

# PROPOSED RULES

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

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

## TITLE 16. ECONOMIC REGULATION

### PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

#### CHAPTER 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT

##### SUBCHAPTER B. POWERS AND RESPONSIBILITIES

###### 16 TAC §60.24

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC) Chapter 60, Subchapter B, §60.24, regarding the Procedural Rules of the Commission and the Department.

Senate Bill 202, 84th Legislature, Regular Session (2015), transferred seven programs from the Texas Department of State Health Services to the Department to include, Athletic Trainers, Dietitians, Hearing Instrument Fitters and Dispensers, Licensed Dyslexia Therapists and Practitioners, Midwives, Orthotists and Prosthetists and Speech-Language Pathologists and Audiologists. In addition, House Bill 1786, 84th Legislature, Regular Session (2015), transferred driver and traffic safety education from the Texas Education Agency and the Department of Public Safety to the Department. Lastly, House Bill 3315, 84th Legislature, Regular Session (2015), changed the Medical Advisory Committee to the Combative Sports Advisory Board. The proposed amendments primarily update the list of Advisory Boards to include the additional advisory boards added from program transfers. The proposed amendments are necessary to comply with Texas Government Code, §2110.008.

The proposed amendments to §60.24 add the Advisory Board of Athletic Trainers, Driver Training and Traffic Safety Advisory Committee, Dietitians Advisory Board, Dyslexia Therapists and Practitioners Advisory Committee, Hearing Instrument Fitters and Dispensers Advisory Board, Midwives Advisory Board, Orthotists and Prosthetists Advisory Board and Speech-Language Pathologists and Audiologists Advisory Board with respective abolishment dates. Editorial changes are also made to renumber and rename the section to accurately represent all advisory boards, committees and councils.

William H. Kuntz, Jr., Executive Director, has determined that for the first five-year period the proposed amendments are in effect there will be no direct cost to state or local government as a result of enforcing or administering the proposed rule. There is no estimated decrease or increase in revenue to the state or

local government as a result of enforcing or administering the proposed rule.

Mr. Kuntz also has determined that for each year of the first five-year period the proposed amendments are in effect, the public will benefit by having experienced and knowledgeable personnel to offer insight for the regulated programs through the advisory boards.

There will be no anticipated economic effect on small and micro-businesses that are required to comply with the rule as proposed.

Since the agency has determined that the proposed amendments will have no adverse economic effect on small or micro-businesses, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, under Texas Government Code §2006.002, is not required.

Comments on the proposal may be submitted by mail to Pauline Easley, Legal Assistant, General Counsel's Office, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711; or by facsimile to (512) 475-3032; or electronically to [erule.comments@tdlr.texas.gov](mailto:erule.comments@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

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

In addition, the following statutes establishing advisory boards/committees/councils are affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Health and Safety Code, Chapters 754 (Elevators, Escalators, and Related Equipment) and 755 (Boilers); Government Code, Chapter 469 (Elimination of Architectural Barriers); and Texas Occupations Code Chapters 203 (Midwives), 401 (Speech-Language Pathologists and Audiologists), 402 (Hearing Instrument Fitters and Dispensers), 403 (Licensed Dyslexia Practitioners and Licensed Dyslexia Therapists), 451 (Athletic Trainers), 605 (Orthotists and Prosthetists), 701 (Dietitians), 802 (Dog or Cat Breeders), 1151 (Property Tax Professionals), 1152 (Property Tax Consultants), 1302 (Air Conditioning and Refrigeration Contractors), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetologists), 1603 (Regulation of Barbering and Cosmetology), 1703 (Polygraph Examiners), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Vehicle Towing and Booting), and 2309 (Used Automotive Parts Recyclers). No other statutes, articles, or codes are affected by the proposal.

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

§60.24. *Advisory Boards.*

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

(c) In accordance with Texas Government Code, §2110.008, the commission establishes the following periods during which the advisory boards listed will continue in existence. The automatic abolishment date of each advisory board will be the date listed for that board unless the commission subsequently establishes a different date:

- (1) Advisory Board of Athletic Trainers--09/01/2024;
- (2) ~~[(1)]~~ Advisory Board on Barbering--09/01/2024;
- (3) ~~[(2)]~~ Advisory Board on Cosmetology--09/01/2024;
- (4) ~~[(3)]~~ Architectural Barriers Advisory Committee--09/01/2024;
- (5) ~~[(4)]~~ Air Conditioning and Refrigeration Contractors Advisory Board--09/01/2024;
- (6) ~~[(5)]~~ Auctioneer Education Advisory Board--09/01/2024;
- (7) ~~[(6)]~~ Board of Boiler Rules--09/01/2024;
- (8) Combative Sports Advisory Board--09/01/2024;
- (9) Dietitians Advisory Board--09/01/2024;
- (10) Dyslexia Therapists and Practitioners Advisory Committee--09/01/2024;
- ~~[(7) Licensed Breeders Advisory Committee--09/01/2024;]~~
- (11) ~~[(8)]~~ Electrical Safety and Licensing Advisory Board--09/01/2024;
- (12) ~~[(9)]~~ Elevator Advisory Board--09/01/2024;
- (13) Hearing Instrument Fitters and Dispensers Advisory Board--09/01/2024;
- (14) Licensed Breeders Advisory Committee--09/01/2024;
- (15) Midwives Advisory Board--09/01/2024;
- (16) Orthotists and Prosthetists Advisory Board--09/01/2024;
- ~~[(10) Medical Advisory Committee--09/01/2024;]~~
- (17) ~~[(11)]~~ Polygraph Advisory Committee--09/01/2024;
- (18) ~~[(12)]~~ Property Tax Consultants Advisory Council--09/01/2024;
- (19) Speech Language Pathologists and Audiologists--09/01/2024;
- (20) ~~[(13)]~~ Texas Tax Professional Advisory Committee--09/01/2024;
- (21) ~~[(14)]~~ Towing, Storage, and Boating Advisory Board--09/01/2024;
- (22) ~~[(15)]~~ Used Automotive Parts Recycling Advisory Board--09/01/2024;
- (23) ~~[(16)]~~ Vehicle Protection Product Warrantor Advisory Board--09/01/2024;

~~[(24) [(17)]~~ Water Well Drillers Advisory Council--09/01/2024; and

~~[(25) [(18)]~~ Weather Modification Advisory Committee--09/01/2024.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2016.

TRD-201602488

William H. Kuntz, Jr.

Executive Director

Texas Department of Licensing and Regulation

Earliest possible date of adoption: July 3, 2016

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



## TITLE 22. EXAMINING BOARDS

### PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

#### CHAPTER 322. PRACTICE

##### 22 TAC §322.1

The Texas Board of Physical Therapy Examiners proposes an amendment to §322.1, concerning Provision of Services.

The amendment is proposed to add the requirement for direct physical therapist-to-patient interaction during the reevaluation process and to eliminate the requirement for a reexamination of the patient which implies completion of a comprehensive screening and testing process including patient history, systems review, and tests and measures.

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

Mr. Maline has also determined that for each year of the first five-year period these amendments are in effect there will be no adverse effect on public safety as "physical therapist-to-patient interaction" during a reevaluation will still be required.

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

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

The amendments are proposed under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy

Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

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

§322.1. *Provision of Services.*

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

(d) Reevaluation.

(1) Provision of physical therapy treatment by a PTA or an aide may not continue if the PT has not performed a reevaluation:

(A) at a minimum of once every 60 days after treatment is initiated, or at a higher frequency as established by the PT; and

(B) In response to a change in the patient's medical status that affects physical therapy treatment, when a change in the physical therapy plan of care is needed, or prior to any planned discharge.

(2) A reevaluation must include:

(A) Direct physical therapist-to-patient interaction; [An onsite reexamination of the patient;] and

(B) A review of the plan of care with appropriate continuation, revision, or termination of treatment

(e) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 20, 2016.

TRD-201602480

John P. Maline

Executive Director

Texas Board of Physical Therapy Examiners

Earliest possible date of adoption: July 3, 2016

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



## PART 18. TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS

### CHAPTER 371. EXAMINATION AND LICENSURE

#### 22 TAC §371.3

The Texas State Board of Podiatric Medical Examiners proposes amendments to §371.3, concerning Fees. The amendments to §371.3 are being proposed to cover the requirements of Senate Bill 195 (84th Texas Legislature; relating to prescriptions for certain controlled substances, access to information about those prescriptions, and the duties of prescribers and other entities registered with the Federal Drug Enforcement Administration; authorizing fees) which requires the board to assess or increase fees sufficient to generate during FY 2017 \$10,000.00 in funds to be transferred to the Texas State Board of Pharmacy to administer the Prescription Drug Monitoring Program.

Texas Occupations Code §202.153, Fees, states that the board by rule shall establish fees in amounts reasonable and necessary to cover the cost of administering this chapter.

Hemant Makan, Executive Director, has determined that for each year of the first five years the rule is in effect, there will be no fiscal implications for state or local government as a result of adopting the section.

Mr. Makan has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of adopting the amendments for §371.3 will be to safeguard against prescription fraud and drug diversion by allowing podiatric prescribers the ability to access the Texas State Board of Pharmacy's Prescription Drug Monitoring Database.

There will be no effect on small or micro-businesses. The minimal cost to persons (i.e., licensees) who are required to comply with the amendments to §371.3 will be \$10.00.

Comments on or about the amendments may be submitted to Hemant Makan, Executive Director, Texas State Board of Podiatric Medical Examiners, P.O. Box 12216, Austin, Texas 78711-2216, [Hemant.Makan@tsbpme.texas.gov](mailto:Hemant.Makan@tsbpme.texas.gov).

The amendments are being proposed under Texas Occupations Code, §202.151, which provides the Texas State Board of Podiatric Medical Examiners with the authority to adopt reasonable or necessary rules and bylaws consistent with the law regulating the practice of podiatry, the laws of this state, and the law of the United States to govern its proceedings and activities, the regulation of the practice of podiatry and the enforcement of the law regulating the practice of podiatry.

The proposed change for §371.3 implements Texas Occupations Code §202.153, Fees.

#### §371.3. *Fees.*

(a) The fees set by the Board and collected by the Board must be sufficient to meet the expenses of administering the Podiatric Medical Practice Act, subsequent amendments, and the applicable rules and regulations.

(b) Fees are as follows:

(1) Examination--\$250 plus \$39 fee for HB660 (criminal history record information)

(2) Re-Examination--\$250 plus \$39 fee for HB 660 (criminal history record information)

(3) Temporary License--\$125

(4) Extended Temporary License--\$50

(5) Temporary Faculty License--\$40

(6) Provisional License--\$125

(7) Initial Licensing Fee--\$534.00 [§524] (i.e. \$514 plus \$5 TXOL fee, plus \$5 "Initial" Office of Patient Protection fee for Texas Occupations Code (TOC) §202.301 and TOC §101.307, plus \$10.00 SB195/84th fee)

(8) Annual Renewal--\$530.00 [§520] (i.e. \$514 plus \$5 TXOL fee, plus \$1 "Renewal" Office of Patient Protection fee for TOC §202.301 and TOC §101.307, plus \$10.00 SB195/84th fee)

(9) Renewal Penalty--as specified in Texas Occupations Code, §202.301(d)

(10) Non certified podiatric technician registration--\$35

(11) Non certified podiatric technician renewal--\$35

(12) Hyperbaric Oxygen Certificate--\$25

(13) Nitrous Oxide Registration--\$25

(14) Duplicate License--\$50

(15) Copies of Public Records--The charges to any person requesting copies of any public record of the Board will be the charge established by the appropriate state authority. The Board may reduce or waive these charges at the discretion of the Executive Director if there is a public benefit.

(16) Statute and Rule Notebook--provided at cost to the agency

(17) Duplicate Certificate--\$10

(18) HB 660 (criminal history record information)--\$39

(19) Recovery Fee--An additional \$100 charge may be applied for processing special requests exceeding standard application/service costs (e.g. examination rescheduling, excessive/amended document reviews, obtaining legal/court documentation, criminal history evaluation letters, etc.).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2016.

TRD-201602504

Hemant Makan

Executive Director

Texas State Board of Podiatric Medical Examiners

Earliest possible date of adoption: July 3, 2016

For further information, please call: (512) 305-7000



## TITLE 25. HEALTH SERVICES

### PART 1. DEPARTMENT OF STATE HEALTH SERVICES

#### CHAPTER 73. LABORATORIES

##### 25 TAC §73.54, §73.55

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

##### BACKGROUND AND PURPOSE

This rule package concerns fees for laboratory services--specifically, fee schedules for clinical testing, newborn screening, and chemical analysis.

The proposed amendments to §73.54 and §73.55 are necessary to update the fee schedules to incorporate new laboratory tests, adjust fees associated with testing, and delete low volume laboratory tests that are no longer performed by the department. "Low volume" tests are defined as tests that were ordered less than 100 times in fiscal year 2015, and are not considered core public health tests. These "low volume" tests are readily available at commercial laboratories.

The department uses a standardized formula to set fees to reflect the current actual costs. Senate Bill (SB) 80, 82nd Legislature, Regular Session, 2011, required that the department: (1) develop, document, and implement procedures for setting fees for

laboratory services, including updating and implementing a documented cost allocation methodology that determines reasonable costs for the provision of laboratory tests; and (2) analyze the department's costs and update the fee schedule as needed in accordance with Texas Health and Safety Code, §12.032(c). In a past rulemaking action (adopted October 2012), the Laboratory Services Section (LSS) developed and documented a cost accounting methodology and determined the costs for each test listed in the fee schedule. The methodology for determining the cost per test included calculating the specific costs of performing a test or analysis, and the administrative and overhead costs necessary to operate the state laboratories in question. It is these figures together which determined the fee amount for each of the tests in these fee schedules. In order to determine the specific cost for each test or analysis, the LSS performed a work load unit study for every procedure or test offered by the laboratory. A "work load unit" is defined as a measurement of staff time, consumables, and testing reagents required to perform each procedure from the time the sample enters the laboratory until the time the results are reported. More than 3,000 procedures performed by the department's LSS were included in this analysis. These procedures translated to approximately 700 different tests listed in the department fee schedule. It was understood at that time that the department would need to make periodic subsequent changes to its fee schedule in the rules in order to reflect changes in actual cost over time. Whenever such rulemaking actions are proposed, they employ the same fee calculation methodology mandated by law in 2011. In the current rulemaking proposal, this same approach was employed on a much smaller number of tests.

Currently, the Newborn Screening (NBS) Program is not able to recover the cost of testing and follow-up on abnormal screens because the cost to perform these activities is far more than is represented by the current fee of \$33.60, the 10th lowest fee in the United States. An increase of the NBS fee to \$55.24 would make Texas' fee the 13th lowest in the nation. The NBS fee is composed of LSS and clinical care coordination costs. In addition to the components included in the cost accounting module reference in the Background and Purpose, clinical care coordination costs for care coordination at the department's central office, case management in health service regions, and client benefits are also included in the fee for NBS. The LSS portion of the fee is \$48.67, and the clinical care coordination portion is \$6.57.

There are many factors that contributed to the need for an increased fee for the NBS panel.

-NBS testing panel costs have not been reviewed since 2011.

-Cost to add severe combined immunodeficiency (SCID) screening in 2012 was an estimate. A work-load unit study was done recently to determine the exact direct cost.

-Increase in testing reagents and consumables costs for NBS testing.

--Contract with the vendor has increased 9.88% since 2011.

--Costs for SCID screening reagents/consumables have increased up to 22.30% since implementation in 2012.

-Correction of a previous calculation error for tandem mass spectrometry screening reagent costs and addition of costs for tandem mass spectrometry instrument replacement consumables: an increase of \$3.25 per specimen.

-Inclusion of the cost for 2nd tier DNA analysis tests: an increase of \$1.50 per specimen.

-Addition of secondary targets to the NBS panel.

-Increase in overall operating costs, including salary, fringe, charity testing, server, and indirect costs.

-The NBS Program uses public health services fees to fund clinical care coordination at the department's central office, case management in Health Service Regions, and client benefits. The expenditures have increased over 75% from \$1,007,394 in Fiscal Year 2011 to \$1,770,253 in Fiscal Year 2015. The NBS Program has consulted with the department's Budget Section staff to identify that \$1.8 million in the public health service fees will be needed to continue existing services.

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

#### SECTION-BY-SECTION SUMMARY

Existing §73.54(a)(1)(A)(i) is proposed to be amended by updating the fee from \$33.60 to \$55.24. There are several factors that contributed to this proposed fee increase as described in the Background and Purpose Section of this preamble.

The low volume tests in existing §73.54(a)(1)(B)(ii), (II) glucose post prandial (1 hour), (III) glucose post prandial (2 hour), (V) glucose tolerance test 1 hour, (VI) glucose tolerance test 2 hour, and (VII) glucose tolerance test 3 hour are proposed for deletion to make more efficient use of the LSS staff as the tests are no longer offered and will lower operational costs. The remaining subclause would be renumbered accordingly.

Existing §73.54(a)(1)(C)(i) is proposed to be amended by increasing the fee for Cystic fibrosis mutation panel from \$147.22 to \$175.19. This increase is due to increased costs associated with testing.

Existing §73.54(a)(1)(C)(ii) is proposed to be amended by increasing the fees for (I) HbS, HbC, HbE, HbD, or HbO-Arab from \$186.84 to \$255.72; (II) common beta-thalassemia mutation from \$213.21 to \$287.66; and (III) beta-globin gene sequencing from \$783.42 to \$1054.24. This increase is due to increased costs associated with testing.

Existing §73.54(a)(1)(C)(iii) is proposed to be amended by updating the fee for Galactosemia common mutation panel from \$383.21 to \$529.03. This increase is due to increased costs associated with testing.

Existing §73.54(a)(1)(C)(vi) is proposed to be amended by increasing the fee for Medium chain acyl-CoA dehydrogenase deficiency (MCAD), common mutation panel from \$280.79 to \$374.95. This increase is due to increased costs associated with testing.

New §73.54(a)(2)(A)(xviii) Whole Genome Sequencing is proposed to add new subclause (I) Gram Negative with a fee of \$318.64 and subclause (II) Gram Positive with a fee of \$329.37.

Existing §73.54(a)(2)(B)(ii)(II), (VI), (VII) and (IX) are proposed to be renamed. Subclause (II) Arsenic in urine, ICP-DRC-MS (Dynamic reaction cell), MS was moved from the end of the test name and added to the method for better clarity. Subclauses (VI) Metals in blood and (VII) Metals in urine are proposed to remove the metals list from the name of the tests. The testing platform for both tests allow for multiple metals to be tested without a fee change. This proposed change will allow the LSS to

add metals or remove metals to meet customer needs in real time. Subclause (IX) is proposed to be amended by updating the name to Tetramine, gas chromatography/mass selection detector (GC/MS). These updates will accurately reflect the current testing method.

Existing §73.54(a)(2)(C)(i)(I)(-a-) is proposed for deletion. This Blood culture test is a low volume test, and the instrument for the testing is no longer operational. This low volume test is proposed for deletion to make more efficient use of the LSS staff and to lower operational costs. The existing items would be renumbered accordingly.

New §73.54(a)(2)(D)(v) is proposed to add a new test Microfilariae identification, with a fee of \$46.52. Existing §73.54(a)(2)(D)(v)(IV) is proposed to be deleted. This low volume tissue preparation test is proposed for deletion to make more efficient use of the LSS staff and to lower operational costs. The remaining clauses and subclauses would be renumbered accordingly.

New §73.54(a)(2)(E)(iv), (v), and (viii) are proposed to add three new tests (iv) Chagas, IgG with a fee of \$27.68, (v) Chikungunya, IgM with a fee of \$74.72, and (viii) Emerging Disease, IgM with a fee of \$74.72. These tests are being added to support the department's public health efforts. The remaining clauses would be renumbered accordingly.

Existing §73.54(a)(2)(E)(xi)(I) is proposed to be amended by updating the name of the test to "serum, confirmation" to more accurately identify the test and by updating the fee from \$40.74 to \$83.74. This price increase is due to a change in testing methodology.

Existing §73.54(a)(2)(F) is proposed to delete two low volume tests (i) Adenoviruses, PCR and (ix)(II) PCR. Existing §73.54(a)(2)(F) is to be further amended by restructuring the clause to read (ix) Enterovirus, DFA with its current fee of \$162.96. A new test was added in new §73.54(a)(2)(F)(ii) Chikungunya real time, RT-PCR, with a fee of \$145.02. Existing §73.54(a)(2)(F) is also proposed to increase the fees for (viii) Emerging Disease, PCR from \$116.22 to \$137.31 and (xii) Norovirus (Norwalk-like virus) PCR from \$55.77 to \$162.96. The fee for (xvi) Respiratory viral panel, PCR is decreased from \$167.13 to \$149.82. These fees would reflect the true costs to perform the tests.

New §73.54(b)(6)(A)(vi) is proposed to be amended by adding a new test Nucleic acid amplification for *Mycobacterium tuberculosis* (*M. tuberculosis*) complex with a fee of \$166.70. The remaining clause would be renumbered accordingly.

Existing §73.54(c)(3)(A)(i) is proposed to be restructured to read (i) Bacillus identification with the current fee of \$101.16. This proposed amendment will correct the spelling of the test name and remove low volume test (ii) enumeration, most probable number (MPN). Also proposed for deletion due to low volume tests are §73.54(c)(3)(C) Yeast and mold and (D) enumeration and standard plate count. These low volume tests are proposed for deletion to make more efficient use of laboratory staff and to lower operational costs.

New §73.54(c)(6)(A)(iii) and (iv) are proposed to add two new tests, (iii) PCR Emerging, Non-clinical testing Aedes with a fee of \$17.20 and (iv) PCR Emerging, Non-clinical testing Culex with a fee of \$16.58. The remaining clauses would be renumbered accordingly.

New §73.55(2)(A)(i)(XV) is proposed to be amended by adding a new test for (XV) cyanide, free, SM, 20th edition, 4500-CN-F with a fee of \$113.43.

Existing §73.55(2)(A)(ii) is proposed to be amended by updating the name of the test to Routine water mineral group, EPA methods 300.0, and 353.2, and SM, 19th edition, 2320B, 2510B and 2540C, and decreasing the fee from \$106.39 to \$102.25. This proposed change is to remove the pH test from the method. The pH test is now performed in the field and is no longer performed at the LSS.

Existing §73.55(2)(C) is proposed to be amended by adding new tests in clauses (viii) haloacetic acids, EPA method 552.3 with a fee of \$45.34, (xiii) semi-volatile organic compounds by GC-MS, EPA method 525.3 with a fee of \$120.88, and (xvii) volatile organic compounds VOCs by GC-MS, EPA method 524.3 with a fee of \$56.42.

#### FISCAL NOTE

Dr. Grace Kubin, Director, LSS, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications to the state as a result of administering the sections as proposed. It is impossible to predict the volume of testing that the LSS will receive under a revised fee schedule as well as the actual resulting revenues, but this rulemaking proposal reflects the fee calculation methodology derived and implemented in the large recently-completed rulemaking action which revised the entire department laboratory fee schedule, consistent with SB 80, 82nd Legislature, Regular Session, 2011. SB 80 requires the LSS to develop and document a cost accounting methodology to determine costs for each test performed. Because the proposed rulemaking would reduce fees for some tests, the volume of those same tests may increase and thus result in a net increase in revenue. Some fees are being lowered to reflect cost savings the department recently realized through changes in technology or increased volume. Some fees are proposed to be increased due to the true costs that the department incurs when performing these tests. Increased fees would result in increased revenues to the department unless the increased results in a substantial decrease of orders for that test.

The exception to this assessment is the NBS panel fee. NBS is a mandated test, and the LSS performed 788,612 tests last year. Approximately 36% of all screening kits were private pay. The proposed increased fee for private pay kits would generate approximately \$6.1 million in revenue each year for the department to cover the cost of testing to comply with SB 80, 82nd Legislature, Regular Session, 2011.

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

Dr. Kubin has also determined that there may be an economic effect on those small or micro-businesses who submit specimens or samples to the LSS for analysis. The LSS does not collect information on our submitters but knows that a variety of entities and a few individuals approach the department to purchase laboratory services. The LSS does not collect information on the size of a submitter's business, and so it does not have direct data at hand to definitely determine what percentage of its usual submitters are small or micro-businesses.

As discussed previously in the Background and Purpose Section, the proposed modifications are to adjust fees, which update the entirety of the LSS fee schedule consistent with SB 80. The adjusted fee amounts would properly reflect the methodol-

ogy used in a previous rulemaking action, which was designed to recoup the departments costs related to providing the services in its laboratories. Some of these proposed amendments would decrease fee amounts for specific tests while others would increase fees. Actual impact for a particular submitter, would be determined by the test the submitter orders and thus may have an adverse economic impact on a small or micro-businesses. Since there is a proposed increase in the mandated NBS fee, this will potentially impact all submitters who submit newborn screens for testing (i.e., anyone who might order this test, alone or in combination with other tests), the department analysis under the Economic Impact Statement in this preamble will also serve to satisfy the Small Business Impact Analysis required by Texas Government Code, §2006.002(a).

#### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

The LSS does not collect information on the size of a submitter's business, and so it does not have direct data at hand to definitely determine what percentage of its usual submitters are small or micro-businesses. However, the department has made an estimate, using an approach suggested in the Texas Office of the Attorney General guidance document associated with House Bill 3430 of the 80th, Regular Legislative Session in 2007. A review of The North American Industry Classification System (NAICS) on the U.S. Census Bureau website revealed four classifications that appear to represent all the submitter types for the LSS. Specific information on the number of small businesses listed for each of these codes was found on the Texas Comptroller of Public Accounts website. The NAICS codes that represent submitters to the LSS include: "6221" - General Medical and Surgical Hospitals (364 businesses listed of which 56 are defined as small businesses), "6214" - Outpatient Care Centers (578 businesses listed of which 442 are defined as small businesses), and "6223" - Specialty (except Psychiatric and Substance Abuse) Hospitals (116 businesses listed of which 80 are defined as small businesses). The total number of businesses listed for these three classification codes is 1058. Of that number, only 578 of the businesses listed (physician, clinics, and hospitals) are small businesses that could be affected by these proposed rule amendments.

The department believes that most of these 578 small or micro-businesses are contractors for department programs such as Texas Health Steps and HIV Prevention. Therefore, the economic impact would be to the department program which engages each contractor, and it is those department programs which would ultimately have to absorb the fee increases. Subtracting these contractors from the total, the department believes this leaves a much smaller number of non-department contractor small and micro-businesses that could be impacted by any fee increases.

Again, the exception would be the NBS panel fee since it is a mandated test for all clinicians overseeing the birth of a newborn. The department does not know the private business model for all NBS submitters but believes that there may be an adverse impact on the small or micro-business or person until the business or person can renegotiate their contract with private third party payors for reimbursement of the NBS testing kits.

There is no anticipated negative impact on local employment.

#### PUBLIC BENEFIT

Dr. Kubin has also determined that for each year of the first five years the sections are in effect, the public will benefit from adop-

tion of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be the continued operation of the department's laboratories, which perform important public health activities every day. The public would also benefit by the department offering new tests to support core public health testing. The tests proposed for deletion would lead to more efficient LSS operations, which also benefits the public.

#### REGULATORY ANALYSIS

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

#### TAKINGS IMPACT ASSESSMENT

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

#### PUBLIC COMMENT

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

#### LEGAL CERTIFICATION

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

#### STATUTORY AUTHORITY

The amendments are authorized under Texas Health and Safety Code, §12.031 and §12.032 which allow the department to charge fees to a person who receives public health services from the department; §12.034 which requires the department to establish collection procedures; §12.035 which requires the department to deposit all money collected for fees and charges under §12.032 and §12.033 in the state treasury to the credit of the department's public health service fee fund; §12.0122 which allows the department to enter into a contract for laboratory services; and Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Texas Health and Safety Code, Chapter 1001.

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

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

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

(1) Biochemistry and genetics.

(A) Newborn screening.

(i) Newborn screening panel--~~\$55.24~~ [~~\$33.60~~]. (Fees are based on the newborn screening specimen collection kit which is a department approved, bar-coded, FDA approved medical specimen collection device that includes a filter paper collection device, parent information sheet, specimen storage and use information, parent disclosure request form, demographic information sheet, and specimen collection directions with protective wrap-around cover for the specimen that should be used to submit a newborn's blood specimen for the first or second screen, repeat or follow-up testing and which includes the cost of screening.)

(ii) - (iii) (No change.)

(B) Clinical chemistry.

(i) (No change.)

(ii) Glucose:

(I) glucose fasting--\$4.30; and

~~{(II) glucose post prandial (1 hour)--\$8.60;}~~

~~{(III) glucose post prandial (2 hour)--\$12.90;}~~

(II) [(IV)] glucose random--\$4.30.[;]

~~{(V) glucose tolerance test 1 hour--\$8.60;}~~

~~{(VI) glucose tolerance test 2 hour--\$12.90; and}~~

~~{(VII) glucose tolerance test 3 hour--\$17.20}.~~

(iii) - (vii) (No change.)

(C) DNA Analysis.

(i) Cystic fibrosis mutation panel--~~\$175.19~~ [~~\$147.22~~].

(ii) Hemoglobin (Hb) DNA:

(I) HbS, HbC, HbE, HbD or HbO-Arab--~~\$255.72; [\$186.84;]~~

(II) common beta-thalassemia mutation--~~\$287.66; [\$213.21;]~~ and

(III) beta-globin gene sequencing--~~\$1,054.24~~ [~~\$783.42~~].

(iii) Galactosemia common mutation panel--~~\$529.03~~ [~~\$383.21~~].

(iv) Medium chain acyl-CoA dehydrogenase deficiency (MCAD), common mutation panel--~~\$374.95~~ [~~\$280.79~~].

(v) (No change.)

(2) Microbiology.

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

(i) - (xvii) (No change.)

(xviii) Whole Genome Sequencing:

(I) Gram Negative--\$318.64; and

(II) Gram Positive--\$329.37.

(B) Emergency preparedness.

- (i) (No change.)
- (ii) Chemical Threat agent Analysis.
  - (I) (No change.)
  - (II) Arsenic in urine, ICP-DRC-MS [~~ICP-DRC~~] (Dynamic reaction cell) [~~MS~~]-\$176.62.
  - (III) - (V) (No change.)
  - (VI) Metals in blood [~~mercury, lead, cadmium~~], inductively coupled plasma mass spectrometry (ICP/MS)-\$194.64.
  - (VII) Metals in urine [~~barium, beryllium, cadmium, lead, thallium, uranium~~], ICP/MS-\$176.25.
  - (VIII) (No change.)
  - (IX) Tetramine, gas chromatography/mass selective detector (GC/MS) [~~(GC/MSD)~~]-\$183.05.
  - (X) - (XI) (No change.)
- (C) Mycobacteriology/mycology
  - (i) Acid fast bacilli (AFB).
    - (I) Clinical specimen, AFB isolation and identification.
      - ~~[(a-) Blood culture--\$138.97.]~~
      - ~~(-a) [(b-)] Culture, other than blood--\$32.04.~~
      - ~~(-b) [(c-)] Direct detection by high-performance liquid chromatography (HPLC)--\$66.26.~~
      - ~~(-c) [(d-)] Identification of AFB isolate.~~
        - (-1) HPLC--\$124.90;
        - (-2) Accuprobe--\$81.40;
        - (-3) biochemical, basic--\$132.35;
        - and
        - (-4) biochemical, complex--\$472.84.
      - ~~(-d) [(e-)] Nucleic acid amplification for *Mycobacterium tuberculosis* (*M. tuberculosis*) complex--\$166.70.~~
      - ~~(-e) [(f-)] Specimen concentration--\$5.38.~~
      - ~~(-f) [(g-)] Smear--\$11.59.~~
    - (II) (No change.)
- (ii) - (v) (No change.)
- (D) Parasitology.
  - (i) - (iv) (No change.)
  - (v) Microfilariae identification--\$46.52.
  - (vi) [(v)] Miscellaneous Parasite examination:
    - (I) acid fast stain--\$74.17;
    - (II) chromotrope stain--\$140.55;
    - (III) Giemsa stain--\$177.55;
    - ~~[(IV) tissue preparation--\$73.55.]~~
    - (IV) [(V)] trichrome stain--\$96.98; and
    - (V) [(VI)] wet mount--\$73.55.
  - (vii) [(vi)] Parasite identification, PCR--\$141.79.
  - (viii) [(vii)] Pinworm examination--\$37.50.
  - (ix) [(viii)] Urine ova and parasite exam--\$56.36.

- (x) [(ix)] Worm identification--\$46.44.
- (E) Serology.
  - (i) - (iii) (No change.)
  - (iv) Chagas, IgG--\$27.68.
  - (v) Chikungunya, IgM--\$74.72.
  - (vi) [(iv)] Cytomegalovirus (CMV):
    - (I) IgG--\$23.23; and
    - (II) IgM--\$24.26.
  - (vii) [(v)] Ehrlichia IFA--\$131.31.
  - (viii) Emerging Disease, IgM--\$74.72.
  - (ix) [(vi)] Francisella tularensis:
    - (I) IgG--\$61.15; and
    - (II) IgM--\$122.30.
  - (x) [(vii)] Hantavirus IgG/IgM--\$362.05.
  - (xi) [(viii)] Hepatitis A:
    - (I) IgM--\$44.04; and
    - (II) total--\$34.45.
  - (xii) [(ix)] Hepatitis B:
    - (I) core antibody--\$36.06;
    - (II) core IgM antibody--\$44.75;
    - (III) surface antibody (Ab)--\$28.34; and
    - (IV) surface antigen (Ag)--\$18.47.
  - (xiii) [(x)] Hepatitis C (HCV)--\$25.68.
  - (xiv) [(xi)] Human immunodeficiency virus (HIV):
    - (I) serum, confirmation [~~multi spot~~]-\$83.74 [~~\$40.74~~]; and
    - (II) HIV Combo Ag/Ab EIA--\$7.90.
  - (xv) [(xii)] Human immunodeficiency virus-1 (HIV-1):
    - (I) enzyme immunoassay (EIA) Dried Blood Spots (DBS)--\$14.32;
    - (II) enzyme immunoassay (EIA) oral fluid--\$69.99;
    - (III) Nucleic acid amplification test (NAAT)--\$7.79;
    - (IV) western blot serum--\$277.23;
    - (V) western blot DBS--\$277.23; and
    - (VI) western blot oral--\$324.71.
  - (xvi) [(xiii)] Measles:
    - (I) IgG--\$21.36; and
    - (II) IgM--\$85.60.
  - (xvii) [(xiv)] Mumps:
    - (I) IgG--\$22.62; and
    - (II) IgM--\$83.93.
  - (xviii) [(xv)] Pertussis Toxin IgG--\$89.86.

(~~xix~~) [~~(xvi)~~] Q-Fever IgG--\$85.61.  
 -\$53.66. (~~xx~~) [~~(xvii)~~] QuantiFERON (tuberculosis serology)-  
 -\$42.93; and (~~xxi~~) [~~(xviii)~~] *Rickettsia* panel:  
 (I) Rocky Mountain spotted Fever (RMSF) IgG-  
 (II) Typhus fever IgG--\$42.93.  
 (~~xxii~~) [~~(xix)~~] Rubella:  
 (I) IgM--\$24.77; and  
 (II) screen--\$22.33.  
 (~~xxiii~~) [~~(xx)~~] Schistosoma EIA--\$10.30.  
 (~~xxiv~~) [~~(xxi)~~] Strongyloides EIA--\$16.89.  
 (~~xxv~~) [~~(xxii)~~] Syphilis:  
 (I) Confirmation particle agglutination (TP-PA)-  
 -\$27.02;  
 (II) Rapid plasma reagin (RPR):  
 (-a-) screen (qualitative)--\$2.89; and  
 (-b-) titer (quantitative)--\$12.88;  
 (III) Screening, IgG--\$7.57.  
 (~~xxvi~~) [~~(xxiii)~~] Toxoplasmosis--\$23.23.  
 (~~xxvii~~) [~~(xxiv)~~] *Varicella zoster* virus (VZV):  
 (I) IgG--\$19.70; and  
 (II) IgM--\$147.84.  
 (~~xxviii~~) [~~(xxv)~~] *Yersinia pestis* (Plague), serum--  
 \$237.18.  
 (F) Virology.  
~~(i)~~ Adenoviruses, PCR--\$304.38.}]  
 (~~i~~) [~~(ii)~~] Arbovirus identification, direct fluorescent  
 antibody (DFA)--\$152.93.  
 (~~ii~~) Chikungunya real time, RT-PCR--\$145.02.  
 (~~iii~~) Coxsackievirus, DFA--\$84.37.  
 (~~iv~~) Culture:  
 (I) Supplemental Cell Culture--\$135.46; and  
 (II) reference--\$96.66.  
 (~~v~~) Dengue, real-time PCR--\$215.52.  
 (~~vi~~) Echovirus, DFA--\$115.80.  
 (~~vii~~) Electron microscopy (includes observation,  
 electron microscopy and photography)--\$527.91.  
 (~~viii~~) Emerging Disease [~~disease~~], PCR--\$137.31  
 [\$116.22].  
 (~~ix~~) Enterovirus, DFA--\$162.96.}]  
~~(i)~~ DFA--\$162.96; and}  
~~(ii)~~ PCR--\$393.27.}]  
 (x) - (xi) (No change.)  
 (xii) Norovirus (Norwalk-like virus) PCR--\$162.96  
 [\$55.77].

(~~xiii~~) - (xv) (No change.)  
 (~~xvi~~) Respiratory viral panel, PCR--\$149.82  
 [\$167.13].  
 (~~xvii~~) - (~~xxii~~) (No change.)  
 (b) Tests performed on clinical specimens, South Texas Laboratory. Specimens that must be sent to a reference lab for testing will be billed at the reference laboratory price plus a \$3.00 handling fee.  
 (1) - (5) (No change.)  
 (6) Microbiology.  
 (A) Mycobacteriology, Acid fast bacillus (AFB).  
 (i) - (v) (No change.)  
 (~~vi~~) Nucleic acid amplification for *Mycobacterium tuberculosis* (*M. tuberculosis*) complex--\$166.70.  
 (~~vii~~) [~~(vi)~~] Smear only--\$5.09.  
 (B) - (C) (No change.)  
 (7) - (8) (No change.)  
 (c) Non-clinical testing, Austin Laboratory.  
 (1) - (2) (No change.)  
 (3) Food.  
 (A) Bacterial identification.  
 (i) Bacillus identification--\$101.16. [~~Bacillus:~~]  
~~(i)~~ identification--\$101.16; and}  
~~(ii)~~ enumeration, most probable number  
 (MPN)--\$245.53.}]  
 (ii) - (x) (No change.)  
 (B) *Staphylococcus* enterotoxin detection--\$90.80.  
~~(C)~~ Yeast and mold enumeration--\$128.50.}]  
~~(D)~~ Standard plate count--\$67.38.}]  
 (4) - (5) (No change.)  
 (6) Virology.  
 (A) Arbovirus:  
 (i) - (ii) (No change.)  
 (~~iii~~) PCR Emerging, Non-clinical testing Aedes--  
 \$17.20;  
 (~~iv~~) PCR Emerging, Non-clinical testing Culex--  
 \$16.58;  
 (~~v~~) [~~(iii)~~] St. Louis Encephalitis (SLE), mosquitoes,  
 PCR--\$60.18;  
 (~~vi~~) [~~(iv)~~] Western Equine Encephalitis (WEE),  
 mosquitoes, PCR--\$60.41; and  
 (~~vii~~) [~~(v)~~] West Nile Virus (WNV), mosquitoes,  
 PCR--\$57.87.  
 (B) (No change.)  
 (7) - (8) (No change.)  
 (d) - (e) (No change.)  
 §73.55. Fee Schedule for Chemical Analyses.  
 Fees for chemical analyses and physical testing.

- (1) (No change.)  
 (2) The following fees apply to analysis of drinking water samples.

(A) Inorganic parameters.

(i) Individual tests:

(I) - (XIV) (No change.)

(XV) cyanide, free, SM, 20th edition, 4500-CN-F--\$113.43;

(XVI) [(XV)] cyanide, total, QuickChem 10-204-00-1-X--\$53.75;

(XVII) [(XVI)] fluoride, EPA method 300.0--\$15.03;

(XVIII) [(XVII)] nitrate and nitrite as nitrogen, EPA method 353.2--\$8.49;

(XIX) [(XVIII)] nitrate as nitrogen, EPA method 353.2--\$8.49;

(XX) [(XIX)] nitrite as nitrogen, EPA method 353.2--\$8.49;

(XXI) [(XX)] odor, SM, 20th edition, 2150B--\$51.93;

(XXII) [(XXI)] perchlorate, EPA method 314.0--\$1008.60;

(XXIII) [(XXII)] pH, SM, 19th edition, 4500H--\$4.15;

(XXIV) [(XXIII)] phenolics, total recoverable, EPA method 420.4--\$114.49;

(XXV) [(XXIV)] silica, dissolved, SM, 20th edition, 4500SiO, E--\$20.25;

(XXVI) [(XXV)] solids, total dissolved, determined, SM, 20th edition, 2540C--\$14.65;

(XXVII) [(XXVI)] sulfate, EPA method 300.0--\$15.11; and

(XXVIII) [(XXVII)] turbidity, EPA method 180.1--\$136.28.

(ii) Routine water mineral group, EPA methods 300.0, and 353.2, and SM, 19th edition, 2320B, 2510B [4500-HB] and 2540C--\$102.25 [\$106.39].

(B) (No change.)

(C) Organic compounds:

(i) - (vii) (No change.)

(viii) haloacetic acids, EPA Method 552.3--\$45.34;

(ix) [(viii)] carbamates insecticides, EPA 531--\$57.01;

(x) [(ix)] PCB SOC6, EPA method 508A--\$1045.02;

(xi) [(x)] synthetic organic contaminants group 5, EPA methods 508.1 and 525.2--\$205.41;

(xii) [(xi)] semi-volatile organic compounds by GC-MS, EPA method 525.2--\$111.74;

(xiii) semi-volatile organic compounds by GC-MS, EPA method 525.3--\$120.88;

(xiv) [(xii)] trihalomethanes, EPA method 524.2--\$50.13;

(xv) [(xiii)] trihalomethanes, EPA method 551.1--\$43.91; [and]

(xvi) [(xiv)] volatile organic compounds VOCs by GC-MS, EPA method 524.2--\$55.12; and[-]

(xvii) volatile organics compounds VOCs by GC-MS, EPA method 524.3--\$56.42.

(D) (No change.)

(3) - (9) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 19, 2016.

TRD-201602466

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: July 3, 2016

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

**TITLE 37. PUBLIC SAFETY AND CORRECTIONS**

**PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY**

**CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES**

**SUBCHAPTER B. REGULATIONS GOVERNING TRANSPORTATION SAFETY**

**37 TAC §4.11**

The Texas Department of Public Safety (the department) proposes amendments to §4.11, concerning General Applicability and Definitions. The proposed amendments are necessary to harmonize updates to Title 49, Code of Federal Regulations with those laws adopted by Texas.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the section as proposed. There is no anticipated economic cost to individuals who are required to comply with this rule as proposed. There is no anticipated negative impact on local employment.

Ms. Whittenton has determined that for each year of the first five-year period the rule is in effect the public benefit anticipated

as a result of enforcing the rule will be maximum efficiency of the Motor Carrier Safety Assistance Program.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

The Texas Department of Public Safety, in accordance with the Administrative Procedure Act, Texas Government Code, §2001, et seq., and Texas Transportation Code, Chapter 644, will hold a public hearing on Tuesday, June 14, 2016, at 9:00 a.m., at the Texas Department of Public Safety, Texas Highway Patrol Division, Building G Annex, 5805 North Lamar, Austin, Texas. The purpose of this hearing is to receive comments from all interested persons regarding adoption of the proposed amendments to Administrative Rule §4.11 regarding Transportation of Hazardous Materials, proposed for adoption under the authority of Texas Transportation Code, Chapter 644, which provides that the director shall, after notice and a public hearing, adopt rules regulating the safe operation of commercial motor vehicles.

Persons interested in attending this hearing are encouraged to submit advance written notice of their intent to attend the hearing and to submit a written copy of their comments. Correspondence should be addressed to Major Chris Nordloh, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500.

Persons with special needs or disabilities who plan to attend this hearing and who may need auxiliary aids or services are requested to contact Major Chris Nordloh at (512) 424-2775 at least three working days prior to the hearing so that appropriate arrangements can be made.

Other comments on this proposal may be submitted to Major Chris Nordloh, Texas Highway Patrol Division, Texas Department of Public Safety, P.O. Box 4087, Austin, Texas 78773-0500, (512) 424-2775. Comments must be received no later than thirty (30) days from the date of publication of this proposal.

These amendments are proposed pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

Texas Transportation Code, §644.051 is affected by this proposal.

#### *§4.11. General Applicability and Definitions.*

(a) General. The director of the Texas Department of Public Safety incorporates, by reference, the Federal Motor Carrier Safety Regulations, Title 49, Code of Federal Regulations, Parts 40, 380, 382, 385, 386, 387, 390 - 393, and 395 - 397 including all interpretations thereto, as amended through May 1, 2016 [~~January 4, 2015~~]. All other

references in this subchapter to the Code of Federal Regulations also refer to amendments and interpretations issued through May 1, 2016 [~~January 4, 2015~~]. The rules adopted herein are to ensure that:

(1) a commercial motor vehicle is safely maintained, equipped, loaded, and operated;

(2) the responsibilities imposed on a commercial motor vehicle's operator do not impair the operator's ability to operate the vehicle safely;

(3) the physical condition of a commercial motor vehicle's operator enables the operator to operate the vehicle safely;

(4) commercial motor vehicle operators are qualified, by reason of training and experience, to operate the vehicle safely; and

(5) the minimum levels of financial responsibility for motor carriers of property or passengers operating commercial motor vehicles in interstate, foreign, or intrastate commerce is maintained as required.

(b) Terms. Certain terms, when used in the federal regulations as adopted in subsection (a) of this section, will be defined as follows:

(1) the definition of motor carrier will be the same as that given in Texas Transportation Code, §643.001(6) when vehicles operated by the motor carrier meet the applicability requirements of subsection (c) of this section;

(2) hazardous material shipper means a consignor, consignee, or beneficial owner of a shipment of hazardous materials;

(3) interstate or foreign commerce will include all movements by motor vehicle, both interstate and intrastate, over the streets and highways of this state;

(4) department means the Texas Department of Public Safety;

(5) director means the director of the Texas Department of Public Safety or the designee of the director;

(6) FMCSA field administrator, as used in the federal motor carrier safety regulations, means the director of the Texas Department of Public Safety for vehicles operating in intrastate commerce;

(7) farm vehicle means any vehicle or combination of vehicles controlled and/or operated by a farmer or rancher being used to transport agriculture commodities, farm machinery, and farm supplies to or from a farm or ranch;

(8) commercial motor vehicle has the meaning assigned by Texas Transportation Code, §548.001(1) if operated intrastate; commercial motor vehicle has the meaning assigned by Title 49, Code of Federal Regulations, Part 390.5 if operated interstate;

(9) foreign commercial motor vehicle has the meaning assigned by Texas Transportation Code, §648.001;

(10) agricultural commodity is defined as an agricultural, horticultural, viticultural, silvicultural, or vegetable product, bees and honey, planting seed, cottonseed, rice, livestock or a livestock product, or poultry or a poultry product that is produced in this state, either in its natural form or as processed by the producer, including wood chips. The term does not include a product which has been stored in a facility not owned by its producer;

(11) planting and harvesting seasons are defined as January 1 to December 31;

(12) producer is defined as a person engaged in the business of producing or causing to be produced for commercial purposes

an agricultural commodity. The term includes the owner of a farm on which the commodity is produced and the owner's tenant or sharecropper; and

(13) off-road motorized construction equipment includes but is not limited to motor scrapers, backhoes, motor graders, compactors, excavators, tractors, trenchers, bulldozers, and other similar equipment routinely found at construction sites and that is occasionally moved to or from construction sites by operating the equipment short distances on public highways. Off-road motorized construction equipment is not designed to operate in traffic and such appearance on a public highway is only incidental to its primary functions. Off-road motorized construction equipment is not considered to be a commercial motor vehicle as that term is defined in Texas Transportation Code, §644.001.

(14) The phrase "The commercial driver's license requirements of part 383 of this subchapter" as used in Title 49, Code of Federal Regulations, §382.103(a)(1) shall mean the commercial driver's license requirements of Texas Transportation Code, Chapter 522.

(15) For purposes of removal from safety-sensitive functions for prohibited conduct as described in Title 49, Code of Federal Regulations, Part 382.501(c), commercial motor vehicle means a vehicle subject to the requirements of Texas Transportation Code, Chapter 522 and a vehicle subject to §4.22 of this title (relating to Contract Carriers of Certain Passengers), in addition to those vehicles enumerated in Title 49, Code of Federal Regulations, Part 382.501(c).

(c) Applicability.

(1) The regulations shall be applicable to the following vehicles:

(A) a vehicle or combination of vehicles with an actual gross weight, a registered gross weight, or a gross weight rating in excess of 26,000 pounds when operating intrastate;

(B) a farm vehicle or combination of farm vehicles with an actual gross weight, a registered gross weight, or a gross weight rating of 48,000 pounds or more when operating intrastate;

(C) a vehicle designed or used to transport more than 15 passengers, including the driver;

(D) a vehicle transporting hazardous material requiring a placard;

(E) a motor carrier transporting household goods for compensation in intrastate commerce in a vehicle not defined in Texas Transportation Code, §548.001(1) is subject to the record keeping requirements in Title 49, Code of Federal Regulations, Part 395 and the hours of service requirements specified in this subchapter;

(F) a foreign commercial motor vehicle that is owned or controlled by a person or entity that is domiciled in or a citizen of a country other than the United States; and

(G) a contract carrier transporting the operating employees of a railroad on a road or highway of this state in a vehicle designed to carry 15 or fewer passengers.

(2) The regulations contained in Title 49, Code of Federal Regulations, Part 392.9a, and all interpretations thereto, are applicable to motor carriers operating exclusively in intrastate commerce and to the intrastate operations of interstate motor carriers that have not been federally preempted by the United Carrier Registration Act of 2005. The term "operating authority" as used in Title 49, Code of Federal Regulations, Part 392.9a, for the motor carriers described in this paragraph, shall mean compliance with the registration requirements found

in Texas Transportation Code, Chapter 643. For purposes of enforcement of this paragraph, peace officers certified to enforce this chapter, shall verify that a motor carrier is not registered, as required in Texas Transportation Code, Chapter 643, before placing a motor carrier out-of-service. Motor carriers placed out-of-service under Title 49, Code of Federal Regulations, Part 392.9a may request a review under §4.18 of this title (relating to Intrastate Operating Authority Out-of-Service Review). All costs associated with the towing and storage of a vehicle and load declared out-of-service under this paragraph shall be the responsibility of the motor carrier and not the department or the State of Texas.

(3) All regulations contained in Title 49, Code of Federal Regulations, Parts 40, 380, 382, 385, 386, 387, 390 - 393 and 395 - 397, and all interpretations thereto pertaining to interstate drivers and vehicles are also adopted except as otherwise excluded.

(4) A medical examination certificate, issued in accordance with Title 49, Code of Federal Regulations, Part 391.41, 391.43, and 391.45, shall expire on the date indicated by the medical examiner; however, no such medical examination certificate shall be valid for more than two years from the date of issuance.

(5) Nothing in this section shall be construed to prohibit an employer from requiring and enforcing more stringent requirements relating to safety of operation and employee health and safety.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 17, 2016.

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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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For further information, please call: (512) 424-5848



## CHAPTER 35. PRIVATE SECURITY SUBCHAPTER A. GENERAL PROVISIONS

### 37 TAC §35.3

The Texas Department of Public Safety (the department) proposes the repeal of §35.3, concerning Registration Applicant Pre-employment Check. The repeal of §35.3 is filed simultaneously with the proposed new §35.3 which was made necessary by HB 4030 (84th Legislative Session). The bill renders the current rule's background check redundant in some cases, as it requires a more substantial background check for applicants under certain conditions. The department is proposing new language to clarify the bill's requirements.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this repeal is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the repeal as proposed. There is no anticipated economic cost to individuals who are required to comply with the repeal as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be greater clarity and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246 or by email at <https://www.txdps.state.tx.us/rsd/contact/default.aspx>. Select "Vehicle Inspection". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and §1702.061(b) are affected by this proposal.

*§35.3. Registration Applicant Pre-employment Check.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2016.

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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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For further information, please call: (512) 424-5848



**37 TAC §35.3**

The Texas Department of Public Safety (the department) proposes new §35.3, concerning Registration Applicant Pre-Employment Check. New §35.3 was made necessary by HB 4030 (84th Legislative Session). The bill renders the current rule's background check redundant in some cases, as it requires a more substantial background check for applicants under certain conditions. The department is proposing new language to clarify the bill's requirements.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there

will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater clarity and consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246 or by email at <https://www.txdps.state.tx.us/rsd/contact/default.aspx>. Select "Vehicle Inspection". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b) are affected by this proposal.

*§35.3. Registration Applicant Pre-Employment Check.*

(a) Pursuant to §1702.230 of the Act, the pre-employment background check of the applicant described in subsection (c) of this section must be conducted when:

(1) An application meeting the requirements of §35.21 of this title (relating to Registration Applications) has been submitted;

(2) The department's website does not indicate the application is complete within 48 hours after the submission of the applicant's fingerprints; and

(3) Regulated services are to be performed by the applicant prior to issuance of the registration.

(b) The ability to perform a non-commissioned regulated service prior to licensure is conditional on either:

(1) Department notification that a complete application has been received and:

(A) Performance of the pre-employment background check required under subsection (c) of this section;

(B) The determination that the applicant is not disqualified based on the background check; and

(C) The employer's retention of the search results in the employee's file, as required by subsection (e) of this section; or

(2) The absence of notification by the department that a complete application has been received, the passage of 48 hours since submission of the application materials required by §35.21 of this title, and;

(A) Performance of the pre-employment background check required under subsection (d) of this section;

(B) The determination that the applicant is not disqualified based on the background check; and

(C) The employer's retention of the search results in the employee's file, as required by subsection (e) of this section.

(c) For purposes of subsection (b)(1) of this section, the pre-employment background check must at a minimum include the review of either the department's publicly accessible criminal history website or a commercial criminal history website, review of the department's sex offender registry website, and confirmation the applicant is not disqualified for the registration or endorsement based on either the applicant's criminal history or the requirement to register as a sex offender under Chapter 62, Code of Criminal Procedure. Nothing in this subsection precludes an employer from using a more stringent method of determining an applicant's eligibility.

(d) For purposes of subsection (b)(2) of this section, the pre-employment background check must at a minimum include the review of the department's publicly accessible criminal history and sex offender registry website(s), and confirmation the applicant is not disqualified for the registration or endorsement based on either the applicant's criminal history or the requirement to register as a sex offender under Chapter 62, Code of Criminal Procedure. Nothing in this subsection precludes an employer from using a more stringent method of determining an applicant's eligibility.

(e) The employer must maintain written documentation of the pre-employment check for at least two (2) years, regardless of the subsequent employment status of the applicant. The absence of such documentation constitutes a rebuttable presumption that the background check was not conducted.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2016.

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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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For further information, please call: (512) 424-5848



### 37 TAC §35.4

The Texas Department of Public Safety (the department) proposes amendments to §35.4, concerning Guidelines for Disqualifying Criminal Offenses. The amendment to §35.4 addresses the rule's reference to Article 42.12(3g), Code of Criminal Pro-

cedure, which is repealed by House Bill 2299, 84th Legislative Session, effective January 1, 2017. The bill creates new Article 42A.054 to replace 42.12(3g). The amendment is necessary to ensure any convictions for listed offenses occurring after January 1, 2017 will be disqualifying under the rule

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be consistency with legislative changes.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246 or by email at <https://www.txdps.state.tx.us/rsd/contact/default.aspx>. Select "Vehicle Inspection". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and §1702.061(b) are affected by this proposal.

#### §35.4. Guidelines for Disqualifying Criminal Offenses.

(a) The private security industry is in a position of trust; it provides services to members of the public that involve access to confidential information, to private property, and to the more vulnerable and defenseless persons within our society. By virtue of their licenses, security professionals are provided with greater opportunities to engage in fraud, theft, or related property crimes. In addition, licensure provides those predisposed to commit assaultive or sexual crimes with greater opportunities to engage in such conduct and to escape detection or prosecution.

(b) Therefore, the board has determined that offenses of the following types directly relate to the duties and responsibilities of those who are licensed under the Act. Such offenses include crimes under the laws of another state or the United States, if the offense contains elements that are substantially similar to the elements of an offense under the laws of this state. Such offenses also include those "aggravated" or otherwise enhanced versions of the listed offenses.

(c) The list of offenses in this subsection is intended to provide guidance only and is not exhaustive of either the offenses that may relate to a particular regulated occupation or of those that are independently disqualifying under Texas Occupations Code, §53.021(a)(2) - (4). The listed offenses are general categories that include all specific offenses within the corresponding chapter of the Texas Penal Code. In addition, after due consideration of the circumstances of the criminal act and its relationship to the position of trust involved in the particular licensed occupation, the board may find that an offense not described below also renders a person unfit to hold a license. In particular, an offense that is committed in one's capacity as a registrant under the Act, or an offense that is facilitated by one's registration, endorsement, or commission under the Act, will be considered related to the licensed occupation and may render the person unfit to hold the license.

(1) Arson, damage to property--Any offense under the Texas Penal Code, Chapter 28.

(2) Assault--Any offense under the Texas Penal Code, Chapter 22.

(3) Bribery--Any offense under the Texas Penal Code, Chapter 36.

(4) Burglary and criminal trespass--Any offense under the Texas Penal Code, Chapter 30.

(5) Criminal homicide--Any offense under the Texas Penal Code, Chapter 19.

(6) Disorderly conduct--Any offense under the Texas Penal Code, Chapter 42.

(7) Fraud--Any offense under the Texas Penal Code, Chapter 32.

(8) Kidnapping--Any offense under the Texas Penal Code, Chapter 20.

(9) Obstructing governmental operation--Any offense under the Texas Penal Code, Chapter 38.

(10) Perjury--Any offense under the Texas Penal Code, Chapter 37.

(11) Robbery--Any offense under the Texas Penal Code, Chapter 29.

(12) Sexual offenses--Any offense under the Texas Penal Code, Chapter 21.

(13) Theft--Any offense under the Texas Penal Code, Chapter 31.

(14) In addition:

(A) An attempt to commit a crime listed in this subsection;

(B) Aiding and abetting in the commission of a crime listed in this subsection; and

(C) Being an accessory (before or after the fact) to a crime listed in this subsection.

(d) A felony conviction for an offense listed in subsection (c) of this section is disqualifying for ten (10) years from the date of the completion of the sentence, unless subject to this subsection.

(e) A Class A misdemeanor conviction for an offense listed in subsection (c) of this section is disqualifying for five (5) years from the date of completion of the sentence.

(f) Conviction for a felony or Class A offense that does not relate to the occupation for which license is sought is disqualifying for five (5) years from the date of commission, pursuant to Texas Occupations Code, §53.021(a)(2).

(g) Independently of whether the offense is otherwise described or listed in subsection (c) of this section, a conviction for an offense listed in Texas Code of Criminal Procedure, Article 42.12 §3g, or Article 42A.054, or that is a sexually violent offense as defined by Texas Code of Criminal Procedure, Article 62.001, or a conviction for burglary of a habitation, is permanently disqualifying subject to the requirements of Texas Occupations Code, Chapter 53.

(h) A Class B misdemeanor conviction for an offense listed in subsection (c) of this section is disqualifying for five (5) years from the date of conviction.

(i) Any unlisted offense that is substantially similar in elements to an offense listed in subsection (c) of this section is disqualifying in the same manner as the corresponding listed offense.

(j) A pending Class B misdemeanor charged by information for an offense listed in subsection (c) of this section is grounds for summary suspension.

(k) Any pending Class A misdemeanor charged by information or pending felony charged by indictment is grounds for summary suspension.

(l) In determining the fitness to perform the duties and discharge the responsibilities of the licensed occupation of a person against whom disqualifying charges have been filed or who has been convicted of a disqualifying offense, the board shall consider:

(1) The extent and nature of the person's past criminal activity;

(2) The age of the person when the crime was committed;

(3) The amount of time that has elapsed since the person's last criminal activity;

(4) The conduct and work activity of the person before and after the criminal activity;

(5) Evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;

(6) The date the person will be eligible; and

(7) Any other evidence of the person's fitness, including letters of recommendation from:

(A) Prosecutors or law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person; or

(B) The sheriff or chief of police in the community where the person resides.

(m) In addition to the documentation listed in subsection (l) of this section, the applicant or licensee or registrant shall furnish proof in the form required by the department that the person has:

(1) Maintained a record of steady employment;

- (2) Supported the applicant's dependents;
- (3) Maintained a record of good conduct; and
- (4) Paid all outstanding court costs, supervision fees, fines and restitution ordered in any criminal case in which the applicant has been charged or convicted.

(n) The failure to timely provide the information listed in subsection (l) and subsection (m) of this section may result in the proposed action being taken against the application or license.

(o) The provisions of this section are authorized by the Act, §1702.004(b), and are intended to comply with the requirements of Texas Occupations Code, Chapter 53.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2016.

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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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For further information, please call: (512) 424-5848



## SUBCHAPTER B. REGISTRATION AND LICENSING

### 37 TAC §§35.21, 35.22, 35.25

The Texas Department of Public Safety (the department) proposes amendments to §§35.21, 35.22, and 35.25 concerning Registration and Licensing.

Section 35.21 is amended in response to HB 4030 (84th Legislative Session). The bill amends §1702.230 of the Private Security Act, "Application for Registration or Endorsement." Section 35.21, relating to Registration Applications, is based on the requirements of §1702.230. HB 4030 therefore necessitates the updating of §35.21. Additionally, the requirements of an alien registration card and copy of a current work authorization card are being removed: the former is only applicable to applicants for a commission; the latter is not a requirement for licensure under Chapter 1702. Section 35.22 is also amended to remove the requirements of an alien registration card and copy of a current work authorization.

The amendments to §35.25 are intended to bring this rule line with the statutory requirements relating to the use of assumed names.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period these rules are in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rules as proposed. There is no anticipated economic cost to individuals who are required to comply with the rules as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater clarity and consistency with legislative changes, and the simplification of the application process for non-commissioned employees of private security companies through the elimination of unnecessary application requirements.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246 or by email at <https://www.txdps.state.tx.us/rsd/contact/default.aspx>. Select "Vehicle Inspection". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b) are affected by this proposal.

#### §35.21. Registration Applications.

(a) It is the responsibility of the licensed company to ensure an [each employee who is required to register under the Act has submitted to the department a substantially complete] application that meets the requirements of this section has been submitted to the department by or on behalf of any employee who is required to register under the Act. An application must include all items required under subsection (b) of this section in order to comply with the requirements of §1702.230(c) of the Act. [prior to employment in a regulated capacity.]

(b) The items detailed in this subsection must be submitted in the manner prescribed by the department[; prior to employment in a regulated capacity]:

- (1) The required fee;
- (2) A copy of the applicant's Level II certificate of completion when applicable;
- [(3) A copy of the alien registration card if the applicant is not a United States citizen;]
- [(4) A copy of a current work authorization card if the applicant is a non resident alien;]
- (3) [(5)] Fingerprints in the form and manner approved by the department; and

(4) ~~[(6)]~~ The criminal history check fee as provided in this chapter.

(c) As part of the department's criminal history check, additional court documents or related materials may be requested of the applicant. Failure to comply with such a request may result in the rejection of the application as incomplete.

§35.22. *Renewal Applications for Registrations and Licenses.*

(a) An application for renewal must be submitted in the manner prescribed by the department. The application must include:

(1) The required fee;

~~[(2) A copy of the alien registration card if the applicant is not a United States citizen;]~~

~~[(3) A copy of a current work authorization card if the applicant is a non resident alien;]~~

(2) ~~[(4)]~~ Fingerprints in the form and manner approved by the department; and

(3) ~~[(5)]~~ The criminal history check fee as provided in this chapter.

(b) A complete renewal application must be submitted prior to expiration for the current registration, endorsement or license to remain in effect pending the approval of the renewal application. If the completed application is not received by the department prior to the expiration date, no regulated services may be performed until a complete renewal application is submitted in compliance with this chapter.

§35.25. *Assumed Names; Corporations.*

(a) All individual applicants doing business under an assumed name shall submit an assumed name [a] certificate from the county clerk of the county in which the applicant either: ~~[of the applicant's residence showing compliance with the assumed name statute.]~~

(1) has or will maintain business or professional premises;  
or

(2) conducts business or renders a professional service, if the person does not or will not maintain business or professional premises in any county.

(b) Corporations and other entities permitted and governed by the Texas Business Organizations Code using an assumed name shall submit an assumed name [a] certificate from the Texas Secretary of State and the county clerk of the county in which the entity either: ~~[of the applicant's residence showing compliance with the assumed name statute.]~~

(1) has or will maintain business or professional premises;  
or

(2) conducts business or renders a professional service, if the entity does not or will not maintain business or professional premises in any county.

(c) Corporate applicants shall submit a current certificate of existence or a certificate of authority from the Texas Secretary of State.

(d) Licensees may not operate under any name not reflected in current department records as the name under which the licensee will be doing business.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2016.

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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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## SUBCHAPTER D. DISCIPLINARY ACTIONS

### 37 TAC §35.52

The Texas Department of Public Safety (the department) proposes amendments to §35.52, concerning Administrative Penalties. This section is being amended to update the fine schedule to accurately reflect current statutory and rule violations.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater consistency between administrative violations by licensees and the available administrative penalties.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246 or by email at <https://www.txdps.state.tx.us/rsd/contact/default.aspx>. Select "Vehicle Inspection." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is proposed pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and §1702.061(b) are affected by this proposal.

§35.52. *Administrative Penalties.*

The administrative penalties in this section are guidelines to be used in enforcement proceedings under the Act. The fines are to be construed as maximum penalties only, and are subject to application of the factors provided in §1702.402 of the Act.

Figure: 37 TAC §35.52  
[Figure: 37 TAC §35.52]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## SUBCHAPTER F. COMMISSIONED SECURITY OFFICERS

### 37 TAC §35.81

The Texas Department of Public Safety (the department) proposes amendments to §35.81, concerning Application for a Security Officer Commission. Amendments to §35.81 are necessary to remove the requirement of a current work authorization card which is not a requirement for licensure under Chapter 1702.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be the simplification of the application process for commissioned security officers through the elimination of an unnecessary requirement.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246 or by email at <https://www.txdps.state.tx.us/rsd/contact/default.aspx>. Select "Vehicle Inspection." Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b) are affected by this proposal.

§35.81. *Application for a Security Officer Commission.*

(a) A complete security officer commission application must be submitted on the most current version of the form provided by the department. The application must include:

- (1) The required application fee;
- (2) Fingerprints in form and manner approved by the department;
- (3) The required criminal history check fee;
- (4) A copy of the applicant's Level II certificate of completion;
- (5) A copy of the applicant's Level III certificate of completion;
- (6) Non Texas residents must provide a copy of an identification card issued by the state of the applicant's residence, or other government issued identification card; and
- (7) Non United States citizens must submit a copy of their current alien registration card. Non-resident aliens must also submit [a copy of a current work authorization card and] documents establishing the right to possess firearms under federal law.

(b) Incomplete applications will not be processed and will be returned for clarification or missing information.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 23, 2016.

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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

Earliest possible date of adoption: July 3, 2016

For further information, please call: (512) 424-5848



## SUBCHAPTER I. COMPANY RECORDS

### 37 TAC §35.112

The Texas Department of Public Safety (the department) proposes amendments to §35.112, concerning Business Records. Amendments to §35.112 are necessary to comply with Occupations Code, §1702.110(b), which requires the board to adopt rules to enable an out-of-state license holder to comply with the Act's requirement that license holders maintain a physical address in this state.

Suzy Whittenton, Chief Financial Officer, has determined that for each year of the first five-year period this rule is in effect there will be no fiscal implications for state or local government, or local economies.

Ms. Whittenton has also determined that there will be no adverse economic effect on small businesses or micro-businesses required to comply with the rule as proposed. There is no anticipated economic cost to individuals who are required to comply with the rule as proposed. There is no anticipated negative impact on local employment.

In addition, Ms. Whittenton has also determined that for each year of the first five-year period the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be greater simplicity and clarity in the application and record keeping processes for private security companies.

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

The department has determined that Chapter 2007 of the Texas Government Code does not apply to this proposal. Accordingly, the department is not required to complete a takings impact assessment regarding this proposal.

Comments on this proposal may be submitted to Steve Moninger, Regulatory Services Division, Department of Public Safety, P.O. Box 4087, MSC-0240, Austin, Texas 78773-0246 or by e-mail at <https://www.txdps.state.tx.us/rsd/contact/default.aspx>. Select "Vehicle Inspection". Comments must be received no later than thirty (30) days from the date of publication of this proposal.

This proposal is made pursuant to Texas Government Code, §411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work, and Texas Occupations Code, §1702.061(b), which authorizes the department to adopt rules to administer Texas Occupations Code, Chapter 1702.

Texas Government Code, §411.004(3) and Texas Occupations Code, §1702.061(b) are affected by this proposal.

*§35.112. Business Records.*

(a) Licensees shall maintain copies of the records detailed in this section, or otherwise required under this chapter, for two (2) years from the later of the date the related service was provided or the date the contract was completed:

(1) All contracts for regulated service and related documentation reflecting the actual provision of the regulated service; and

(2) Copies of any timesheets, invoices, or scheduling records reflecting the employment dates of any registered employees.

(b) If the company has no physical place of business within the State of Texas, the records shall be maintained:

(1) At the office of the registered agent within the State of Texas; or

(2) At any physical location within the State of Texas of an agent or employee of the company.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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D. Phillip Adkins

General Counsel

Texas Department of Public Safety

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For further information, please call: (512) 424-5848



## PART 13. TEXAS COMMISSION ON FIRE PROTECTION

### CHAPTER 437. FEES

#### 37 TAC §437.13, §437.17

The Texas Commission on Fire Protection (the commission) proposes amendments to Chapter 437, Fees, concerning, §437.13, Processing Fees for Test Application, and §437.17, Records Review Fees.

The purpose of the proposed amendments is to adjust the fee charged for sectional exams, which are administered as retests following an initial exam failure; and to adjust fees charged for records review.

Tim Rutland, Executive Director, has determined that for each year of the first five year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments.

Mr. Rutland has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit from the passage is clear and concise rules regarding test application fees for fire protection personnel. There will be no effect on micro or small businesses or persons required to comply with the amendments as proposed.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to [info@tcfp.texas.gov](mailto:info@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.026, which allows the commission to set examination fees for certification of fire protection personnel.

The proposed amendments implement Texas Government Code, Chapter 419, §419.008 and §419.026.

§437.13. *Processing Fees for Test Application.*

(a) A non-refundable application processing fee of \$85 shall be charged for each examination.

(b) A non-refundable application processing fee of \$35 shall be charged for each sectional examination.

(c) [(b)] Fees will be paid in advance with the application or the certified training provider may be invoiced or billed if previous arrangements have been approved by the commission in writing via mail, e-mail or fax.

(1) Any payment postmarked from 61 to 90 days after the invoice date will cause the provider of training to be assessed a non-refundable late fee of one half the amount shown on the invoice. This late fee is in addition to the amount shown on the invoice for test application processing fees.

(2) Any payment postmarked more than 90 days after the invoice date will cause the provider of training to be assessed a non-refundable late fee in an amount equal to the amount shown on the invoice. This late fee is in addition to the amount shown on the invoice for test application processing fees.

(d) [(e)] The test application processing fee is waived for a military service member or military veteran whose military service, training, or education substantially meets the training requirements for a commission examination. This subsection applies to initial examinations for certifications required by commission rules for appointment to duties. Retests following a failed initial examination or an examination to regain a certification that was lost are not included.

(e) [(d)] The test application processing fee is waived for a military service member, military veteran, or military spouse who holds a current license or certification issued by another jurisdiction that has requirements substantially equivalent to the training requirements for a commission examination. This subsection applies to initial examinations for certifications required by commission rules for appointment to duties. Retests following a failed initial examination or an examination to regain a certification that was lost are not included.

§437.17. *Records Review Fees.*

(a) A non-refundable fee of \$75 [~~\$35~~] shall be charged for each training records review conducted by the commission for the purpose of determining equivalency to the appropriate commission training program or to establish eligibility to test. Applicants submitting training records for review shall receive a written analysis from the commission.

(b) The fee provided for in this section shall not apply to an individual who holds an advanced or Fire Fighter II certificate from the State Firemen's and Fire Marshals' Association of Texas.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-201602489

Tim Rutland

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812



CHAPTER 439. EXAMINATIONS FOR CERTIFICATION  
SUBCHAPTER A. EXAMINATIONS FOR ON-SITE DELIVERY TRAINING

37 TAC §§439.1, 439.3, 439.7, 439.9, 439.11, 439.19

The Texas Commission on Fire Protection (the commission) proposes amendments to Chapter 439, Examinations for Certification, Subchapter A, Examinations for On-Site Delivery Training, concerning §439.1, Requirements--General; §439.3, Definitions; §439.7, Eligibility; §439.9, Grading; §439.11, Commission-Designated Performance Skill Evaluations; and §439.19, Number of Test Questions.

The purpose of the proposed amendments is to require an individual to pass all sections of a multiple-section examination, place an expiration on certificates of completion, place a limit on the amount of time required for a person to complete skills evaluations and adjust the number of questions on certain state examinations.

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state or local governments.

Mr. Rutland has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit from the passage is that all individuals tested to become certified fire protection personnel will have passed each section of a multiple examination with at least seventy percent. There will be no effect on micro or small businesses or persons required to comply with the amendments as proposed.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to [info@tcfp.texas.gov](mailto:info@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.026, which allows the commission to set examination fees for certification.

The proposed amendments implement Texas Government Code, Chapter 419, §419.008 and §419.026.

§439.1. *Requirements--General.*

(a) The administration of examinations for certification, including performance skill evaluations, shall be conducted in compliance with commission rules and; as applicable, with:

(1) International Fire Service Accreditation Congress (IF-SAC) regulations; or

(2) National Board on Fire Service Professional Qualifications (Pro Board) regulations for examinations administered by the Texas A&M Engineering Extension Service. Only Pro Board examinations administered by the Texas A&M Engineering Extension Service will be accepted by the commission for certification. In order for a Pro Board document to be accepted for certification, it must:

(A) List the commission issued course approval number for which the examination was conducted;

(B) Indicate that the examination was conducted in English; and

(C) List any special accommodations provided to the examinee. The commission may not issue a certificate for an examination conducted under special accommodations other than those specified in §439.13 of this title (relating to Special Accommodations for Testing).

(b) It is incumbent upon commission staff, committee members, training officers and field examiners to maintain the integrity of the state certification examination process (or portion thereof) for which they are responsible.

(c) The commission shall reserve the authority to conduct an annual review of Pro Board examinations, procedures, test banks, and facilities utilized by the Texas A&M Engineering Extension Service. The commission may also conduct a review at any time for cause and as deemed necessary to ensure the integrity of the certification examination process.

(d) Exams will be based on the job performance requirements and knowledge and skill components of the applicable NFPA standard for that discipline, if a standard exists and has been adopted by the commission. If a standard does not exist or has not been adopted by the commission, the exam will be based on curricula as currently adopted in the commission's Certification Curriculum Manual.

(e) Commission examinations that receive a passing grade shall expire two years from the date of the examination.

(f) An examination for Basic Structure Fire Protection shall consist of four sections: Fire Fighter I, Fire Fighter II, Hazardous Materials Awareness Level, and Hazardous Materials Operations Level including the Mission-Specific Competencies for Personal Protective Equipment and Product Control. The examinee must pass each section of the examination with a minimum score of 70% in order to qualify for certification.

(g) An examination for Basic Fire Inspector shall consist of three sections: Inspector I, Inspector II, and Plan Examiner I. The examinee must pass each section of the examination with a minimum score of 70% in order to qualify for certification.

(h) An examination for Basic Structure Fire Protection and Intermediate Wildland Fire Protection shall consist of five sections: Fire Fighter I, Fire Fighter II, First Responder Awareness, First Responder Operations, and Intermediate Wildland Fire Protection. The examinee must pass each section of the examination with a minimum score of 70% in order to qualify for certification.

(i) All other state examinations consist of only one section.

(j) The individual who fails to pass a commission examination for state certification will be given one additional opportunity to pass the examination or section(s) [section] thereof. This opportunity must be exercised within 180 days after the date of the first failure. [An individual who passes the applicable state certification examination but fails to pass a section thereof for an IFSAC seal(s) will be given one additional opportunity to pass the section thereof. This opportunity must be exercised within two years after the date of the first attempt.] An examinee who fails to pass the examination within the required time may not sit for the same examination again until the examinee has re-qualified by repeating the curriculum applicable to that examination.

(k) An individual may obtain a new certificate in a discipline which was previously held by passing a commission proficiency examination.

(l) If an individual who has never held certification in a discipline defined in §421.5 of this title (relating to Definitions), seeks certification in that discipline, the individual shall complete all certification requirements.

(m) If an individual completes a commission [an] approved training program, or a program that has been evaluated and deemed equivalent to a certification curriculum approved by the commission, such as an out-of-state or military training program or a training program administered by the State Firemen's and Fire Marshals' Association of Texas, the individual may use only one of the following examination processes for certification: [must pass a commission examination for certification status and meet any other certification requirements in order to become eligible for certification by the commission as fire protection personnel.]

(1) pass a commission examination; or

(2) submit documentation of the successful completion of the Pro Board examination process administered by the Texas A&M Engineering Extension Service; and

(3) meet any other certification requirements in order to become eligible for certification as fire protection personnel.

(4) An individual cannot use a combination of the two examination processes in this subsection from a single commission approved class for certification. An individual who chooses to submit to the commission examination process may not utilize the other process toward certification.

(n) An individual or entity may petition the commission for a waiver of the examination required by this section if the person's certificate expired because of the individual's or employing entity's good faith clerical error, or expired as a result of termination of the person's employment where the person has been restored to employment through a disciplinary procedure or a court action. All required renewal fees including applicable late fees and all required continuing education must be submitted before the waiver request may be considered.

(1) Applicants claiming good faith clerical error must submit a sworn statement together with any supporting documentation that evidences the applicant's good faith efforts to comply with commission renewal requirements and that failure to comply was due to circumstances beyond the control of the applicant.

(2) Applicants claiming restoration to employment as a result of a disciplinary or court action must submit a certified copy of the order, ruling or agreement restoring the applicant to employment.

#### §439.3. Definitions.

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

(1) Certificate of Completion--A statement by the provider of training certifying that an individual has successfully completed a commission-approved certification curriculum or phase program for a particular discipline, including having been evaluated by field examiners on performance skills identified by the commission. The certificate of completion qualifies an individual to take an original certification examination. The certificate expires two years from the date of completion. If an individual does not take the certification examination prior to the expiration of the certificate of completion, he or she must again complete the curriculum in order to obtain a new certificate of completion.

(2) Curriculum--The competencies established by the commission as a minimum requirement for certification in a particular discipline.

(3) Designee--An entity or individual approved by commission staff to administer commission certification examinations and/or performance skills in accordance with this chapter.

(4) Eligibility--A determination of whether or not an individual has met the requirements set by the commission and would therefore be allowed to take a commission examination.

(5) Endorsement of eligibility--A statement testifying to the fact that an individual has met all requirements specified by the commission and is qualified to take a commission examination. An endorsement of eligibility will be issued by a member of the commission staff.

(6) Examination--A state test which an examinee must pass as one of the requirements for certification.

(7) Examinee--An individual who has met the commission requirements and therefore qualifies to take the commission examination.

(8) Field examiner--An individual authorized to evaluate performance skills in commission approved curricula. The field examiner must possess a Fire Instructor Certification or other instructor qualification as allowed by §427.307(h) and (i) of this title (relating to On-Site and Distance Training Provider Staff Requirements) for Wildland courses only, complete the on-line commission field examiner course, and sign an agreement to comply with the commission's testing procedures. The field examiner must be approved by the commission to instruct all subject areas identified in the curriculum that he or she will be evaluating. The field examiner must repeat the examiner course every two years and submit a new Letter of Intent.

(9) Lead Examiner--A member of the commission staff or a designee who has been assigned by the commission to administer a commission examination.

(10) Letter of Intent--A statement, signed by an individual applying to the commission for field examiner status, that he or she is familiar with the commission's examination procedures, and agrees to abide by the policies and guidelines as set out in Chapter 439 of this title (relating to Examinations for Certification).

(11) Sectional examination--A test that covers one section of a multiple section examination.

#### §439.7. Eligibility.

(a) An examination may not be taken by an individual who currently holds an active certificate from the commission in the discipline to which the examination pertains, unless required by the commission in a disciplinary matter, or test scores have expired and the individual is testing for IFSAC seals.

(b) An individual who passes an examination and is not certified in that discipline, will not be allowed to test again if the original examination grade is still active, [until 30 days before the expiration date of the previous examination] unless required by the commission in a disciplinary matter.

(c) In order to qualify for a commission examination, the examinee must:

(1) meet or exceed the minimum requirements set by the commission as a prerequisite for the specified examination;

(2) submit a test application with documentation showing completion of a commission approved curriculum and any other prerequisite requirements, along with the appropriate application processing fee(s).

(3) receive from the commission an "Endorsement of Eligibility" letter and provide this letter to the lead examiner.

(4) bring to the test site, and display upon request, government issued identification which contains the name and photograph of the examinee;

(5) report on time to the proper location; and

(6) comply with all the written and verbal instructions of the lead examiner.

(d) No examinee shall be permitted to:

(1) violate any of the fraud provisions of this section;

(2) disrupt the examination;

(3) bring into the examination site any books, notes, or other written materials related to the content of the examination;

(4) refer to, use, or possess any such written material at the examination site;

(5) give or receive answers or communicate in any manner with another examinee during the examination;

(6) communicate at any time or in any way, the contents of an examination to another person for the purpose of assisting or preparing a person to take the examination;

(7) steal, copy, or reproduce any part of the examination;

(8) engage in any deceptive or fraudulent act either during an examination or to gain admission to it;

(9) solicit, encourage, direct, assist, or aid another person to violate any provision of this section; or

(10) bring into the examination site any electronic devices.

(e) No person shall be permitted to sit for any commission examination who has an outstanding debt owed to the commission.

#### §439.9. Grading.

(a) If performance skills are required as a part of the examination, the examinee must demonstrate performance skill objectives in a manner consistent with performance skill evaluation forms provided by the Commission. The evaluation format for a particular performance skill will determine the requirements for passage of the skill. Each performance skill evaluation form will require successful completion of one of the following formats:

(1) all mandatory tasks; or

(2) an accumulation of points to obtain a passing score of at least 70%; or

(3) a combination of both paragraphs (1) and (2) of this subsection.

(b) The minimum passing score on each examination or section thereof [as outlined in §439.1(d) of this title (relating to Requirements--General)] shall be 70%. This means that 70% of the total possible active questions must be answered correctly. The commission [Commission] may, at its discretion, invalidate any question.

(c) If the commission [Commission] invalidates an examination score for any reason, it may also, at the discretion of the commission, [Commission,] require a retest to obtain a substitute valid test score.

#### §439.11. Commission-Designated Performance Skill Evaluations.

(a) The commission-designated performance evaluations are randomly selected from each subject area within the applicable curricu-

lum containing actual skill evaluations. This applies only for curricula in which performance standards have been developed.

(b) The [During the course of instruction, the ] training provider shall test [for competency,] the commission designated performance skills for competency. The skill evaluations may only [may be scheduled at any time during the course, but must] take place after all training on the identified subject area has been completed. The date(s), time(s) and location(s) for the commission designated skill evaluations must be submitted on the commission designated skill schedule contained within the Training Prior Approval system. The commission must be notified immediately of any deviation from the submitted commission designated skill schedule. All skills must be evaluated by a commission approved field examiner.

(c) In order to qualify for the commission certification examination, the student must successfully complete and pass all designated skill evaluations. The student may be allowed two attempts to complete each skill. A second failure during the evaluation process will require remedial training in the failed skill area with a certified instructor before being allowed a third attempt. A third failure shall require that the student repeat the entire certification curriculum.

(d) If performance skill evaluations are not conducted for a student during the course of instruction, they must be conducted within ninety days (90) following the end date of the course. If performance skill evaluations are not conducted within the ninety day (90) period, the student must repeat the course. The ninety (90) day period may be extended for students who were unable to complete their performance skill evaluations due to injury, illness, military commitment, or other situation beyond their control.

(e) ~~[(d)]~~ The training facility must maintain records (electronic or paper) of skills testing on each examinee. The records must reflect the results of the evaluation of skills, the dates the evaluation of skills took place, and the names of the field examiners who conducted the evaluations.

(f) ~~[(e)]~~ For certification disciplines in which an IDLH environment may exist, all skill testing participants shall have available for use NFPA compliant PPE and SCBA as defined in §435.1 of this title (relating to Protective Clothing) and §435.3 of this title (relating to Self-Contained Breathing Apparatus).

*§439.19. Number of Test Questions.*

(a) Each examination may have two types of questions: pilot and active. Pilot questions are new questions placed on the examination for statistical purposes only. These questions do not count against an examinee if answered incorrectly.

(b) The number of questions on an [the state] examination, sectional examination, or retest will be based upon the specific examination, or number of recommended hours for a [in the] particular curriculum or section as shown in the table below. Any pilot questions added to an examination, sectional examination, or retest will be in addition to the number of exam questions. [being tested. The standard is outlined below:]

Figure: 37 TAC §439.19(b)

[Figure: 37 TAC §439.19(b)]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-201602492

Tim Rutland

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812

◆ ◆ ◆  
**CHAPTER 451. FIRE OFFICER**

The Texas Commission on Fire Protection (the commission) proposes new §451.307, International Fire Service Accreditation Congress (IFSAC) Seal, under Subchapter C, Minimum Standards for Fire Officer III, and new §451.407, International Fire Service Accreditation Congress (IFSAC) Seal, under Subchapter D, Minimum Standards for Fire Officer IV.

The purpose of the proposed new sections is to add language for the issuance of International Fire Service Accreditation Congress (IFSAC) seals for Fire Officer III and Fire Officer IV.

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed new sections are in effect, there will be no fiscal impact on state or local governments.

Mr. Rutland has also determined that for each year of the first five years the proposed new sections are in effect, the public benefit from the passage is that individuals certified as Fire Officer III or Fire Officer IV can obtain IFSAC seals. There will be no effect on micro or small businesses or persons required to comply with the new sections as proposed.

Comments regarding the proposed new sections may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to *info@tcfp.texas.gov*. Comments will be reviewed and discussed at a future commission meeting.

**SUBCHAPTER C. MINIMUM STANDARDS FOR FIRE OFFICER III**

**37 TAC §451.307**

The new section is proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032, which allows the commission to establish qualifications for certifying individuals as fire protection personnel.

The proposed new section implements Texas Government Code, Chapter 419, §419.008 and §419.032.

§451.307. International Fire Service Accreditation Congress (IFSAC) Seal.

(a) Individuals holding a current commission Fire Officer III certification received prior to September 1, 2016, may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Fire Officer III by making application to the commission for the IFSAC seal and paying applicable fees. This subsection will expire on August 31, 2017.

(b) Individuals completing a commission approved Fire Officer III program; documenting IFSAC seals for Fire Fighter II, Instructor II and Fire Officer II; and passing the applicable state examination, may be granted an IFSAC seal as a Fire Officer III by making application to the commission for the IFSAC seal and paying applicable fees.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Tim Rutland

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812



## SUBCHAPTER D. MINIMUM STANDARDS FOR FIRE OFFICER IV

### 37 TAC §451.407

The new section is proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032, which allows the commission to establish qualifications for certifying individuals as fire protection personnel.

The proposed new section implements Texas Government Code, Chapter 419, §419.008 and §419.032.

§451.407. International Fire Service Accreditation Congress (IF-SAC) Seal.

(a) Individuals holding a current commission Fire Officer IV certification received prior to September 1, 2016, may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Fire Officer IV by making application to the commission for the IFSAC seal and paying applicable fees. This subsection will expire on August 31, 2017.

(b) Individuals completing a commission approved Fire Officer IV program; documenting IFSAC seals for Fire Fighter II, Instructor II and Fire Officer III; and passing the applicable state examination, may be granted an IFSAC seal as a Fire Officer IV by making application to the commission for the IFSAC seal and paying applicable fees.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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