retail sales made by consignees.

(e) [(d)] Exclusions and exemptions.

(1) The following items are excluded from the fireworks tax base, but retail sales of these items may be subject to sales tax:

(A) a toy pistol, toy cane, toy gun, or other device that uses a paper or plastic cap;

(B) a model rocket or model rocket motor that is designed, sold, and used for the purpose of propelling a recoverable aero model;

(C) a propelling or expelling charge that consists of a mixture of sulfur, charcoal, and potassium nitrate;

(D) a novelty or trick noisemaker;

(E) a pyrotechnic signaling device or distress signal that is designed for marine, aviation, or highway use in an emergency situation;

(F) a fusee or railway torpedo for use by a railroad;

(G) a blank cartridge that is sold for use in a radio, television, film, or theater production, for signal or ceremonial purposes in athletic events, or for industrial purposes; or

(H) a pyrotechnic device that is sold for use by a military organization.

(2) No fireworks tax is due on a sale that is exempt from sales tax.

(3) A seller who accepts a valid and properly completed resale or exemption certificate for sales tax is not required to collect the fireworks tax. All sales that are unsupported by valid resale or exemption certificates or by other exemption documentation acceptable under the law are considered to be retail sales, and the seller will be liable for the fireworks tax on those sales.

(f) [(e)] Reports. A seller must report the fireworks tax to the comptroller on forms that the comptroller prescribes. A seller who fails to receive the correct form from the comptroller is not relieved of the responsibility for filing a fireworks tax report and for payment of the tax by the due date.

(g) [(f)] Due dates for reports and payments. A seller must report and remit fireworks tax on or before the applicable due date for the sales period as specified in this section.

(1) The due dates are:

(A) [(H)] August 20 for tax collected on sales that occur during:

(i) [(A)] the period that begins May 1 and ends at midnight on May 5 at a location that is not more than 100 miles from the Texas-Mexico border in a county in which the commissioners court has approved the sale of fireworks during that period; and

(ii) [(B)] the period that begins on June 24 and ends at midnight on July 4; and

(B) [(2)] February 20 for tax collected on sales that occur during the period that begins December 20 and ends at midnight on January 1.

(2) Returns and remittances that are due on Saturdays, Sundays, or legal holidays may be submitted on the next business day.

(3) Returns submitted by mail must be postmarked on or before the due date to be considered timely.

(4) Returns filed electronically must be completed and submitted by 11:59 p.m., central time, on the due date to be considered timely.

(h) [(g)] Prepayment and timely filing discounts.

(1) The 1.75% sales tax prepayment discount does not apply to fireworks tax.

(2) A seller who timely files the fireworks report and pays the tax due on or before the applicable due date may retain 0.5% of the gross fireworks tax due.

(i) [(h)] Late filing of returns and payment of tax due; penalty and interest.

(1) If the tax is paid or postmarked one to 30 days after the due date, a penalty of 5.0% of the tax due is imposed.

(2) If the tax is paid or postmarked more than 30 days after the due date, a penalty of 10% of the tax due is imposed.

(3) If the tax is paid or postmarked more than 60 days after the due date, interest is also due on the late payment. Interest is applied at the applicable annual rate to the amount of the delinquent tax due, exclusive of any late penalty. The comptroller publishes the annual interest rate online at www.window.state.tx.us and by phone at 1-877-44RATE4.

(4) A late filing penalty of \$50 is imposed for each report that is not filed on or before the due date. The penalty is due regardless of whether the person subsequently files the report or whether no taxes are due for the reporting period. The \$50 penalty is due in addition to any other penalties assessed for the reporting period.

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

Filed with the Office of the Secretary of State on September 16, 2013.

TRD-201303965

Ashley Harden

General Counsel

Comptroller of Public Accounts

Earliest possible date of adoption: October 27, 2013

For further information, please call: (512) 475-0387

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 17. STATE PENSION REVIEW BOARD

CHAPTER 605. STANDARDIZED FORM

40 TAC §605.1, §605.3

The State Pension Review Board (the "Board") proposes amendments to §605.1, concerning Adoption of Standard Forms, and §605.3, concerning Submission of Forms.

The amendment to §605.1 amends the rule to eliminate Form PRB-500 from the Board's adopted series of forms.

The amendment to §605.1 amends the rule to adopt by reference a new PRB standardized form, PRB-1000.

The amendment to §605.3 amends the rule to remove submission requirements relating to Form PRB-500.

The amendment to §605.3 amends the rule to add submission requirements for Form PRB-1000, including exemption of volunteer firefighters' retirement systems created under the Texas Local Fire Fighters' Retirement Act (TLFFRA) and defined contribution plans.

BACKGROUND AND PURPOSE

The Sunset Advisory Commission (the "Commission") recommended to the 83rd Legislature that the PRB should no longer require public retirement systems to submit quarterly financial data. Additionally, the 83rd Texas Legislature enacted House Bill (HB) 13 that amended the Government Code by adding §802.108 requiring Texas Public Retirement Systems to submit investment returns and assumptions report to the PRB. In response to the Commission's recommendation and HB 13, the Board is proposing to amend rules §605.1 and §605.3 by eliminating Form PRB-500, relating to quarterly plan report, and adopting by reference a new PRB standardized form, PRB-1000, relating to investment returns and assumptions report. The recommendation to adopt a new PRB form is proposed in accordance with Texas Government Code, §801.201(c), which authorizes the Board to adopt standardized forms to assist the Board in determining the actuarial soundness and current financial condition of public retirement systems.

Also, the Board is proposing to amend rule §605.3 to create an exemption for volunteer TLFFRA and defined contribution plans from filing Form PRB-1000. Based on the deference given to the Board expertise, the Board has determined that actuarial principles do not apply to volunteer TLFFRA or defined contribution plans. Additionally, Senate Bill 200 (PRB Sunset Legislation), enacted by the 83rd Texas Legislature, amended the Government Code by adding §802.002(c) and (d) to explicitly exempt these plans from preparing actuarial valuations. This actuarial valuation exemption makes it unfeasible for volunteer TLFFRA and defined contribution plans to complete the investment returns and assumptions report because the relevant information required for this new report is derived from the exempted actuarial valuation report. Based on the Board's determination above and the statutory exemption of these plans, the Board has interpreted that it is necessarily implied that §802.002(c) and (d) includes an exemption from §802.108 requiring an investment

returns and assumptions report. Likewise, it is necessarily implied that the new reporting requirement provision of §802.108, added by HB 13 to the Government Code, does not apply to volunteer TLFFRA and defined contribution plans.

FISCAL NOTE

John Perryman, Accountant/HR Director, has determined that for each year of the first five-year period the proposed amendment would be in effect, there will be no fiscal implications to state or local governments or local economies.

MICRO-BUSINESSES AND SMALL BUSINESSES IMPACT ANALYSIS

Mr. Perryman also has determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the amendment as proposed.

ECONOMIC COST TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

Mr. Perryman has further determined that there are no anticipated economic costs to individuals who are required to comply with the amendment as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Perryman has determined that for each year of the first five-year period the amendments are in effect, the public benefit anticipated as a result of enforcing the amended rules and adoption of PRB forms will be having current and updated rules and standardization and efficiency of reporting functions of public retirement systems, respectively.

LOCAL EMPLOYMENT IMPACT STATEMENTS

The proposed amendment will not affect a local economy; therefore, the Board has not prepared a local employment impact statement pursuant to Texas Government Code, §2001.022.

PUBLIC COMMENT

Comments on the proposal may be submitted to Christopher Hanson, Executive Director, State Pension Review Board, P.O. Box 13498, Austin, Texas 78711-3498 or by electronic mail to prb@prb.state.tx.us. Comments will be accepted until 5:00 p.m. on October 28, 2013, which is 30 days after publication in the *Texas Register*.

The Board encourages all interested persons to submit comments no later than the deadline. The Board cannot guarantee that comments submitted after the deadline will be considered.

STATUTORY AUTHORITY

The proposed amendments are authorized by the Texas Government Code, §801.201(a), which grants specific authority to the Board to adopt rules for the conduct of its business.

CROSS REFERENCE

The proposed amendment affects the Texas Government Code Chapters 801 and 802.

§605.1. Adoption of Standard Forms.

(a) The Board hereby adopts by reference the standard forms identified [below] under subsection (b) of this section to assist in efficiently determining the actuarial soundness and current financial condition of public retirement systems[; to implement a quarterly reporting system addressing factors included in these forms, under subsection

(b)(5) of this section] and to assist in the conduct of the Board's business.

(b) The standard forms hereby adopted by the Board are the following:

- (1) Pension System Registration--Form Series PRB-100;
- (2) Benefits and Membership Report--Form Series PRB-200;
- (3) Financial Statement Report--Form Series PRB-300;
- (4) Actuarial Report--Form Series PRB-400;
- (5) Investment Returns and Assumptions Report--Form Series PRB-1000.

~~[(5) Quarterly Plan Report--Form Series: PRB-500]~~

(c) A public retirement system can obtain the most current version of these forms from the offices of the State Pension Review Board and from its web site at <http://www.prb.state.tx.us>.

§605.3. *Submission of Forms.*

(a) A public retirement system must complete and submit to the Board the standard forms identified as Form numbers PRB-100, PRB-200, PRB-300, PRB-400, and PRB-1000 ~~[PRB-500]~~ in §605.1 ~~of this chapter relating to Adoption of Standard Forms. [regarding adoption of standard forms.]~~

(b) The public system must submit the forms with the information the system submits to the Board as a result of reviews and studies conducted by the Board regarding the actuarial soundness and current financial condition of the fund the system administers.

(c) Defined contribution plans as defined by Texas Government Code, §802.001(1-a) and retirement systems consisting exclusively of volunteers organized under the Texas Local Fire Fighters' Retirement Act as defined by Texas Government Code, §802.002(d)), are not required to submit to the Board Form PRB-1000.

~~[(e) A public retirement system must complete and submit to the Board Form PRB 500 no later than the 45th day after each quarter ending March, June, September and December.]~~

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

Filed with the Office of the Secretary of State on September 13, 2013.

TRD-201303942

Chris Hanson

Executive Director

State Pension Review Board

Proposed date of adoption: November 13, 2013

For further information, please call: (512) 463-1736



TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

SUBCHAPTER B. ADJUDICATIVE PRACTICE AND PROCEDURE

43 TAC §215.58

The Texas Department of Motor Vehicles (department) proposes new §215.58, Delegation of Final Order Authority.

EXPLANATION OF PROPOSED NEW SECTION

The proposed new section delegates final order authority and motion for rehearing authority from the board of the Texas Department of Motor Vehicles (board) to the director of the department division that regulates the distribution and sale of motor vehicles in certain cases resolved without a decision on the merits and in all cases under Occupations Code, §2301.204 or §§2301.601-2301.613 filed before January 1, 2014.

Currently, the designated division is the department's Motor Vehicle Division, but the proposed language allows the board or the Executive Director the flexibility to change the division's name.

Proposed new §215.58(a) delegates the authority to issue final orders in certain cases to the director of the department division that regulates the distribution and sale of motor vehicles.

Proposed new §215.58(b) delegates the authority to issue decisions and orders in cases under Occupations Code, §2301.204 or §§2301.601-2301.613 filed prior to January 1, 2014.

Proposed new §215.58(c) delegates the authority to issue decisions and orders regarding motions for rehearing in certain cases.

FISCAL NOTE

Ms. Linda Flores, Chief Financial Officer, has determined that for each of the first five years the new section as proposed is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the new section.

Mr. William P. Harbeson, Interim Director of the Motor Vehicle 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 section.

PUBLIC BENEFIT AND COST

Mr. Harbeson has also determined that for each year of the first five years the new section is in effect, the public benefit anticipated as a result of enforcing or administering the new section will be better service to department contested case parties and expedited closure of cases in settled matters. The new section will allow the processing of franchise dealer applications on hold for protest before settlement to resume more quickly. As a result, dealer licenses will be issued sooner. Lastly, the new section will streamline department board meeting agendas. There are no anticipated economic costs for persons required to comply with the new section as proposed. There will be no adverse economic effect on small businesses or individuals.

SUBMITTAL OF COMMENTS

Written comments on the proposed new section may be submitted to Aline Aucoin, Interim General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on October 28, 2013.

STATUTORY AUTHORITY

The new section is proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and duties for the Texas Department of Motor Vehicles under the Transportation Code and the Occupations Code; Occupations Code, §2301.155, which authorizes the board to adopt rules as necessary or convenient to administer Occupations Code, Chapter 2301; and more specifically, Occupations Code, §2301.154(c) and Transportation Code, §1003.005(b), which provide the board with the authority to delegate final order authority.

CROSS REFERENCE TO STATUTE

Occupations Code, Chapter 2301.

§215.58. Delegation of Final Order Authority.

(a) Pursuant to Occupations Code, §2301.154(c), except as provided in subsection (b) of this section, the director of the department division that regulates the distribution and sale of motor vehicles is authorized to issue final orders in cases without a decision on the merits resolved in the following ways:

- (1) by settlement;
- (2) by agreed order;
- (3) by withdrawal of the complaint;
- (4) by withdrawal of a protest;
- (5) by dismissal for want of prosecution;
- (6) by dismissal for want of jurisdiction;
- (7) by default judgment; or
- (8) when a party waives opportunity for a hearing.

(b) Pursuant to Occupations Code, §2301.154(c), the director of the department division that regulates the distribution and sale of motor vehicles is authorized to issue final orders in cases, under Occupations Code, §2301.204 or §§2301.601-2301.613, filed prior to January 1, 2014.

(c) In contested cases where the board has delegated final order authority under subsection (a) or (b) of this section, motions for rehearing shall be filed with and decided by the final order authority delegate.

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

Filed with the Office of the Secretary of State on September 16, 2013.

TRD-201303970

Aline Aucoin

Interim General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: October 27, 2013

For further information, please call: (512) 467-3853



CHAPTER 215. MOTOR VEHICLE DISTRIBUTION

The Texas Department of Motor Vehicles (department) proposes the repeal of §215.304, Notice of Alleged Violation, and the de-

partment proposes new Subchapter J, Administrative Sanctions, §215.500, Administrative Sanctions and Procedures; §215.501, Final Decisions and Orders; Motions for Rehearing; §215.502, Judicial Review of Final Order; and §215.503, Refund of Fees.

EXPLANATION OF PROPOSED REPEAL AND NEW SECTIONS

The repeal and new sections are proposed to implement the changes mandated by House Bill 2741, 83rd Legislature, Regular Session, 2013, which amends Occupations Code, §2301.651(d) by adding a provision that the department may not deny, revoke, or suspend a license or take disciplinary action against a licensee under Occupations Code, Chapter 2301, Subchapter N, which includes violations under Transportation Code, 503.038(a), unless the respondent is given an opportunity for a hearing.

The repeal of §215.304 will ensure an orderly transition from current procedure to the procedure described by the new sections.

Proposed new §215.500 describes the types of administrative sanctions that could be imposed by the department on a license applicant or a licensee, and explains the procedure by which an administrative sanction will be imposed. Proposed new subsection (a) lists the types of administrative sanctions that could be imposed by the department on a license applicant or a licensee for a violation. Proposed new subsection (b) requires the department to issue and send a Notice of Department Decision (notice) to a license applicant or a licensee determined to be in violation of Occupations Code, Chapter 2301, or Transportation Code, Chapter 503 to the license applicant's or the licensee's last known address by certified mail delivery. Proposed new subsection (c) details the specific requirements of the notice. The notice shall include a statement of the department's decision of administrative sanction and an effective date, a description of the alleged violation(s), a description of the administrative sanction proposed for each alleged violation, a statement as to the legal basis for each administrative sanction, a statement notifying the license applicant or licensee of the right to request and procedure to set an administrative hearing on the matter on or before a specific date certain, and a statement informing the license applicant or the licensee that the proposed administrative sanction will become final if a request for hearing is not timely. Proposed new subsection (d) establishes a 26-day deadline by which a written request for hearing must be received by the department. Proposed new subsection (e) establishes the procedure by which the department shall set the time, date and location for an administrative hearing and provides that the hearing will be conducted under the provisions of Occupations Code, Chapter 2301 and heard by an administrative law judge from the State Office of Administrative Hearings. Proposed new subsection (f) informs the license applicant or the licensee that the consequence of the untimely request for an administrative hearing is that the department's decision becomes final.

Proposed new §215.501 describes the procedure by which the notice becomes a final order. Proposed new subsection (a) provides that, in the absence of a proper request for hearing, the department or a final order authority shall issue a final order that will be sent to the license applicant or the licensee. Proposed new subsection (b) provides that Government Code, Chapter 2001, Subchapter F relating to Contested Cases: Final Decisions and Orders; Motions for Rehearing governs the issuance of final orders and motions for rehearing.

Proposed new §215.502 provides that Government Code, Chapter 2001, Subchapter G, relating to Contested Cases: Judicial Review governs the appeal of a final order issued under new Subchapter J.

Proposed new §215.503 provides that the department will not refund fees paid by a license applicant or a licensee if the license has been denied, suspended or revoked under the new subchapter.

FISCAL NOTE

Ms. Linda Flores, Chief Financial Officer, has determined that for each of the first five years the repeal and 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 repeal and new sections.

Mr. William P. Harbeson, Director of the Enforcement Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the repeal and new sections.

PUBLIC BENEFIT AND COST

Mr. Harbeson has also determined that for each year of the first five years the repeal and new sections are in effect, the public benefit anticipated as a result of enforcing or administering the repeal and new sections as proposed will be substantial time savings and greater efficiency in the enforcement of contested case matters in the areas in which the division is tasked. There are no anticipated economic costs for persons required to comply with repeal and the new sections as proposed. There will be no adverse economic effect on small businesses or individuals.

SUBMITTAL OF COMMENTS

Written comments on the proposed repeal and new section may be submitted to Aline Aucoin, Interim General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on October 28, 2013.

SUBCHAPTER I. PRACTICE AND PROCEDURE FOR HEARINGS CONDUCTED BY THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

43 TAC §215.304

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

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §503.002, Transportation Code, §1002.001, and Occupations Code, §2301.155, which provide the board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department; and more specifically, Occupations Code, §2301.153, which authorizes the board to adopt rules to perform a power or duty expressly granted under Chapter 2301.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 503 and Occupations Code, Chapter 2301.

§215.304. Notice of Alleged Violation.

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

Filed with the Office of the Secretary of State on September 16, 2013.

TRD-201303971

Aline Aucoin

Interim General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: October 27, 2013

For further information, please call: (512) 467-3853

SUBCHAPTER J. ADMINISTRATIVE SANCTIONS

43 TAC §§215.500 - 215.503

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §503.002, Transportation Code, §1002.001, and Occupations Code, §2301.155, which provide the board of the Texas Department of Motor Vehicles with the authority to establish rules for the conduct of the work of the department; and more specifically, Occupations Code, §2301.153, which authorizes the board to adopt rules to perform a power or duty expressly granted under Chapter 2301.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 503 and Occupations Code, Chapter 2301.

§215.500. Administrative Sanctions and Procedures.

(a) Administrative sanctions may include license denial, suspension, revocation, and the imposition of civil penalties.

(b) The department shall issue and mail a Notice of Department Decision to a license applicant or a licensee by certified mail to its last known address upon a determination that, under Occupations Code, Chapter 2301 or Transportation Code, Chapter 503:

- (1) an application for a license should be denied; or
- (2) administrative sanctions should be imposed.
- (c) The Notice of Department Decision shall include:
 - (1) a statement describing the department decision and its effective date;
 - (2) a description of each alleged violation, if applicable;
 - (3) a description of each administrative sanction being proposed;
 - (4) a statement as to the legal basis for each administrative sanction;
 - (5) a statement as to the right of the license applicant or the licensee to request an administrative hearing;
 - (6) a statement as to the procedure for requesting an administrative hearing, including the period during which a request must be received by the department; and

(7) a statement that the proposed decision and sanctions specified in the Notice of Department Decision will become final on the date specified if the license applicant or the licensee fails to timely request a hearing.

(d) A request for an administrative hearing under this section must be made in writing and received by the department within 26 days of the date the Notice of Department Decision is mailed by the department.

(e) If a request for an administrative hearing is timely received, the department shall set a hearing and give notice to the license applicant or the licensee of the date, time, and location where it will be held. The hearing shall be conducted under the provisions set forth in this chapter by an administrative law judge of the State Office of Administrative Hearings.

(f) If the license applicant or the licensee does not make a timely request for an administrative hearing or enter into a settlement agreement before the 27th day after the date the Notice of Department Decision is mailed, the department's decision becomes final.

§215.501. Final Decisions and Orders; Motions for Rehearing.

(a) If a department decision becomes final under a Notice of Department Decision issued under §215.500 of this title (relating to Administrative Sanctions and Procedures), the department or final order authority shall issue a final order incorporating the decisions, findings, and sanctions imposed by the Notice of Department Decision. The department will send a copy of the final order to the parties.

(b) The provisions of Government Code, Chapter 2001 (Administrative Procedure Act), Subchapter F (Contested Cases: Final Decisions and Orders; Motions for Rehearing) govern the issuance of a final order issued under this subchapter and motions for rehearing filed in response thereto.

§215.502. Judicial Review of Final Order.

The provisions of Government Code, Chapter 2001 (Administrative Procedure Act), Subchapter G (Contested Cases: Judicial Review) govern the appeal of a final order issued under this subchapter.

§215.503. Refund of Fees.

The department will not refund fees paid by a license applicant or a licensee if the license is denied, suspended, or revoked under this subchapter.

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

Filed with the Office of the Secretary of State on September 16, 2013.

TRD-201303972

Aline Aucoin

Interim General Counsel

Texas Department of Motor Vehicles

Earliest possible date of adoption: October 27, 2013

For further information, please call: (512) 467-3853



CHAPTER 217. VEHICLE TITLES AND
REGISTRATION
SUBCHAPTER B. MOTOR VEHICLE
REGISTRATION

43 TAC §§217.21, 217.23, 217.24, 217.26, 217.29

The Texas Department of Motor Vehicles (department) proposes amendments to Chapter 217, Subchapter B, §217.21, Definitions; §217.23, Special Registration Permits; §217.24, Disabled Person License Plates and Identification Placards; §217.26, Military Specialty License Plates; and §217.29, Vehicle Registration Renewal via the Internet, all relating to Motor Vehicle Registration.

EXPLANATION OF PROPOSED AMENDMENTS

The proposed amendments are necessary to implement the legislative requirements of House Bills 120, 1678, 2485, and 2741, and Senate Bills 563, 597, and 1376, 83rd Legislature, Regular Session, 2013; House Bill 2357, 82nd Legislature, Regular Session, 2011; and House Bill 2553, 81st Legislature, Regular Session, 2009.

The proposed amendments to §217.21(8) delete "in tons" from the definition of Carrying Capacity, and now define the term as "the maximum safe load that a commercial vehicle may carry, as determined by the manufacturer." The proposed amendments conform the definition to the requirements of House Bill 2357, 82nd Legislature, Regular Session, 2011.

The proposed amendments to §217.23(b)(1)(C) revise the language from "difference between the owner's regular annual registration fee and the annual fee for the desired tonnage" to "difference between the owner's annual registration fee and the annual fee for the desired gross vehicle weight." The proposed amendments to §217.23(b)(1)(E) revise the language "hauling the larger tonnage" to "hauling the additional weight." The proposed amendments to §217.23(b)(2)(C)(i) require that the foreign semitrailer registration be current. The amendments also change the criteria of the exemption for foreign semitrailers from token fee payment and license plate display requirements. The proposed amendments are required by House Bill 2357, 82nd Legislature, Regular Session, 2011, and House Bill 2553, 81st Legislature, Regular Session, 2009. The proposed amendments to §217.23(e)(2) authorize the return of unused temporary registration permits to the county tax assessor-collector as well as the department. The proposed amendments are intended to increase the convenience to department customers.

The proposed amendments to §217.24, Disabled Person License Plates and Identification Placards, delete unnecessary language in §217.24(b)(2)(A) and (B), §217.24(c), and §217.24(d)(2) and (3) because this language is included in Transportation Code, §§504.201-504.203 and 681.001-681.013. The proposed amendments to §217.24(f)(1)(B), relating to transfer of Disabled Person license plates between vehicles, remove the prohibition on such transfers, and authorize transfer if the county or department can verify the plate ownership and that the vehicle the plates are transferred to is owned by the disabled person or used for the transportation of the disabled person. The proposed amendments also add the requirement that an owner who sells or transfers a vehicle with Disabled Person license plates must remove the plates from the vehicle. The amendments proposed to §217.24(g)(1) require a law enforcement officer who seizes an identification placard under Transportation Code, §681.012, to destroy the placard and provide the department with a notice that the placard was destroyed not later than the fifth day after the date of the seizure. The proposed amendments streamline the settlement procedure available under §217.24(g)(2) concerning placard seizure disputes by allowing the placard holder to obtain a replacement

placard from the county tax assessor-collector. The proposed amendments to §217.24(g)(2)(C) also delete some unnecessary provisions which no longer apply to the placard procedures. The proposed amendments are necessary to implement the legislative requirements of House Bill 2741, 83rd Legislature, Regular Session, 2013. The amendments renumber the provisions accordingly. These proposed amendments will reduce the time and effort currently required of both law enforcement officers and department personnel in storing and processing seized placards. The amendments to the section are proposed for the increased convenience of department customers.

Proposed amendments to §217.26(b) add the Defense Superior Service Medal, Air Medal, Air Medal with Valor, and Enduring Freedom Afghanistan military specialty license plates. The proposed amendments also add Retired military specialty license plates for honorably discharged members of the U.S. Armed Forces. The proposed amendments to §217.26(c) authorize a person eligible for Surviving Spouse Disabled Veteran specialty plates to register one vehicle for the person's own use without payment of any fee other than \$3 for the first set of license plates. The new military specialty license plates are authorized by Transportation Code, §§504.301-504.319, as amended by House Bills 120,1678, and 2485, and Senate Bills 563, 597, and 1376, 83rd Legislature, Regular Session, 2013.

The department proposes amendments to §217.29(b) to clarify that participation by county tax assessor-collectors in an online registration renewal system designated by the department is now mandatory. The proposed amendments to §217.29(c)(2) and (3) delete unnecessary language and move language from subsection (c) to subsection (f). The amendments are proposed in compliance with Transportation Code, §520.005, as amended by House Bill 2741, 83rd Legislature, Regular Session, 2013.

Nonsubstantive amendments to correct punctuation, grammar, and capitalization were made throughout the proposed amended sections.

FISCAL NOTE

Ms. Linda M. Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Mr. Randy Elliston, Director of the Vehicle Titles and Registration Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Elliston has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments is to streamline procedures for the registration of motor vehicles. There are no anticipated economic costs for persons required to comply with the amendments as proposed. There will be no adverse economic effect on small businesses or individuals.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Aline Aucoin, Interim General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on October 28, 2013.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §1002.001, which provides the board of the Texas Department of Motor Vehicles with the authority to adopt rules that are necessary and appropriate to implement the powers and duties of the Texas Department of Motor Vehicles under the Transportation Code; and more specifically, Transportation Code, §502.0021, which authorizes the department to adopt rules to administer Chapter 502, Registration of Vehicles; Transportation Code §504.0011, which authorizes the board to adopt rules to implement and administer Transportation Code, Chapter 504, License Plates; and Transportation Code, §520.003, which authorizes the department to adopt rules to administer Transportation Code, Chapter 520, Miscellaneous Provisions.

CROSS REFERENCE TO STATUTE

Transportation Code, §§502.093, 502.255, 504.201-504.203, 504.301-504.319, 520.005 and 681.001-681.013.

§217.21. Definitions.

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

(1) Affidavit for alias exempt registration--A form prescribed by the director that must be executed by an exempt law enforcement agency to request the issuance of exempt registration in the name of an alias.

(2) Agent--A duly authorized representative possessing legal capacity to act for an individual or legal entity.

(3) Alias--The name of a vehicle registrant reflected on the registration, different than the name of the legal owner of the vehicle.

(4) Alias exempt registration--Registration issued under an alias to a specific vehicle to be used in covert criminal investigations by a law enforcement agency.

(5) Axle load--The total load transmitted to the road by all wheels whose centers may be included between two parallel transverse vertical planes 40 inches apart, extending across the full width of the vehicle.

(6) Border commercial zone--A commercial zone established under Title 49, C.F.R., Part 372 that is contiguous to the border with Mexico.

(7) Bus--A motor vehicle used to transport persons and designed to accommodate more than 10 passengers, including the operator; or a motor vehicle, other than a taxicab, designed and used to transport persons for compensation.

(8) Carrying capacity--The maximum safe load that a commercial vehicle may carry, [in tons,] as determined by the manufacturer.

(9) Character--A numeric or alpha symbol displayed on a license plate.

(10) County or city civil defense agency--An agency authorized by a commissioner's court order or by a city ordinance to provide protective measures and emergency relief activities in the event of hostile attack, sabotage, or natural disaster.

(11) Director--The director of the Vehicle Titles and Registration Division, Texas Department of Motor Vehicles.

(12) Division--Vehicle Titles and Registration Division.

(13) Executive administrator--The director of a federal agency, the director of a Texas state agency, the sheriff of a Texas

county, or the chief of police of a Texas city that by law possesses the authority to conduct covert criminal investigations.

(14) Exempt agency--A governmental body exempted by statute from paying registration fees when registering motor vehicles.

(15) Exempt license plates--Specially designated license plates issued to certain vehicles owned or controlled by exempt agencies.

(16) Exhibition vehicle--

(A) An assembled complete passenger car, truck, or motorcycle that:

(i) is a collector's item;

(ii) is used exclusively for exhibitions, club activities, parades, and other functions of public interest;

(iii) does not carry advertising; and

(iv) has a frame, body, and motor that is at least 25-years old; or

(B) A former military vehicle as defined in Transportation Code, §504.502.

(17) Fire-fighting equipment--Equipment mounted on fire-fighting vehicles used in the process of fighting fires, including, but not limited to, ladders and hoses.

(18) Foreign commercial motor vehicle--A commercial motor vehicle, as defined by 49 C.F.R. §390.5, that is owned by a person or entity that is domiciled in or a citizen of a country other than the United States.

(19) Highway construction project--That section of the highway between the warning signs giving notice of a construction area.

(20) International symbol of access--The symbol adopted by Rehabilitation International in 1969 at its Eleventh World Congress of Rehabilitation of the Disabled.

(21) Legally blind--Having not more than 20/200 visual acuity in the better eye with correcting lenses, or visual acuity greater than 20/200 but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.

(22) Make--The trade name of the vehicle manufacturer.

(23) Nonprofit organization--An unincorporated association or society or a corporation that is incorporated or holds a certificate of authority under the Business Organizations Code.

(24) Nominating State Agency--A state agency authorized to accept and distribute funds from the sale of a specialty plate as designated by the nonprofit organization (sponsoring entity).

(25) Political subdivision--A county, municipality, local board, or other body of this state having authority to provide a public service.

(26) Registration period--A designated period during which registration is valid. A registration period begins on the first day of a calendar month and ends on the last day of a calendar month.

(27) Service agreement--A contractual agreement that allows individuals or businesses to access the department's vehicle registration records.

(28) Specialty license plate--A special design license plate issued by the department under statutory authority.

(29) Specialty license plate fee--Statutorily or department required fee payable on submission of an application for a specialty license plate, symbol, tab, or other device, and collected in addition to statutory motor vehicle registration fees.

(30) Sponsoring entity--An institution, college, university, sports team, or any other non-profit individual or group that desires to support a particular specialty license plate by coordinating the collection and submission of the prescribed applications and associated license plate fees or deposits for that particular license plate.

(31) Street or suburban bus--A vehicle, other than a passenger car, used to transport persons for compensation exclusively within the limits of a municipality or a suburban addition to a municipality.

(32) Tandem axle group--Two or more axles spaced 40 inches or more apart from center to center having at least one common point of weight suspension.

(33) Unconventional vehicle--A vehicle built entirely as machinery from the ground up, that is permanently designed to perform a specific function, and is not designed to transport property.

(34) Vehicle classification--The grouping of vehicles in categories for the purpose of registration, based on design, carrying capacity, or use.

(35) Vehicle description--Information regarding a specific vehicle, including, but not limited to, the vehicle make, model year, body style, and vehicle identification number.

(36) Vehicle identification number--A number assigned by the manufacturer of a motor vehicle or the department that describes the motor vehicle for purposes of identification.

(37) Vehicle inspection sticker--A sticker issued by the Texas Department of Public Safety signifying that a vehicle has passed all applicable safety and emissions tests.

(38) Vehicle registration insignia--A license plate, symbol, tab, or other device issued by the department evidencing that all applicable fees have been paid for the current registration period and allowing the vehicle to be operated on the public highways.

(39) Vehicle registration record--Information contained in the department's files that reflects, but is not limited to, the make, vehicle identification number, model year, body style, license number, and the name of the registered owner.

(40) Volunteer fire department--An association that is organized for the purpose of answering fire alarms, extinguishing fires, and providing emergency medical services.

§217.23. *Special Registration Permits.*

(a) Purpose and scope. Transportation Code, Chapter 502, Subchapters C and I charge the department with the responsibility of issuing special registration permits which shall be recognized as legal registration for the movement of motor vehicles not authorized to travel on Texas public highways for lack of registration or for lack of reciprocity with the state or country in which the vehicles are registered. For the department to efficiently and effectively perform these duties, this section prescribes the policies and procedures for the application and the issuance of temporary registration permits.

(b) Permit categories. The department will issue the following categories of special registration permits.

(1) Additional weight permits. The owner of a truck, truck tractor, trailer, or semitrailer may purchase temporary additional weight permits for the purpose of transporting the owner's own seasonal agricultural products to market or other points for sale or processing in

accordance with Transportation Code, §502.434. In addition, such vehicles may be used for the transportation without charge of seasonal laborers from their place of residence, and materials, tools, equipment, and supplies from the place of purchase or storage, to a farm or ranch exclusively for use on such farm or ranch.

(A) Additional weight permits are valid for a limited period of less than one year.

(B) An additional weight permit will not be issued for a period of less than one month or extended beyond the expiration of a license plate issued under Transportation Code, Chapter 502.

(C) The statutory fee for an additional weight permit is based on a percentage of the difference between the owner's ~~regular~~ annual registration fee and the annual fee for the desired gross vehicle weight ~~tonnage~~ computed as follows:

- (i) one-month (or 30 consecutive days)--10 percent;
- (ii) one-quarter (three consecutive months)--30 percent;
- (iii) two-quarters (six consecutive months)--60 percent; or
- (iv) three-quarters (nine consecutive months)--90 percent.

(D) Additional weight permits are issued for calendar quarters with the first quarter to begin on April 1st of each year.

(E) A permit will not be issued unless the registration fee for hauling the additional weight ~~larger tonnage~~ has been paid prior to the actual hauling.

(F) Additional weight permits may not be issued to farm licensed trailers or semitrailers.

(2) Annual permits.

(A) Transportation Code, §502.093 authorizes the department to issue annual permits to provide for the movement of foreign commercial vehicles that are not authorized to travel on Texas highways for lack of registration or for lack of reciprocity with the state or country in which the vehicles are registered. The department will issue annual permits:

(i) for a 12-month period designated by the department which begins on the first day of a calendar month and expires on the last day of the last calendar month in that annual registration period; and

(ii) to each vehicle or combination of vehicles for the registration fee prescribed by weight classification in Transportation Code, §502.253 and §502.255.

(B) The department will not issue annual permits for the importation of citrus fruit into Texas from a foreign country except for foreign export or processing for foreign export.

(C) The following exemptions apply to vehicles displaying annual permits.

(i) Currently registered ~~Registered~~ foreign semitrailers having a gross weight ~~weights~~ in excess of 6,000 pounds used or to be used in combination with commercial motor vehicles or truck tractors having a gross vehicle weight in excess of 10,000 pounds ~~or commercial motor vehicles with manufacturer's rated carrying capacities in excess of one ton~~ are exempted from the requirements ~~requirement~~ to pay the token fee and display the associated distinguishing license plate provided for in Transportation Code, §502.255. An annual permit is required for the power unit only. For vehicles reg-

istered in combination, the combined gross weight may not be less than 18,000 pounds.

(ii) Vehicles registered with annual permits are not subject to the optional county registration fee under Transportation Code, §502.401, the optional county fee for transportation projects under Transportation Code, §502.402, or the optional registration fee for child safety under Transportation Code, §502.403.

(3) 72-hour permits and 144-hour permits.

(A) In accordance with Transportation Code, §502.094, the department will issue a permit valid for 72 hours or 144 hours for the movement of commercial motor vehicles, trailers, semitrailers, and motor buses owned by residents of the United States, Mexico, or Canada.

(B) A 72-hour permit or a 144-hour permit is valid for the period of time stated on the permit beginning with the effective day and time as shown on the permit registration receipt.

(C) Vehicles displaying 72-hour permits or 144-hour permits are subject to vehicle safety inspection in accordance with Transportation Code, §548.051, except for:

(i) vehicles currently registered in another state of the United States, Mexico, or Canada; and

(ii) mobile drilling and servicing equipment used in the production of gas, crude petroleum, or oil, including, but not limited to, mobile cranes and hoisting equipment, mobile lift equipment, forklifts, and tugs.

(D) The department will not issue a 72-hour permit or a 144-hour permit to a commercial motor vehicle, trailer, semitrailer, or motor bus apprehended for violation of Texas registration laws. Apprehended vehicles must be registered under Transportation Code, Chapter 502.

(4) Temporary agricultural permits.

(A) Transportation Code, §502.092 authorizes the department to issue a 30-day temporary nonresident registration permit to a nonresident for any truck, truck tractor, trailer, or semitrailer to be used in the movement of all agriculture products produced in Texas:

(i) from the place of production to market, storage, or railhead not more than 75 miles distant from the place of production; or

(ii) to be used in the movement of machinery used to harvest Texas-produced agricultural products.

(B) The department will issue a 30-day temporary nonresident registration permit to a nonresident for any truck, truck tractor, trailer, or semitrailer used to move or harvest farm products, produced outside of Texas, but:

(i) marketed or processed in Texas; or

(ii) moved to points in Texas for shipment from the point of entry into Texas to market, storage, processing plant, railhead or seaport not more than 80 miles distant from such point of entry into Texas.

(C) The statutory fee for temporary agricultural permits is one-twelfth of the annual Texas registration fee prescribed for the vehicle for which the permit is issued.

(D) The department will issue a temporary agricultural permit only when the vehicle is legally registered in the nonresident's home state or country for the current registration year.

(E) The number of temporary agricultural permits is limited to three permits per nonresident owner during any one vehicle registration year.

(F) Temporary agricultural permits may not be issued to farm licensed trailers or semi-trailers.

(5) One-trip permits. Transportation Code, §502.095 authorizes the department to temporarily register any unladen vehicle upon application to provide for the movement of the vehicle for one trip, when the vehicle is subject to Texas registration and not authorized to travel on the public roadways for lack of registration or lack of registration reciprocity.

(A) Upon receipt of the \$5 fee, registration will be valid for one trip only between the points of origin and destination and intermediate points as may be set forth in the application and registration receipt.

(B) The department will issue a one-trip permit to a bus which is not covered by a reciprocity agreement with the state or country in which it is registered to allow for the transit of the vehicle only. The vehicle should not be used for the transportation of any passenger or property, for compensation or otherwise, unless such bus is operating under charter from another state or country.

(C) A one-trip permit is valid for a period up to 15 days from the effective date of registration.

(D) A one-trip permit may not be issued for a trip which both originates and terminates outside Texas.

(E) A laden motor vehicle or a laden commercial vehicle cannot display a one-trip permit. If the vehicle is unregistered, it must operate with a 72-hour or 144-hour permit.

(6) 30-day temporary registration permits. Transportation Code, §502.095 authorizes the department to issue a temporary registration permit valid for 30 days for a \$25 fee. A vehicle operated on a 30-day temporary permit is not restricted to a specific route. The permit is available for:

(A) passenger vehicles;

(B) motorcycles;

(C) private buses;

(D) trailers and semitrailers with a gross weight not exceeding 10,000 pounds;

(E) light commercial vehicles not exceeding a gross weight of 10,000 pounds; and

(F) a commercial vehicle exceeding 10,000 pounds, provided the vehicle is operated unladen.

(c) Application process.

(1) Procedure. An owner who wishes to apply for a temporary registration permit for a vehicle which is otherwise required to be registered in accordance with §217.22 of this subchapter (relating to Motor Vehicle Registration), must do so on a form prescribed by the director.

(2) Form requirements. The application form will at a minimum require:

(A) the signature of the owner;

(B) the name and complete address of the applicant; and

(C) the vehicle description.

(3) Fees and documentation. The application must be accompanied by:

(A) statutorily prescribed fees;

(B) evidence of financial responsibility:

(i) as required by Transportation Code, Chapter 502, Subchapter B, provided that all policies written for the operation of motor vehicles must be issued by an insurance company or surety company authorized to write motor vehicle liability insurance in Texas; or

(ii) if the applicant is a motor carrier as defined by §218.2 of this title (relating to Definitions), indicating that the vehicle is registered in compliance with Chapter 218, Subchapter B of this title (relating to Motor Carrier Registration); and

(C) any other documents or fees required by law.

(4) Place of application.

(A) All applications for annual permits must be submitted directly to the department for processing and issuance.

(B) Additional weight permits and temporary agricultural permits may be obtained by making application with the department through the county tax assessor-collectors' offices.

(C) 72-hour and 144-hour permits, one-trip permits, and 30-day temporary registration permits may be obtained by making application either with the department or the county tax assessor-collectors' offices.

(d) Display of registration insignia. The department will issue a specially designed tag or windshield validation sticker, upon receipt of a complete application for a permit.

(1) Tags shall be displayed in a manner that is clearly visible and legible when viewed from outside of the vehicle. The tag shall be attached to or displayed in the vehicle to allow ready inspection.

(2) Windshield validation stickers shall be displayed on the inside of the front windshield in the lower left corner.

(3) A receipt will be issued for each registration insignia as evidence of registration to be carried in the vehicle during the time the permit is valid. If the receipt is lost or destroyed, the owner must obtain a duplicate from the department or from the county office who issued the original receipt. The fee for the duplicate receipt is the same as the fee required by Transportation Code, §502.058.

(e) Transfer of temporary registration permits.

(1) Temporary registration permits are non-transferable between vehicles and/or owners.

(2) If the owner of a vehicle displaying a temporary registration permit disposes of the vehicle during the time the permit is valid, the permit must be returned to the county tax assessor-collector office or department immediately.

(f) Replacement permits. Vehicle owners displaying annual permits may obtain replacement permits if an annual permit is lost, stolen, or mutilated.

(1) The fee for a replacement annual permit is the same as for a replacement number plate, symbol, tab, or other device as provided by Transportation Code, §502.060.

(2) The owner shall apply directly to the department in writing for the issuance of a replacement annual permit. Such request should include a copy of the registration receipt and replacement fee.

(g) Agreements with other jurisdictions. In accordance with Transportation Code, §502.091 and Chapter 648, the executive director of the department may enter into a written agreement with an authorized officer of a state, province, territory, or possession of a foreign country to provide for the exemption from payment of registration fees by nonresidents if residents of this state are granted reciprocal exemptions. The executive director may enter into such agreement only upon:

(1) the approval of the governor; and

(2) making a determination that the economic benefits to the state outweigh all other factors considered.

(h) Border commercial zones.

(1) Texas registration required. A vehicle located in a border commercial zone must display a valid Texas registration if the vehicle is owned by a person who:

(A) owns a leasing facility or a leasing terminal located in Texas; and

(B) leases the vehicle to a foreign motor carrier.

(2) Exemption for trips of short duration. Except as provided by paragraph (1) of this subsection, a foreign commercial vehicle operating in accordance with Transportation Code, Chapter 648 is exempt from the display of a temporary registration permit if:

(A) the vehicle is engaged solely in the transportation of cargo across the border into or from a border commercial zone;

(B) for each load of cargo transported the vehicle remains in this state for:

(i) not more than 24 hours; or

(ii) not more than 48 hours, if:

(I) the vehicle is unable to leave this state within 24 hours because of circumstances beyond the control of the motor carrier operating the vehicle; and

(II) all financial responsibility requirements applying to this vehicle are satisfied;

(C) the vehicle is registered and licensed as required by the country in which the person that owns the vehicle is domiciled or is a citizen as evidenced by a valid metal license plate attached to the front or rear exterior of the vehicle; and

(D) the country in which the person who owns the vehicle is domiciled or is a citizen provides a reciprocal exemption for commercial motor vehicles owned by residents of Texas.

(3) Exemption due to reciprocity agreement. Except as provided by paragraph (1) of this subsection, a foreign commercial motor vehicle in a border commercial zone in this state is exempt from the requirement of obtaining a Texas registration if the vehicle is currently registered in another state of the United States or a province of Canada with which this state has a reciprocity agreement that exempts a vehicle that is owned by a resident of this state and that is currently registered in this state from registration in the other state or province.

§217.24. *Disabled Person License Plates and Identification Placards.*

(a) Purpose. Transportation Code, Chapters 504 and 681, charge the department with the responsibility for issuing specially designed license plates and identification placards for disabled persons. For the department to perform these duties efficiently and effectively, this section prescribes the policies and procedures for the application, issuance, and renewal of Disabled Person [disabled person] license plates and placards.

(b) Issuance.

(1) Disabled Person [person] license plates.

(A) Eligibility. In accordance with Transportation Code, §504.201, the department will issue specially designed license plates displaying the international symbol of access to permanently disabled persons or their transporters instead of regular motor vehicle license plates.

(B) Specialty license plates. The department will issue Disabled Person [disabled person] insignia on those specialty license plates that can accommodate the identifying insignia and that are issued in accordance with §217.28 of this subchapter (relating to Specialty License Plates, Symbols, Tabs, and Other Devices).

(C) License plate number. Disabled Person [disabled person] license plates will bear a license plate number assigned by the department or will bear a personalized license plate number issued in accordance with §217.28 of this subchapter.

(2) Windshield identification placards. The department will issue removable windshield identification placards to temporarily or permanently disabled persons and to the transporters of permanently disabled persons. A person who has been issued a windshield identification placard shall hang the placard from a vehicle's rearview mirror when the vehicle is parked in a disabled person parking space or shall display the placard on the center portion of the dashboard if the vehicle does not have a rearview mirror.

~~[(A) A placard issued to a person with a permanent disability will be white on a blue shield in color.]~~

~~[(B) A placard issued to a person with a temporary disability will be white on a red shield in color.]~~

~~[(c) Initial application.]~~

~~[(1) Place of application. The following persons may file an application for disabled person license plates or identification placards with the county tax assessor-collector in the county in which the applicant resides:]~~

~~[(A) the owner of a registered vehicle that is regularly operated by or for the transportation of a disabled person; and]~~

~~[(B) a disabled person who is not a vehicle owner.]~~

~~[(2) Application form. The application must be made on a form prescribed by the director and must, at a minimum, include the name, address, and signature of the disabled person, and:]~~

~~[(A) the first four digits of the applicant's driver's license number or the number of a personal identification card issued to the applicant under Transportation Code, Chapter 521; or]~~

~~[(B) an out-of-state current driver's license number issued to a non-resident individual serving in the United States military at a military installation in this state.]~~

~~[(3) Accompanying documentation.]~~

~~[(A) In accordance with Transportation Code, §504.201 and §681.003, and unless otherwise exempted by law or this section, an initial application for disabled person license plates and an identification placard must be accompanied by evidence that the operator or regularly transported person is disabled.]~~

~~[(B) The evidence must take one of the two following forms:]~~

~~[(i) The evidence may be in the form of a disability statement, as it appears on the application for disabled person license~~

plates or identification placards, which has been correctly completed and signed in the presence of a notary.]

[(ii)] The evidence may also be in the form of a written prescription that includes the disabled person's name, a statement that the disability is either temporary or permanent, a statement whether the person's disability is mobility related as described by Transportation Code, §681.001(5), and the signature of a physician. The prescription must be written on a prescription form or on the physician's letterhead.]

[(C)] An initial application for disabled person license plates or identification placards must be signed by a:]

[(i)] physician licensed to practice medicine in Texas, Arkansas, Louisiana, New Mexico, or Oklahoma;]

[(ii)] physician authorized by law to practice medicine in a health facility of the Department of Veterans Affairs;]

[(iii)] physician practicing medicine in the United States Military on a military installation;]

[(iv)] licensed registered nurse or physician assistant acting under the delegation and supervision of a licensed physician in conformance with Occupations Code, Chapter 157, Subchapter B; or]

[(v)] physician's assistant licensed to practice in this state acting as the agent of a licensed physician under Occupations Code, §204.202(e).]

[(D)] If the initial application for disabled license plates or identification placards is based on a mobility problem caused by a disorder of the foot, it may be signed by a podiatrist licensed to practice podiatry in Texas, Arkansas, Louisiana, New Mexico, or Oklahoma.]

[(E)] If the initial application for disabled license plates or identification placards is based on vision impairment, it may be signed by an optometrist licensed to practice optometry or therapeutic optometry in Texas, Arkansas, Louisiana, New Mexico, or Oklahoma.]

[(4)] Exemption from accompanying documentation. The department will issue disabled person identification placards to an organization that regularly transports disabled persons in vehicles it owns or controls if the organization is prohibited by law from disclosing the identities of its clients. The application may be made in the name of the organization. In addition, accompanying documentation described in paragraph (3) of this subsection will not be required. The organization must present an "Exempt" Texas Vehicle Registration Receipt issued in accordance with §217.43 of this subchapter (relating to Exempt and Alias Vehicle Registration) for each disabled person identification placard requested.]

[(5)] Issuance of disabled person license plates and identification placards to certain institutions.]

[(A)] In accordance with Transportation Code, §504.203 and §681.0032, the department will issue disabled person license plates or a blue permanently disabled person identification placard for display on a van or bus operated by an institution, facility, or residential retirement community that is licensed under Health and Safety Code, Chapter 242, 246, or 247.]

[(B)] The van or bus must be used for the transport of residents of the institution, facility, or residential retirement community.]

[(C)] A qualified institution, facility, or residential retirement community must meet the following requirements to obtain disabled parking insignia:]

[(i)] An application for disabled person license plates or an identification placard must be presented. Accompanying documentation described in paragraph (3) of this subsection is not required.]

[(ii)] A Texas Vehicle Registration Receipt issued in accordance with §217.22 of this subchapter (relating to Motor Vehicle Registration) must be presented for each van or bus for which disabled person insignia is requested.]

[(D)] If the Vehicle Registration Receipt indicates that the van or bus is not owned by the eligible institution, facility, or residential retirement community that is requesting disabled person identification insignia, then the institution, facility, or residential retirement community must submit a written statement that the van or bus is in the possession and control of the eligible institution, facility, or residential retirement community and is operated by the institution, facility, or residential retirement community for the transportation of its disabled residents.]

(c) [(d)] Renewal of Disabled Person license plates.

[(1)] [License plates.] Disabled Person [person] license plates are valid for a period of 12 months from the date of issuance, and are renewable as specified in §217.22 of this subchapter.

[(2)] Identification placards.]

[(A)] Place of renewal application. Prior to the expiration of a disabled person identification placard, an applicant must apply for renewal to the tax assessor-collector of the county in which the owner resides.]

[(B)] Accompanying documentation. To renew a permanently disabled person identification placard, an applicant must present the placard that is expiring, a receipt showing that a disabled person placard was previously issued to the applicant, or a copy of the previous identification placard application. If a previous application, placard, or receipt is not available, the applicant must reapply as described in subsection (e) of this section.]

[(3)] Temporarily disabled person identification placards. Temporarily disabled person identification placards are valid for six months from the month of issuance or until the termination of the applicant's disability, whichever occurs first.]

[(A)] Termination of disability. If a person's disability ends prior to the expiration of the identification placard, the placard shall be destroyed.]

[(B)] Renewal. If a person's temporary disability extends for more than the six-month period for which the placard was issued, the person must reapply for a new identification placard as described in subsection (e) of this section.]

(d) [(e)] Replacement.

(1) License plates. If Disabled Person [disabled person] license plates are lost, stolen, or mutilated, the owner may obtain replacement license plates by applying with a county tax assessor-collector.

(A) Accompanying documentation. To replace permanently Disabled Person [disabled person] license plates, the owner must present the current year's registration receipt and personal identification acceptable to the county tax assessor-collector.

(B) Absence of accompanying documentation. If the current year's registration receipt is not available and the county cannot verify that the Disabled Person [disabled person] license plates were issued to the owner, the owner must reapply in accordance with [subsection (e) of] this section.

(2) Disabled Person ~~[person]~~ identification placards. If a Disabled Person ~~[disabled person]~~ identification placard becomes lost, stolen, or mutilated, the owner may obtain a new identification placard in accordance with ~~[subsection (e) of]~~ this section.

~~(c)~~ ~~[(f)]~~ Transfer of Disabled Person ~~[disabled person]~~ license plates and identification placards.

(1) License plates.

(A) Transfer between persons. Disabled Person ~~[person]~~ license plates may not be transferred between persons. An owner who sells or trades a vehicle to which Disabled Person ~~[disabled person]~~ license plates have been issued shall remove the Disabled Person ~~[disabled person]~~ license plates from the vehicle. The owner shall return the license plates to the department and shall obtain appropriate replacement license plates to place on the vehicle prior to any transfer of ownership.

(B) Transfer between vehicles. Disabled Person ~~[person]~~ license plates may ~~[not]~~ be transferred between vehicles if the county or the department can verify the plate ownership and the owner of the vehicle is the disabled person or the vehicle is used to transport the disabled person.

~~(i)~~ Plate ownership verification may include:

~~(I)~~ a Registration and Title System (RTS) inquiry;

~~(II)~~ a copy of the department Application for Disabled Person license plates; or

~~(III)~~ the owner's current registration receipt.

~~(ii)~~ An owner who sells or trades a vehicle with Disabled Person license plates must remove the plates from the vehicle.

(2) Identification placards.

(A) Transfer between vehicles. Disabled Person ~~[person]~~ identification placards may be displayed in any vehicle driven by the disabled person or in which the disabled person is a passenger.

(B) Transfer between persons. Disabled Person ~~[person]~~ identification placards may not be transferred between persons.

~~(f)~~ ~~[(g)]~~ Seizure and revocation of placard.

(1) After a law enforcement officer seizes a placard under Transportation Code, §681.012, not later than the fifth day after the date of the seizure, the officer shall destroy the placard and [promptly] provide the department with the following items:

(A) a notice that the placard was destroyed [the original seized placard];

(B) a copy of the citation issued under Transportation Code, §681.011(a) or (d); and

(C) a brief summary of the events giving rise to the citation.

(2) The person to whom the seized placard was issued may petition for a hearing under Chapter 206, Subchapter D of this title (relating to Procedures in Contested Cases).

(A) If the department has not received the items specified in paragraph (1) of this subsection, the department will advise the petitioner to obtain a replacement placard from the county tax assessor-collector. [return the original seized placard or issue a replacement placard to the petitioner.]

(B) If the department determines from written evidence that the citation was dismissed or withdrawn, the department will advise the petitioner to obtain a replacement placard from the county tax assessor-collector. [return the original seized placard or issue a replacement placard to the petitioner.]

(C) If the department has received the items specified in paragraph (1) of this subsection and if the citation has not been dismissed or withdrawn, the department may negotiate a settlement providing for ~~[return of the seized placard or]~~ issuance of a replacement placard, including an agreement by the petitioner to abide by all laws regarding placards. If a settlement is not reached, the department will refer the matter to the State Office of Administrative Hearings for a hearing.

~~[(i)]~~ If it is determined after a hearing that no offense was committed under Transportation Code, §681.011(a) or (d), the department will return the original seized placard or issue a replacement placard to the petitioner.]

~~[(ii)]~~ If it is determined after a hearing that an offense was committed under Transportation Code, §681.011(a) or (d), the revocation will continue and the petitioner shall not obtain a new placard for one year from the date of the offense.]

~~[(iii)]~~ At any time after the matter has been referred to the State Office of Administrative Hearings, the attorney for the department may dismiss the case for insufficient evidence or negotiate a settlement providing for return of the seized placard or issuance of a replacement placard.]

§217.26. Military Specialty License Plates.

(a) Purpose and Scope. Transportation Code, Chapter 504 authorizes the department to issue military specialty license plates. This section prescribes the policies and procedures for the application, issuance, and renewal of military specialty license plates.

(b) Classification.

(1) Meritorious Service. There are no fees for the first set of specialty license plates. Registration fees and any additional fees will be collected at the time of registration for additional sets. These plates include:

(A) Congressional Medal of Honor;

(B) Legion of Valor, consisting of Air Force Cross, Distinguished Flying Cross, Distinguished Service Cross and Navy Cross;

(C) Legion of Merit;

(D) Silver Star;

(E) Bronze Star and Bronze Star with Valor;

(F) Distinguished Service Medal;

(G) Defense Superior Service Medal; and

(H) Air Medal and Air Medal with Valor.

(2) Recognition Award. The first set of specialty license plates is \$3 and no registration fee is collected. Registration fees and any additional fees will be collected at the time of registration for additional sets. These plates include:

(A) Former Prisoner of War (POW);

(B) Disabled Veteran;

(C) Purple Heart; and

(D) Pearl Harbor Survivor.

(3) Issued to members or former members of the U.S. Armed Forces. There is no charge for the specialty plate, however, registration fees and any additional fees collected at the time of registration apply. These plates include:

(A) World War II, Korea, Vietnam Operations, Iraqi Freedom, Enduring Freedom, Enduring Freedom Afghanistan, Desert Storm and Desert Shield;

(B) Coast Guard Auxiliary;

(C) Armed Forces Reserved;

(D) U.S. Paratrooper;

(E) Marine Corps League;

(F) Texas Guard (National and State);

(G) Texas Wing Civil Air Patrol;

(H) Woman Veteran;

(I) U.S. Air Force;

(J) U.S. Army;

(K) U.S. Coast Guard;

(L) U.S. Marine Corps; or

(M) U.S. Navy.

(4) Honorably discharged and retired. The following license plates may include the words "Honorably Discharged" or "Retired" if the applicant is a former member of one of the following branches of the U.S. Armed Forces and meets eligibility criteria as established in Transportation Code, Chapter 504:

(A) U.S. Air Force;

(B) U.S. Army;

(C) U.S. Coast Guard;

(D) U.S. Marine Corps; or

(E) U.S. Navy.

(c) Surviving spouse license plates.

(1) The surviving spouse of a deceased Disabled Veteran may apply for ~~[one]~~ "Surviving Spouse Disabled Veteran" specialty license plates ~~[plate]~~, if proof exists that Disabled Veteran License Plates were issued to the veteran prior to the time of death, and the surviving spouse remains unmarried. The first set of specialty license plates is \$3 and no registration fee is collected. Registration fees and additional fees will be collected at the time of registration for additional sets. ~~[There is no fee for the specialty license plate, however, registration fees and other applicable fees apply.]~~

(2) The surviving spouse of a deceased veteran who, prior to death, had been issued other military specialty plates, may apply for and continue to register one vehicle and pay the fee applicable for that military specialty license plate. The surviving spouse must remain unmarried to ~~[be]~~ remain eligible.

(d) Application. Applications for military specialty license plates must be made to the department and include evidence of eligibility. The evidence of eligibility may include, but is not limited to:

(1) an official document issued by a governmental entity;

(2) a letter issued by a governmental entity on that agency's letterhead;

(3) discharge papers; or

(4) a death certificate.

(e) Period.

(1) Military Vehicle license plates and registration numbers are issued for a five-year period.

(2) The registration for Congressional Medal of Honor license plates expires each March 31.

(f) Assignment and Transfer. Military plates may not be assigned and may only be transferred to another vehicle owned by the same vehicle owner.

(g) Applicability. Section 217.28 of this subchapter (relating to Specialty License Plates, Symbols, Tabs, and Other Devices) applies to military plates, symbols, tabs, or other devices as to:

(1) what is considered one set of plates per vehicle as determined by vehicle type;

(2) issuance of validation tabs and insignia;

(3) stolen or replaced plates;

(4) payment of other applicable fees;

(5) personalization, except that Congressional Medal of Honor plates may not be personalized;

(6) renewal, except that the owner of a vehicle with Congressional Medal of Honor license plates must return the documentation and specialty license plate fee, if any, directly to the department;

(7) refunds; and

(8) expiration.

§217.29. Vehicle Registration Renewal via the Internet.

(a) Internet registration renewal program. The department will maintain a uniform Internet registration renewal process. This process will provide for the renewal of vehicle registrations via the Internet and will be in addition to vehicle registration procedures provided for in §217.22(d) of this subchapter (relating to Motor Vehicle Registration). The Internet registration renewal program will be facilitated by a third-party vendor.

(b) County participation in program. All county tax assessor-collectors shall process registration renewals through an online system designated by the department. ~~[County participation is optional and requires approval from the commissioner's court of a county. A county tax assessor-collector must submit an agreement to the director indicating intent to participate in the program.]~~

(c) Eligibility of individuals for participation. To be eligible to renew a vehicle's registration via the Internet, the [a] vehicle owner must meet ~~[the following criteria.]~~

~~[(1)]~~ ~~[The vehicle owner must meet]~~ all criteria for registration renewal outlined in this section, in §217.22 of this subchapter, and in Transportation Code, Chapter 502.

~~[(2)]~~ ~~The vehicle owner must be a resident of a participating county.]~~

~~[(3)]~~ ~~The vehicle must have registration at the time the application for registration renewal is submitted. In calculating the expiration date of the registration, the 5-working-day grace period established by Transportation Code, §502.407 will not be considered. The county shall register the vehicle for a 12-month period without changing the initial month of registration.]~~

(d) Fees. A vehicle owner who renews registration via the Internet must pay:

- (1) registration fees prescribed by law;
- (2) any local fees or other fees prescribed by law and collected in conjunction with registering a vehicle;
- (3) a fee of \$1 for the processing of a registration renewal by mail in accordance with Transportation Code, §502.197(a); and
- (4) a convenience fee of \$2 for the processing of an electronic registration renewal paid by a credit card payment in accordance with Transportation Code, §1001.009.

(e) Information to be submitted by vehicle owner. A vehicle owner who renews registration via the Internet must submit or verify the following information:

- (1) registrant information, including the vehicle owner's name and county of residence;
- (2) vehicle information, including the license plate number of the vehicle to be registered;
- (3) insurance information, including the name of the insurance company, the name of the insurance company's agent (if applicable), the telephone number of the insurance company or agent (local or toll free number serviced Monday through Friday 8:00 a.m. to 5:00 p.m.), the insurance policy number, and representation that the policy meets all applicable legal standards;
- (4) credit card information, including the type of credit card, the name appearing on the credit card, the credit card number, and the expiration date; and
- (5) other information prescribed by rule or statute.

(f) Duties of the county [~~participating counties~~]. A [~~participating~~] county tax assessor-collector shall:

- (1) accept electronic payment for vehicle registration renewal via the Internet;

(2) execute an agreement with the department as provided by the director;

(3) process qualified Internet registration renewal transactions as submitted by the third-party vendor;

(4) communicate with the third-party vendor and applicants via email, regular mail, or other means, as specified by the director;

(5) promptly mail renewal registration validation stickers and license plates to applicants;

(6) ensure that all requirements for registration renewal are met, including all requirements set forth in this section, in §217.22 of this subchapter, and in Transportation Code, Chapter 502; [~~and~~]

(7) reject applications that do not meet all requirements set forth in this section, in §217.22 of this subchapter, and in Transportation Code, Chapter 502; and[-]

(8) register each vehicle for a 12-month period.

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

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