

# 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 2. PUBLIC UTILITY COMMISSION OF TEXAS

#### CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

##### SUBCHAPTER H. ELECTRICAL PLANNING

##### DIVISION 2. ENERGY EFFICIENCY AND CUSTOMER-OWNED RESOURCES

###### 16 TAC §25.181

The Public Utility Commission of Texas (commission) proposes an amendment to §25.181, relating to Energy Efficiency Goal. The proposed amendment will require that electric utilities' residential and commercial energy efficiency cost recovery factor (EECRF) cost caps be increased or decreased by a rate equal to the most recently available calendar year's percentage change in the South urban consumer price index (CPI), as determined by the Federal Bureau of Labor Statistics. The amendment replaces the current provision in the rule that only requires that the EECRF cost caps increase in response to an increase in the CPI. In addition, the proposal for publication would amend the benchmarks used for calculating the EECRF cost caps for future program years and delete obsolete language. Project Number 46388 is assigned to this proceeding.

Therese Harris, Senior Utility Analyst, Infrastructure and Reliability Division, has determined that for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Therese Harris has determined that for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of enforcing the section will be that the residential and commercial EECRF cost caps that set the maximum a customer can be charged for an electric utility's energy efficiency incentive programs on a dollar per kilowatt-hour (kWh) basis will decrease when the annual percentage change in the South urban consumer price index as determined by the Federal Bureau of Labor Statistics is negative. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this section. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Therese Harris has also determined that for each year of the first five years the proposed section is in effect, there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, on January 6, 2017, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. The request for a public hearing must be received by January 2, 2017.

Initial comments on the proposed section may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, by December 12, 2016.

Reply comments may be submitted by December 29, 2016. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. All comments should refer to Project Number 46388.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2016) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; PURA §36.204, which authorizes the commission to establish rates for an electric utility that allow timely recovery of the reasonable costs for conservation and load management, including additional incentives for conservation and load management; and PURA §39.905, which requires the commission to provide oversight of energy efficiency programs of electric utilities subject to that section and adopt rules and procedures to ensure that electric utilities subject to that section can achieve their energy efficiency goals, including rules providing for EECRFs and an incentive for electric utilities that meet the energy efficiency goals.

Cross Reference to Statutes: PURA §§14.002, 36.204, and 39.905.

§25.181. *Energy Efficiency Goal.*

(a) - (e) (No change.)

(f) Cost recovery. A utility shall establish an energy efficiency cost recovery factor (EECRF) that complies with this subsection to timely recover the reasonable costs of providing a portfolio of cost-effective energy efficiency programs pursuant to this section.

(1) - (6) (No change.)

(7) The total EECRF costs outlined in paragraph (1) of this subsection, excluding EM&V costs and municipal EECRF proceeding expenses shall not exceed the amounts prescribed in this paragraph unless a good cause exception filed pursuant to subsection (e)(2) of this section is granted.

(A) For residential customers for program years 2016 and 2017, \$0.001266 [~~year 2012, \$0.001~~] per kWh; and

(B) For residential customers for program year 2018, \$0.001263 per kWh increased or decreased by a rate equal to the 2016 calendar year's percentage change in the South urban consumer price index (CPI), as determined by the Federal Bureau of Labor Statistics [2013, \$0.0012 per kWh];

(C) For commercial customers for program years 2016 and 2017 [~~year 2012~~], rates designed to recover revenues equal to \$0.000791 [~~\$0.0005~~] per kWh times the aggregate of all eligible commercial customers' kWh consumption; and

(D) For commercial customers for program year 2018[2013], rates designed to recover revenues equal to \$0.000790 [~~\$0.00075~~] per kWh increased or decreased by a rate equal to the 2016 calendar year's percentage change in the South urban CPI, as determined by the Federal Bureau of Labor Statistics times the aggregate of all eligible commercial customers' kWh consumption.

(E) For the 2019 [2014] program year and thereafter, the residential and commercial cost caps shall be calculated to be the prior period's cost caps increased or decreased by a rate equal to the most recently available calendar year's percentage change in the South urban CPI [~~consumer price index (CPI)~~], as determined by the Federal Bureau of Labor Statistics.

(8) - (14) (No change.)

(g) - (x) (No change.)

~~[(y) Effective date. The effective date of this section is January 1, 2013.]~~

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 October 28, 2016.

TRD-201605613

Adriana Gonzalez

Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: December 11, 2016

For further information, please call: (512) 936-7223



## SUBCHAPTER R. CUSTOMER PROTECTION RULES FOR RETAIL ELECTRIC SERVICE

### 16 TAC §25.474

The Public Utility Commission of Texas (commission) proposes an amendment to §25.474, relating to Selection of Retail Electric Provider for the limited purpose of allowing a Retail Electric Provider (REP) or aggregator to use a portable electronic device during customer enrollments. Project Number 45625 is assigned to this proceeding.

Cliff Crouch, Retail Market Analyst, Competitive Markets Division, has determined that for each year of the first five-year period the proposed section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Crouch has determined that for each year of the first five years that the section is in effect REPs and aggregators will realize efficiencies and enhanced marketing capabilities associated with the ability to use portable electronic devices for enrolling customers. The section will provide customer protections while allowing customers the option of using newer technology for enrollment.

No adverse economic effect is anticipated on small businesses or micro-businesses as a result of enforcing the section. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Crouch has also determined that for each year of the first five years the proposed section are in effect, there should be no effect on local economy, and therefore no local employment impact statement is required under the Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress, Avenue, Austin, Texas 78701. The request for a public hearing must be received within 30 days after publication.

Initial comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, by Friday, December 2, 2016. Reply comments may be submitted by Monday, December 12, 2016. Sixteen copies of comments and reply comments on the proposed amendment are required to be filed pursuant to §22.71(c) of this title relating to Filings of Pleadings, Documents, and Other Materials. Initial and reply comments should be organized in a manner consistent with the organization of the proposed rule. All comments should refer to Project Number 45625.

The amendment is proposed under the Public Utilities Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2016) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.101, which requires the Commission to ensure that retail customer protections are established that entitle a customer to safe, reliable, and reasonably priced electricity, and other protections.

Cross Reference to Statutes: PURA §14.002 and §39.101.

§25.474. *Selection of Retail Electric Provider.*

(a) - (e) (No change.)

(f) Enrollment via door-to-door sales. A REP or aggregator that engages in door-to-door marketing at a customer's residence shall comply with the following requirements:

(1) (No change.)

(2) Use of a portable electronic device (PED) in door-to-door sales. A REP or aggregator may use a PED to conduct door-to-door sales at an applicant's residence. For the purpose of this section, a PED is defined as a nonstationary light-weight, electrically-powered

device that is capable of communications, data storage and processing, and accessing, directly or indirectly, the REP or aggregator network. The devices include, but are not limited to: laptop computers, iPads, tablets, personal digital assistants, and smart phones.

(A) The REP or aggregator is responsible for ensuring that the PED complies with the requirements of this section.

(B) The PED shall be owned by the REP, aggregator, or third-party vendor retained by the REP or aggregator. The PED shall not be owned by an employee of the REP, aggregator, or vendor that has been retained by the REP or aggregator.

(C) The entire enrollment process shall be in plain, easily understood language, and be consistent with the requirements of §25.473 of this title (relating to Non-English Language Requirements). The entire solicitation and enrollment process shall be conducted in the same language. The REP or aggregator shall provide a means of documenting the applicant's language preference.

(D) All information disclosed to the applicant on the PED must be easily readable and conspicuously disclosed.

(E) The PED shall:

(i) be secure from unauthorized access;

(ii) have remote data wipe capabilities that allow the REP or aggregator to remove all data should the device be lost or stolen; and

(iii) have enabled mobile locating and tracking capabilities that allows the REP or aggregator to track the time and location of each customer enrollment.

(F) Any applicant or customer specific information entered into the PED shall be transferred expeditiously to the REP or aggregator's systems using Secure Socket Layer or similar encryption standard to ensure privacy of applicant or customer information. Once the transfer of data has been verified, the applicant or customer information on the PED shall be removed.

(G) The REP or aggregator is responsible for the protection of all applicant or customer information.

(3) [(2)] Required authorization disclosures. Prior to requesting verification of the applicant's authorization to enroll, a REP or aggregator shall comply with all of the authorization disclosure requirements in either subsections (e)(1) - (5)[(e)(5)] or (h)(1) - (4) of this section.

(A) A REP or aggregator may provide the disclosures required by subsection (e)(1) - (5) of this section using a PED; however, if an applicant expresses an inability to read or understand the disclosure information on the PED, the REP or aggregator shall either provide the required disclosures pursuant to subsection (e)(1) - (5) of this section in paper format, provide the disclosures pursuant to subsection (h)(1) - (4) of this section, or advise the applicant that they will not be able to complete enrollment.

(B) If a REP or aggregator provides the disclosures using a PED, the REP or aggregator shall:

(i) provide the applicant a reasonable opportunity to read the terms of service, Electricity Facts Label (EFL), Prepaid Disclosure statements (PDS), if applicable, and any written or electronic materials disclosed;

(ii) answer any questions posed by the applicant about information contained in the documents;

(iii) advise the applicant that if the applicant is under contract with another REP, termination fees for that contract may apply; and

(iv) obtain an electronic signature from the applicant that adheres to Texas and federal guidelines affirming that the applicant has read and understands the disclosures, terms of service, EFL, PDS, if applicable, and all written or electronic materials disclosed prior to verification of authorization.

(4) [(3)] Verification of authorization for door-to-door enrollment not using a PED. A REP, or an independent third party retained by the REP, shall telephonically obtain and record all required verification information from the applicant to verify the applicant's decision to enroll with the REP in accordance with this paragraph.

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

(5) Verification of authorization for enrollments using a PED.

(A) The REP or aggregator shall obtain confirmation from the applicant that the applicant is authorized to perform the enrollment and consents to the enrollment being verified using a PED. If the applicant does not consent to the enrollment being verified using a PED or expresses an inability to read or understand the verification of authorization information on the PED at any time, the representative shall verify authorization of enrollment pursuant to paragraph (4) of this subsection or advise the applicant that they will not be able to complete enrollment.

(B) If the applicant consents to verification being conducted using a PED, the REP or aggregator shall:

(i) obtain or confirm the applicant's email address or other agreed upon means of communication, billing name, billing address, service address, and name of any authorized representative;

(ii) obtain or confirm the applicant's electric service identifier (ESI-ID), if available;

(iii) obtain or confirm at least one of the following account access verification data for the applicant: last four digits of the social security number, mother's maiden name, city or town of birth, month and day of birth, driver's license number or government issued identification number. For non-residential applicants, the REP may obtain the applicant's federal tax identification number; and

(iv) obtain applicant's electronic signature that adheres to Texas and federal guidelines affirming that the applicant has read and understands the disclosures, terms of service, EFL, PDS, if applicable, and all written or electronic materials disclosed and that the applicant is authorized to select or change REPs for the service address and authorizes the new REP to perform necessary tasks to complete a switch or move-in for the applicant's service with the new REP.

(C) The REP shall not submit a move-in or switch request until it has obtained the applicant's verification of the enrollment.

(D) After enrollment, the REP or aggregator shall send a confirmation by first class mail, email, or other agreed upon means of communication to the applicant of the applicant's request to select the REP. If the confirmation is sent by any means other than first class mail, the confirmation must allow for the applicant to confirm receipt and the three-day right of rescission period shall not begin until the REP receives the applicant's confirmation. The REP or aggregator may assume that any delivery of the confirmation deposited first class within the United States Postal service will be received within three federal business days. The confirmation shall include:

(i) a clear and conspicuous notice in the body of the confirmation of the customer's three-day right of rescission required by the Federal Trade Commission's Trade Regulation Rule Concerning Cooling Off Period for Sales Made at Homes or Certain Other Locations (16 C.F.R. Part 429). The notice shall state that the customer may exercise their right to rescission within three federal business days after receiving the terms of service without penalty and offer the customer the option of exercising this right by toll-free number, email, Internet website, facsimile transmission, or regular mail. The notice shall be accessible to the applicant without need to open an attachment or link to any other document; and

(ii) the terms of service document, EFL, PDS, if applicable, and Your Rights as a Customer disclosure.

(g) Personal solicitations other than door-to-door marketing. A REP or aggregator that engages in personal solicitation at a location other than a customer's residence (such as malls, fairs, or places of business) without the use of a PED as defined in subsection (f)(2) of this section shall comply with all requirements for written enrollments and LOA requirements detailed in subsection (e) of this section. A REP or aggregator that uses a PED in personal solicitations at a location other than a customer's residence shall comply with the requirements of use of a PED in subsection (f) of this section. In addition, the REP or aggregator shall comply with the following additional requirements:

(1) - (4) (No change.)

(h) - (q) (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 October 31, 2016.

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Adriana Gonzales  
Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: December 11, 2016

For further information, please call: (512) 936-7293



## **TITLE 19. EDUCATION**

### **PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD**

#### **CHAPTER 21. STUDENT SERVICES SUBCHAPTER RR. TEXAS ARMED SERVICES SCHOLARSHIP PROGRAM**

##### **19 TAC §21.2243**

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to §21.2243, concerning the Texas Armed Services Scholarship Program. Specifically, §21.2243(c)(3) is amended to align the language in the Board rules with the eligibility provision in Texas Education Code, §61.9772, by removing the reference to specific SAT and ACT scores.

Dr. Charles W. Puls, Ed.D., Deputy Assistant Commissioner, Student Financial Aid Programs, has determined that for each

year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Dr. Puls has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering this section will be improved clarity in determining applicant eligibility for the program. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Charles W. Puls, Ed.D., Deputy Assistant Commissioner, Student Financial Aid Programs, P.O. Box 12788, Austin, Texas 78711, (512) 427-6365, charles.puls@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under Texas Education Code §61.9774 which authorizes the Coordinating Board to adopt rules to implement the Texas Armed Services Scholarship Program.

The amendments affect Chapter 21, Subchapter RR of the TAC, §21.2243(c)(3).

§21.2243. *Requirements for Appointment by Elected Officials.*

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

(c) A selected student must meet two of the following four academic criteria at the time of application:

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

(3) Achieved a college readiness score on the SAT [(1590)] or ACT [(23)];

(4) (No change.)

(d) (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 October 28, 2016.

TRD-201605610  
Bill Franz  
General Counsel

Texas Higher Education Coordinating Board

Earliest possible date of adoption: December 11, 2016

For further information, please call: (512) 427-6114



## **TITLE 22. EXAMINING BOARDS**

### **PART 9. TEXAS MEDICAL BOARD**

#### **CHAPTER 186. RESPIRATORY CARE PRACTITIONERS**

##### **22 TAC §§186.1 - 186.14, 186.16 - 186.29**

The Texas Medical Board on behalf of the Texas Board of Respiratory Care proposes new §§186.1 - 186.14 and §§186.16 - 186.29, concerning Respiratory Care Practitioners.

The Texas Legislature enacted Senate Bill 202, 84th Legislature Regular Session (2015), which transferred the respiratory care practitioner (RCP) certification program from the Department of State Health Services (DSHS) to the Texas Medical Board and the Texas Board of Respiratory Care, effective September 1, 2015. The Texas Board of Respiratory Care (hereinafter referred to as "RC Board") acts as an advisory board to the Texas Medical Board. The Medical Board acts as an oversight board to the RC Board and provides administrative support necessary to carry out the RCP regulatory program functions.

New Chapter 186 is proposed in accordance with the changes to Chapter 604 of the Texas Occupations Code (hereinafter referred to as "the Act") enacted by Senate Bill 202, and is necessary to enable the RC Board to perform the necessary regulatory program functions, including licensure, enforcement, and disciplinary action or remedial plan compliance.

A stakeholder meeting was conducted on June 28, 2016. The stakeholders' comments were incorporated into the proposed new Chapter 186.

The RC Board met on July 29, 2016, and October 7, 2016, to consider a draft of the proposed new rules and recommended publishing them in the *Texas Register* for public comment.

The RC Board proposes new Chapter 186, delineating regulations related to the RCP regulatory program functions. The proposed new Chapter 186 adds rules that establish qualifications, procedures, requirements and processes that enable the RC Board to regulate the practice of respiratory care. The proposed new Chapter 186 also contains rules related to certification of and physician supervision of RCPs.

The proposed new rules align processes and procedures related to regulating the practice of respiratory care with the Medical Board's current processes and procedures. The proposed new rules further enable the Medical Board to perform the various administrative functions related to certification, compliance, and enforcement. Additionally, the proposed new rules benefit the public by setting forth practice and certification requirements as they pertain to RCPs, training programs, instructors, and other individuals regulated by the Act. The rules clarify the RC Board's authority and help ensure the safe practice of respiratory care in Texas. Moreover, the proposed rules provide a mechanism for individuals regulated under the Act to obtain treatment through the Texas Physician Health Program for health conditions that impair, or may impair, that individual's practice. The proposed new rules are organized to assist the public and the regulated community in easily locating rules and regulations specific to certification, compliance, and enforcement related to the practice of respiratory care in Texas.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the new sections, as proposed, are in effect the public benefit anticipated as a result of enforcing the proposed new sections will be to implement the new statutory provisions of the Act, which transfers the primary responsibility of regulating the practice of respiratory care to the RC Board, with oversight and administrative support provided by the Medical Board.

Mr. Freshour has determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. The effect to individuals required to comply with these sections, as proposed, will be the fees associated with certification. There will be no effect on small or micro businesses.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: [rules.development@tmb.state.tx.us](mailto:rules.development@tmb.state.tx.us).

The new rules are proposed under the authority of the Texas Occupations Code Annotated, §604.052, which provides authority for the RC Board to adopt rules as necessary to regulate the practice of respiratory care, enforce the requirements set forth by the Act, and perform its duties under the Act.

No other statute, articles, or codes are affected by this proposal.

§186.1. Purpose.

(a) These rules are promulgated under the authority of the Medical Practice Act, Title 3, Subtitle B, Texas Occupations Code and the Respiratory Care Practitioners Act, Title 3, Subtitle K, Chapter 604, Texas Occupations Code, to establish procedures and standards for the training, education, certifying, and discipline of persons performing as a respiratory care practitioner in this state so as to establish an orderly system of regulating the practice of a respiratory care practitioner in a manner that protects the health, safety, and welfare of the public.

(b) The functions of the Texas Board of Respiratory Care include but are not limited to the following:

(1) Establish standards for the practice of a respiratory care practitioner.

(2) Regulate the practice of a respiratory care practitioner through the certification and discipline of respiratory care practitioners.

(3) Interpret the Respiratory Care Practitioners Act and the Texas Board of Respiratory Care rules to ensure that respiratory care practitioners, other allied health professionals, and consumers are properly informed.

(4) Receive complaints and investigate possible violations of the Respiratory Care Practitioners Act and the Texas Board of Respiratory Care rules.

(5) Discipline violators through appropriate legal action to enforce the Respiratory Care Practitioners Act and the Texas Board of Respiratory Care rules.

(6) Provide a mechanism for public comment with regard to the Respiratory Care Practitioners Act and the Texas Board of Respiratory Care rules.

(7) Review and modify the Texas Board of Respiratory Care rules when necessary and appropriate. All rules approved by the advisory board are to be submitted to the Medical Board for consideration in accordance with Texas Occupations Code §604.0522(b).

(8) Examine and certify, in conjunction with the Texas Medical Board, procedures for issuing certificates, as implemented by its licensure division, to qualified applicants to practice as a respiratory care practitioner in Texas in a manner that ensures that applicable standards are maintained.

(9) Provide recommendations to the Texas Medical Board for consideration by the legislature concerning appropriate changes to the Respiratory Care Practitioners Act to ensure that the acts are current and applicable to changing needs and practices.

(10) Provide public information on certificate holders.

(11) Maintain data concerning the practice of a respiratory care practitioner.

§186.2. Definitions.

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

(1) AARC--The American Association for Respiratory Care.

(2) Act--The Respiratory Care Practitioners Act, Texas Occupations Code Annotated, Title 3, Subtitle K, Chapter 604 as amended.

(3) Active duty--A person who is currently serving as full-time military service member in the armed forces of the United States or active duty military service as a member of the Texas military forces, as defined by §437.001, Government Code, or similar military service of another state.

(4) Address of record--The mailing address of each certificate holder or applicant as provided to the agency pursuant to the Act.

(5) Advisory Board or Board--The Texas Board of Respiratory Care, an advisory board to the Texas Medical Board.

(6) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001 as amended.

(7) Applicant--A party seeking a certificate or temporary permit from the Texas Board of Respiratory Care.

(8) Certificate--A respiratory care practitioner certificate issued by the Texas Board of Respiratory Care.

(9) Delegated Authority--As defined in the Texas Medical Practice Act, Texas Occupations Code, Chapter 157 and the rules pertaining thereto adopted by the Texas Medical Board.

(10) Directing physician--A physician licensed by the Medical Board who has an active and unrestricted license in good standing with the Texas Medical Board that directs a Texas state-certified respiratory care practitioner in the practice of respiratory care.

(11) Diagnostic--Of or relating to or used in the art or act of identifying a disease or disorder.

(12) Educational accrediting body--Commission on Accreditation for Respiratory Care (CoARC), or other such organization approved by the advisory board in accordance with §604.054 of the Occupations Code.

(13) Executive Director--The Executive Director of the Texas Medical Board or the authorized designee of the Executive Director.

(14) Formally trained--Completion of an organized educational activity which:

(A) includes supervised and directed instruction specific to the respiratory care procedures to be performed by the individual;

(B) includes specific objectives, activities, and an evaluation of competency; and

(C) is supervised and directed by another individual qualified to provide the training and supervision.

(15) Good professional character--an applicant for certification must not be in violation of or committed any act described in the Respiratory Care Practitioners Act, §§604.302-604.304, Texas Occupations Code Annotated.

(16) Medical Board--The Texas Medical Board.

(17) Medical Practice Act--Texas Occupations Code Annotated, Title 3, Subtitle B, as amended.

(18) Military service member--A person who is currently serving in the armed forces of the United States, in a reserve component

of the armed forces of the United States, including the National Guard, or in the state military service of any state.

(19) Military spouse--A person who is married to a military service member who is currently on active duty.

(20) Military veteran--A person who served on active duty in the army, navy, air force, marine corps, or coast guard of the United States, or in an auxiliary service of one of those branches of the armed forces and who was discharged or released from active duty under conditions other than dishonorable.

(21) NBRC--The National Board for Respiratory Care, Inc.

(22) Open Meetings Act--Texas Government Code Annotated, Chapter 551 as amended.

(23) Palliative--Serving to moderate the intensity of pain or other disease process.

(24) Party--The respiratory care practitioner board and each person named or admitted as a party in a hearing before the State Office of Administrative Hearings.

(25) Practice--Engaging in respiratory care as a clinician, educator, or consultant.

(26) Presiding Officer--The person appointed by the Governor to serve as the presiding officer of the board.

(27) Protocols--For purposes of this chapter, respiratory care-related policies, procedures, and protocols developed or approved by a licensed health facility or a physician through collaboration with administrators, certified respiratory care practitioners, or other health professionals.

(28) Qualified medical director--A physician licensed and in good standing with the Texas Medical Board, and who has special interest and knowledge in the diagnosis and treatment of respiratory care problems and who is actively engaged in the practice of medicine. This physician must be a member of the active medical staff of a health care facility, agency or organization who supervises the provision of respiratory care.

(29) Respiratory care--The treatment, management, control, diagnostic evaluation, and care of inpatients or outpatients who have deficiencies and abnormalities associated with the cardiorespiratory system, in conjunction with the provisions of §604.003 of the Act. Respiratory care does not include the delivery, assembly, set up, testing, and demonstration of respiratory care equipment upon the order of a licensed physician. Demonstration is not to be interpreted here as the actual patient assessment and education, administration, or performance of the respiratory care procedure(s).

(30) Respiratory care education program--

(A) a program in respiratory care approved by the educational accrediting body;

(B) a program approved by an appropriate education agency and working toward becoming an approved program in respiratory care. A program will qualify as a respiratory care education program under this subparagraph only for a period of one year from the date of the first class offered by the program; after that one year, the program must be an approved program in respiratory care; or

(C) a program accredited by the Canadian Medical Association and whose graduates are eligible to take the national registry exam given by the Canadian Board of Respiratory Care.

(31) Respiratory care practitioner--A person holding a certificate or temporary permit to practice respiratory care issued by the Texas Board of Respiratory Care.

(32) Respiratory care procedure--respiratory care provided by the therapeutic and diagnostic use of medical gases, humidifiers, and aerosols, the administration of drugs and medications to the cardiorespiratory system, ventilatory assistance and ventilatory control, postural drainage, chest drainage, chest percussion or vibration (physiotherapy), breathing exercises, cardiopulmonary rehabilitation resuscitation (including cardiopulmonary resuscitation), the maintenance of natural airways, and the insertion and maintenance of artificial airways. The term includes a technique as ordered by a patient's physician, and according to and including standing orders or protocols, used to assist in diagnosis, monitoring, treatment, and research. Examples include:

(A) the measurement of ventilatory volumes, pressures and flows;

(B) the specimen collection of blood and other materials;

(C) pulmonary function testing; and

(D) hemodynamic and other related physiological forms of monitoring or treating the cardiorespiratory system.

(33) State--Any state, territory, or insular possession of the United States and the District of Columbia.

(34) Submit--The term used to indicate that a completed item has been actually received and date-stamped by the board along with all required documentation and fees, if any.

(35) Supervising respiratory care practitioner--A respiratory care practitioner who holds an active and unrestricted certificate from the advisory board; has not been the subject of a disciplinary order, unless the disciplinary order was administrative in nature; and is not a relative or family member of the temporary permit holder supervised. The supervising practitioner assumes responsibility and legal liability for the services rendered by the supervised temporary permit holder.

(36) Supervision--Overseeing the activities of, and accepting responsibility for, the respiratory care services rendered by a temporary permit holder. Supervision does not require the constant physical presence of the supervising respiratory care practitioner but includes a situation where a supervising respiratory care practitioner and the person being supervised are, or can easily be, in contact with one another by radio, telephone, or another telecommunication device.

(37) Temporary Permit--A permit issued in accordance with §186.7 of this chapter (relating to Temporary Permit).

(38) TSRC--Texas Society for Respiratory Care

(39) Therapeutic--Of or relating to the treatment of disorders by remedial agents or methods.

(40) Under the direction--Assuring that established policies are carried out; monitoring and evaluating the quality, safety, and appropriateness of respiratory care services and taking action based on findings; and providing consultation whenever required, particularly on patients receiving continuous ventilatory or oxygenation support.

### §186.3. Meetings and Committees.

(a) The advisory board may meet up to four times a year, with a minimum of three times a year to carry out the mandates of the Act.

(b) Special meetings may be called by the presiding officer of the advisory board, by resolution of the advisory board, or upon written

request to the presiding officer of the advisory board signed by at least three members of the advisory board.

(c) Advisory board and committee meetings shall, to the extent possible, be conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless, by rule, the board adopts a different procedure. A meeting may be held by telephone conference call.

(d) All elections and any other issues requiring a vote of the board shall be decided by a simple majority of the members present. A quorum for transaction of any business by the board shall be a majority of the board, subject to §604.029(c) of the Occupations Code. If more than two candidates contest an election or if no candidate receives a majority of the votes cast on the first ballot, a second ballot shall be conducted between the two candidates receiving the highest number of votes.

(e) The governor shall designate a member of the advisory board as the presiding officer of the board to serve in that capacity at the will of the governor. The advisory board, at a regular meeting or special meeting, shall elect from its membership an assistant presiding officer and other officers for a term to last no more than two (2) years.

(f) The advisory board, at a regular meeting or special meeting, upon majority vote of the members present, may remove a member from office in accordance with §604.026 of the Act.

(g) The following are standing and permanent committees of the advisory board. Each committee shall consist of at least one advisory board member who is a licensed physician, one advisory board member who is a certified respiratory care practitioner, and one public advisory board member. In the event that a committee does not have a representative of one or more of these groups, the presiding officer shall appoint additional members as necessary to maintain this composition. The presiding officer shall name the chair and assign the members of the other committees. The responsibilities and authority of these committees shall include those duties and powers as defined in paragraphs (1) - (2) of this subsection and such other responsibilities and authority which the advisory board may from time to time delegate to these committees.

#### (1) Practice Authorization Committee.

(A) Draft and review proposed rules regarding issuance of certificates, and make recommendations to the advisory board regarding changes or implementation of such rules.

(B) Draft and review proposed rules pertaining to the overall process for issuing certificates, and make recommendations to the advisory board regarding changes or implementation of such rules.

(C) Receive and review applications for certificates in the event an applicant's eligibility for a certificate is in question.

(D) Present the results of reviews of applications for a certificate, and make recommendations to the advisory board regarding issuance of a certificate to applicants whose eligibility is in question.

(E) Make recommendations to the advisory board regarding matters brought to the attention of the Practice Authorization Committee.

(F) Oversee and make recommendations to the advisory board regarding any aspect of the examination process including the approval of an appropriate examination and the administration of such an examination and documentation and verification of records from all applicants;

#### (2) Disciplinary Process Review Committee.

(A) Draft and review proposed rules regarding the discipline of respiratory care practitioners and enforcement of the Act.

(B) Monitor the effectiveness, appropriateness, and timeliness of the disciplinary process.

(C) Make recommendations regarding resolution and disposition of specific cases and approve, adopt, modify, or reject recommendations from staff or representatives of the advisory board regarding actions to be taken on pending cases. Approve dismissals of complaints and closure of investigations.

(D) Make recommendations to the advisory board and staff regarding policies, priorities, budget, and any other matters related to the disciplinary process and enforcement of the Act.

(E) Make recommendations to the advisory board regarding matters brought to the attention of the Disciplinary Process Review Committee.

(h) Meetings of the advisory board and of its committees are open to the public unless such meetings are conducted in executive session pursuant to the Open Meetings Act, the Act, or the Medical Practice Act. In order that advisory board meetings may be conducted safely, efficiently, and with decorum, attendees may not engage in disruptive activity that interferes with advisory board proceedings. The public shall remain within those areas of the advisory board offices and advisory board meeting room designated as open to the public. Members of the public shall not address or question advisory board members during meetings unless recognized by the advisory board's presiding officer pursuant to a published agenda item.

(i) Journalists have the same right of access as other members of the public to advisory board meetings conducted in open session, and are also subject to the same rules. Observers of any advisory board meeting may not disrupt the meeting or disturb participants. Observers may make audio or visual recordings of such proceedings conducted in open session as long as these activities do not disrupt the meeting and subject to the following limitations: the advisory board's presiding officer may request periodically that camera operators extinguish their artificial lights to allow excessive heat to dissipate; camera operators may not assemble or disassemble their equipment while the advisory board is in session and conducting business; persons seeking to position microphones for recording advisory board proceedings may not disrupt the meeting or disturb participants. Journalists may conduct interviews in the reception area of the agency's offices or, at the discretion of the advisory board's presiding officer, in the meeting room after recess or adjournment; no interview may be conducted in the hallways of the agency's offices; and the advisory board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in conduct described in this subsection and subsection (h) of this section.

(j) The assistant presiding officer of the advisory board shall assume the duties of the presiding officer in the event of the presiding officer's absence or incapacity.

(k) In the event of the absence or temporary incapacity of the presiding officer, and the assistant presiding officer, the members of the advisory board may elect another member to act as the presiding officer of an advisory board meeting or may elect an interim acting presiding officer for the duration of the absences or incapacity or until another presiding officer is appointed by the governor.

(l) Upon the death, resignation, removal or permanent incapacity of the presiding officer or the assistant presiding officer, the advisory board shall elect an assistant presiding officer from its membership to fill the vacant position. The advisory board may elect an interim acting presiding officer until another presiding officer is appointed by

the governor. Such an election shall be conducted as soon as practicable at a regular or special meeting of the advisory board.

(m) Committee minutes shall be approved by a quorum of the full advisory board.

§186.4. Procedural Rules and Qualifications for Certificate Applicants.

(a) Except as otherwise provided in this section, an individual applying for a respiratory care practitioner certificate issued by the advisory board must:

(1) submit an application on forms approved by the advisory board;

(2) pay the appropriate application fee as prescribed by the advisory board;

(3) successfully complete an approved four-year high school course of study or the equivalent as determined by the appropriate educational agency;

(4) successfully complete an educational program for respiratory care practitioners accredited by the Commission on Accreditation for Respiratory Care (CoARC) or other accrediting body approved by the advisory board, and hold a valid and current certificate issued by such accrediting body;

(5) certify that the applicant is mentally and physically able to function safely as a respiratory care practitioner;

(6) not have a license, certification, or registration as a respiratory care practitioner in this state or from any other licensing or certifying authority that is currently revoked or on suspension or the applicant is not subject to probation or other disciplinary action for cause;

(7) not have any proceeding that has been instituted against the applicant for the restriction, cancellation, suspension, or revocation of a certificate, permit, license, or other authority to practice respiratory care in any state, territory, Canadian province, country, or uniformed service of the United States in which it was issued;

(8) not have pending any prosecution against applicant in any state, federal, or international court for any offense that under the laws of this state is a felony, a misdemeanor that involves the practice of respiratory care, or a misdemeanor that involves a crime of moral turpitude;

(9) be of good professional character as defined under §186.2(15) of this chapter (relating to Definitions);

(10) submit a complete and legible set of fingerprints, on a form prescribed by the Medical Board, for the purpose of obtaining criminal history record information, as required by §604.1031 of the Act;

(11) submit to the board any other information the board considers necessary to evaluate the applicant's qualifications;

(12) meet any other requirement established by rules adopted by the advisory board;

(13) pass an independently evaluated respiratory care practitioner examination prepared by the NBRC; and

(14) pass the jurisprudence examination ("JP exam"), which shall be conducted on the certification requirements and other laws, rules, or regulations applicable to the respiratory care practitioner profession in this state. The jurisprudence examination shall be developed and administered as follows:

(A) The staff of the Medical Board shall prepare questions for the JP exam and provide a facility by which applicants can take the examination;

(B) Applicants must pass the JP exam with a score of 75 or better within three attempts;

(C) An examinee shall not be permitted to bring books, compends, notes, journals, calculators, "smart phones," cellular phones, or other devices or materials designed to assist examinee pass the exam into the examination room, nor be allowed to communicate by word or sign with another examinee while the examination is in progress without permission of the presiding examiner, nor be allowed to leave the examination room except when so permitted by the presiding examiner;

(D) Irregularities during an examination such as giving or obtaining unauthorized information or aid as evidenced by observation or subsequent statistical analysis of answer sheets, shall be sufficient cause to terminate an applicant's participation in an examination, invalidate the applicant's examination results, or take other appropriate action;

(E) An applicant who is unable to pass the JP exam within three attempts must appear before a committee of the advisory board to address the applicant's inability to pass the examination and to re-evaluate the applicant's eligibility for certification. It is at the discretion of the committee to allow an applicant additional attempts to take the JP exam; and

(F) A person who has passed the JP Exam shall not be required to retake the Exam for recertification, except as a specific requirement of the advisory board as part of an agreed order.

(b) The following documentation shall be submitted as a part of the certificate application process:

(1) Birth Certificate/Proof of Age. Each applicant for a certificate must provide a copy of a birth certificate and translation if necessary to prove that the applicant is at least 18 years of age. In instances where a birth certificate is not available the applicant must provide copies of a passport or other suitable alternate documentation.

(2) Name Change. Any applicant who submits documentation showing a name other than the name under which the applicant has applied must present certified copies of marriage licenses, divorce decrees, or court orders stating the name change. In cases where the applicant's name has been changed by naturalization, the applicant should send the original naturalization certificate by certified mail to the advisory board for inspection.

(3) Certification. Each applicant for a respiratory care practitioner certificate issued by the advisory board must submit:

(A) a letter of verification of current certification acceptable to the advisory board, sent directly from the certifying body, and

(B) a certificate of successful completion of an educational program submitted directly from the program on a form provided by the advisory board.

(4) Examination Scores. Each applicant for a respiratory care practitioner certificate issued by the advisory board must have a certified transcript of grades submitted directly from the appropriate testing service to the advisory board for all examinations accepted by the advisory board for issuance of a certificate. The advisory board must notify the applicant of the results of the examination in accordance with §604.1042 of the Act.

(5) Evaluations.

(A) All applicants must provide evaluations, on forms provided by the board, of their professional affiliations for the past three years or since graduation from an educational program described by subsection (a)(4) of this section, whichever is the shorter period.

(B) The evaluations must come from at least three supervisors or instructors who are either Texas state-certified respiratory care practitioners or licensed physicians and have each supervised the applicant's work experience.

(C) An exception to subparagraph (B) of this paragraph may be made for those applicants who provide adequate documentation that they have not been supervised by at least three licensed physicians or Texas state-certified respiratory care practitioners for the three years preceding the board's receipt of application or since graduation, whichever is the shorter period.

(6) Verification from other states. On request of Medical Board staff, an applicant must have any state, in which he or she has ever been certified or otherwise licensed as a respiratory care practitioner regardless of the current status of the certification or license, submit to the advisory board a letter verifying the status of the certificate or license and a description of any sanctions or pending disciplinary matters. The information must be sent directly from the state certifying or licensing entities. Such information may be considered in accordance with §604.106 of the Act.

(7) Arrest Records. If an applicant has ever been arrested, a copy of the arrest and arrest disposition must be requested from the arresting authority and that authority must submit copies of such records directly to the advisory board.

(8) Malpractice. If an applicant has ever been named in a malpractice claim filed with any liability carrier or if an applicant has ever been named in a malpractice suit, the applicant must:

(A) have each liability carrier complete a form furnished by this advisory board regarding each claim filed against the applicant's insurance;

(B) for each claim that becomes a malpractice suit, have the attorney representing the applicant in each suit submit a letter directly to the advisory board explaining the allegation, dates of the allegation, and current status of the suit. If the suit has been closed, the attorney must state the disposition of the suit, and if any money was paid, the amount of the settlement. The letter shall be accompanied by supporting documentation including court records if applicable. If such letter is not available, the applicant will be required to furnish a notarized affidavit explaining why this letter cannot be provided; and

(C) provide a statement, composed by the applicant, explaining the circumstances pertaining to patient care in defense of the allegations.

(c) Review and Recommendations by the Executive Director.

(1) The executive director or designee shall review each application for a respiratory care practitioner certificate and may determine whether an applicant is eligible for a certificate or refer an application to a committee of the advisory board for review.

(2) If the executive director or designee determines that the applicant clearly meets all requirements for a certificate, the executive director or designee may issue a certificate to the applicant, to be effective on the date issued without formal board approval, as authorized by §604.110 of the Act.

(3) If the executive director determines that the applicant does not clearly meet all requirements for a certificate as prescribed by the Act and this chapter, a certificate may be issued only upon action by

the advisory board following a recommendation by the Practice Authorization Committee, in accordance with §604.110 and §604.209 of the Act and §187.13 of this title (relating to Informal Board Proceedings Relating to Licensure Eligibility). Not later than the 20th day after the date the applicant receives notice of the executive director's determination the applicant shall:

(A) request a review of the executive director's recommendation by a committee of the board conducted in accordance with §187.13 of this title; or

(B) withdraw his or her application.

(C) If an applicant fails to take timely action, as provided under this subsection, such inaction shall be deemed a withdrawal of his or her application.

(4) To promote the expeditious resolution of any certificate issuance matter, the executive director, with the approval of the board, may recommend that an applicant be eligible for a certificate, but only under certain terms and conditions, and may present a proposed agreed order or remedial plan to the applicant. Not later than the 20th day after the date the applicant receives notice of the executive director's recommendation, the applicant shall do one of the following:

(A) sign the order/remedial plan and the order/remedial plan shall be presented to the board for consideration and acceptance without initiating a disciplinary licensure investigation (as defined in §187.13 of this title) or appearing before a committee of the board concerning issues relating to certificate eligibility; or

(B) request a review of the executive director's recommendation by a committee of the board conducted in accordance with §187.13 of this title; or

(C) withdraw his or her application.

(D) If the applicant fails to take timely action, as provided under this subsection, such inaction shall be deemed a withdrawal of his or her application.

(d) Committee Referrals. An applicant who has either requested to appear before the Practice Authorization Committee of the advisory board or has elected to be referred to the Practice Authorization Committee of the board due to a determination of ineligibility by the executive director in accordance with this section, in lieu of withdrawing the application for a certificate, may be subject to a Disciplinary Licensure Investigation as defined by §187.13 of this chapter. Review of the executive director's determination by a committee of the board shall be conducted in accordance with §187.13 of this chapter.

(e) All respiratory care practitioner applicants shall provide sufficient documentation to the advisory board that the applicant has, on a full-time basis, actively practiced as a respiratory care practitioner, has been a student at an acceptable approved respiratory care practitioner program, or has been on the active teaching faculty of an acceptable approved respiratory care practitioner program, within either of the last two years preceding receipt of an application for a respiratory care practitioner certificate. The term "full-time basis," for purposes of this section, shall mean at least 20 hours per week for 40 weeks duration during a given year. Applicants who are unable to demonstrate active practice on a full time basis may, in the discretion of the advisory board, be eligible for an unrestricted certificate or a restricted certificate subject to one or more of the following conditions or restrictions as set forth in paragraphs (1) - (4) of this subsection:

(1) completion of approved continuing education in those topics specified by the advisory board;

(2) limitation and/or exclusion of the practice of the applicant to specified activities of the practice as a respiratory care practitioner;

(3) remedial education; and

(4) such other remedial or restrictive conditions or requirements which, in the discretion of the advisory board, are necessary to ensure protection of the public and minimal competency of the applicant to safely practice as a respiratory care practitioner.

(f) Applicants for a respiratory care practitioner certificate:

(1) whose applications have been filed with the advisory board in excess of one year will be considered expired. Any fee previously submitted with that application shall be forfeited unless otherwise provided by §175.5 of this title (relating to Payment of Fees or Penalties). Any further request for issuance of a certificate will require submission of a new application and inclusion of the current fee. An extension to an application may be granted under certain circumstances, including:

(A) delay by advisory board staff in processing an application;

(B) application requires Practice Authorization Committee review after completion of all other processing and will expire prior to the next scheduled meeting;

(C) Practice Authorization Committee requires an applicant to meet specific additional requirements for certification and the application will expire prior to deadline established by the Committee;

(D) applicant requires a reasonable, limited additional period of time to obtain documentation after completing all other requirements and demonstrating diligence in attempting to provide the required documentation;

(E) applicant is delayed due to unanticipated military assignments, medical reasons, or catastrophic events;

(2) who in any way falsify the application may be required to appear before the advisory board;

(3) on whom adverse information is received by the advisory board may be required to appear before the advisory board;

(4) shall be required to comply with the advisory board's rules and regulations which are in effect at the time the completed application form and fee are filed with the advisory board;

(5) may be required to sit for additional oral or written examinations that, in the opinion of the advisory board, are necessary to determine competency of the applicant;

(6) must have the application for a certificate complete in every detail 20 days prior to the advisory board meeting in which they are considered for approval. Applicants may qualify for a Temporary Permit prior to being considered by the advisory board for issuance of a certificate, as required by §186.7 of this chapter (relating to Temporary Permit);

(7) who previously held a Texas health care provider license, certificate, permit, or registration may be required to complete additional forms as required.

(g) Alternative Certification Procedure for Military Spouse:

(1) An applicant who is the spouse of a member of the armed forces of the United States assigned to a military unit headquartered in Texas may be eligible for alternative demonstrations of competency for certain Texas state-certification requirements. Unless

specifically allowed in this subsection, an applicant must meet the requirements for certification as specified in this chapter.

(2) To be eligible, an applicant must be the spouse of a person serving on active duty as a member of the armed forces of the United States and meet one of the following requirements:

(A) holds an active unrestricted respiratory care practitioner certificate or license issued by another state that has certification or licensure requirements that are substantially equivalent to the requirements for a Texas respiratory care practitioner certificate; or

(B) within the five years preceding the application date, applicant must have held a respiratory care practitioner certificate in this state that expired and was cancelled for nonpayment while the applicant lived in another state for at least six months.

(3) Applications for a respiratory care practitioner certificate from applicants qualifying under paragraphs (1) and (2) of this subsection shall be expedited by the Medical Board's licensure division.

(4) Alternative Demonstrations of Competency Allowed. Applicants qualifying under paragraphs (1) and (2) of this subsection:

(A) in demonstrating compliance with subsection (e) of this section must only provide sufficient documentation to the advisory board that the applicant has, on a full-time basis, actively practiced as a respiratory care practitioner, has been a student at an acceptable approved respiratory care practitioner program, or has been on the active teaching faculty of an acceptable approved respiratory care practitioner program, within one of the last three years preceding receipt of an application for a respiratory care practitioner certificate;

(B) notwithstanding the one year expiration in subsection (f)(1) of this section, are allowed an additional 6 months to complete the application prior to it becoming inactive; and

(C) notwithstanding the 20 day deadline in subsection (f)(6) of this section, may be considered for a certificate up to 5 days prior to the advisory board meeting.

(h) Applicants with Military Experience.

(1) For applications filed on or after March 1, 2014, the advisory board shall, with respect to an applicant who is a military service member or military veteran as defined in §186.2 of this chapter (relating to Definitions), credit verified military service, training, or education toward the certification requirements, other than an examination requirement, for a respiratory care practitioner certificate issued by the advisory board.

(2) This section does not apply to an applicant who:

(A) has had a respiratory care practitioner certificate or license suspended or revoked by another state or a Canadian province;

(B) holds a respiratory care practitioner certificate or license issued by another state or a Canadian province that is subject to a restriction, disciplinary order, or probationary order; or

(C) has an unacceptable criminal history.

(i) Re-Application for Certificate Prohibited. A person who has been determined ineligible for a respiratory care practitioner certificate by the Practice Authorization Committee may not reapply for a certificate prior to the expiration of one year from the date of the advisory board's ratification of the Practice Authorization Committee's determination of ineligibility and denial of a certificate.

§186.5. Recertification.

If a respiratory care practitioner's certificate has been expired for one year, it is considered to have been canceled, unless an investigation is pending. The respiratory care practitioner may obtain a new certificate by complying with the requirements and procedures for obtaining an original certificate.

§186.6. Biennial Renewal of Certificate.

(a) Respiratory care practitioners issued a certificate under the Act shall register biennially and pay a fee. A respiratory care practitioner may, on notification from the advisory board, renew an unexpired certificate by submitting the required form and documents (including fingerprints if required as required by §604.1523 of the Act) and by paying the required renewal fee to the advisory board on or before the expiration date of the certificate. The renewal fee shall be prorated in accordance with §604.151 of the Act. The fee shall accompany the required form which legibly sets forth the certificate holder's name, mailing address, business address, and other necessary information prescribed by the advisory board.

(b) As a prerequisite to renewal, a respiratory care practitioner shall attest to completion of continuing education during the renewal period as required by §186.10 of this chapter (relating to Continuing Education Requirements).

(c) Falsification of an affidavit or submission of false information to obtain renewal of a certificate shall subject a respiratory care practitioner to denial of the renewal and/or to discipline pursuant to the Act, §§604.201-.203.

(d) If the renewal fee and completed application form are not received on or before the expiration date of the certificate, the fees set forth in Chapter 175 of this title (relating to Fees and Penalties) shall apply.

(e) The advisory board shall not waive fees or penalties.

(f) The advisory board shall stagger biennial renewal of respiratory care practitioners proportionally on a periodic basis.

(g) Practicing as a respiratory care practitioner as defined in the Act without a biennially renewed certificate as provided for in the advisory board rules has the same force and effect as and is subject to all penalties of practicing as a respiratory care practitioner without a certificate.

(h) Respiratory care practitioners shall inform the advisory board of address changes on the form prescribed by the advisory board within 30 days of the effective date of the address change.

(i) The board shall provide written notice to each practitioner at the practitioner's address of record at least 30 days prior to the expiration date of the certificate.

(j) Expired Biennial Certificates.

(1) If a respiratory care practitioner's certificate has been expired for less than one year, the respiratory care practitioner may obtain a new certificate by submitting to the advisory board a completed application, the registration fee, as defined in chapter 175 of this title, and the penalty fee, as defined in 175 of this title.

(2) If a respiratory care practitioner's certificate has been expired for one year or longer, the respiratory care practitioner's certificate is automatically canceled, unless an investigation is pending, and the respiratory care practitioner may not renew the certificate. The person may obtain a new certificate by complying with the requirements and procedures, including the examination requirements, for obtaining an original certificate.

(3) A person whose certificate or temporary permit has expired may not engage in activities that require a certificate or temporary

permit until the certificate or temporary permit has been renewed. Practicing as a respiratory care practitioner after a respiratory care practitioner's certificate has expired under subsection (a) of this section without obtaining a renewal has the same effect as, and is subject to all penalties of, practicing as a respiratory care practitioner without a certificate. The advisory board interprets §604.201 of the Act to provide the exclusive sanction that may be imposed by the advisory board for practicing respiratory care after the expiration of the certificate or temporary permit.

(k) Renewal of Certificate by Out-of-State Practitioner.

(1) A person who was issued a respiratory care practitioner certificate in this state, moved to another state, and is currently licensed or certified and has been in practice in the other state for the two years preceding the date of application may obtain a new certificate without reexamination.

(2) The person must pay to the advisory board a fee that is equal to two times the normally required fee for the certificate.

§186.7. Temporary Permit.

(a) The advisory board, or its designee, shall issue a temporary permit to an applicant who:

(1) meets all the qualifications for a respiratory care practitioner certificate under the Act but is waiting for the next scheduled meeting of the advisory board for the certificate to be issued;

(2) seeks to temporarily substitute for a certified respiratory care practitioner during the practitioner's absence, if the applicant:

(A) is certified by the NBRC or is licensed or registered in good standing in another state, territory, or the District of Columbia;

(B) submits an application on a form prescribed by the advisory board; and

(C) pays the appropriate fee prescribed by the advisory board;

(3) has graduated from an accredited respiratory care program; or

(4) has not, on a full-time basis, actively practiced as a respiratory care practitioner, as defined under §186.4(d) of this chapter (relating to Procedural Rules and Qualifications for Certification Applicants), but meets guidelines set by the advisory board including, but not limited to, length of time out of active practice as a respiratory care practitioner and duration of temporary permits.

(b) A temporary permit may be valid for not more than twelve months from the date issued. A temporary permit may be revoked at any time the advisory board deems necessary.

(c) In order to be determined eligible for a temporary permit, applicant must:

(1) be supervised by a respiratory care practitioner certificate holder who:

(A) holds an active, unrestricted respiratory care practitioner certificate in Texas;

(B) has not been the subject of a disciplinary order, unless the order was administrative in nature; and

(C) is not a relative or family member of the applicant; and

(2) present written verification from the certificate holder who will be supervising the applicant that the certificate holder will:

(A) supervise the temporary permit holder according to rules adopted by the advisory board; and

(B) retain professional and legal responsibility for the care rendered by the temporary permit holder.

(d) After the applicant passes the examination, as set out in §186.4(a) of this chapter, the applicant must still be properly qualified and found to be fit for a respiratory care practitioner certificate by the licensure division of the Medical Board prior to issuance of a certificate.

§186.8. Inactive Certificate.

(a) A respiratory care practitioner may have a certificate placed on inactive status by applying to the advisory board. A respiratory care practitioner with an inactive certificate is excused from paying renewal fees on the certificate and may not practice as a respiratory care practitioner in Texas.

(b) In order for a respiratory care practitioner certificate holder to be placed on inactive status, the certificate must be in good standing.

(c) A certificate holder who practices as a respiratory care practitioner in Texas while on inactive status is considered to be practicing without a certificate.

(d) A respiratory care practitioner may return to active status by applying to the advisory board, paying an application fee equal to an application fee for a respiratory care practitioner certificate, complying with the requirements for certificate renewal under the Act, providing current verifications from each state in which the respiratory care practitioner holds a certificate or license, demonstrating current certification by NBRC, submitting professional evaluations from each employment held after the certificate was placed on inactive status, and complying with subsection (e) of this section.

(e) A respiratory care practitioner applicant applying to return to active status shall provide sufficient documentation to the advisory board that the applicant has, on a full-time basis as defined in §186.4(e) of this chapter (relating to Procedural Rules and Qualifications for Certificate Applicants), actively practiced as a respiratory care practitioner or has been on the active teaching faculty of an acceptable approved respiratory care practitioner program, within either of the two years preceding receipt of an application for reactivation. Applicants who do not meet this requirement may, in the discretion of the advisory board, be eligible for the reactivation of a certificate subject to one or more of the following conditions or restrictions as set forth in paragraphs (1) - (5) of this subsection:

(1) current certification by the NBRC, the AARC, or such other certifying body acceptable to the board;

(2) completion of approved continuing education in topics specified by the advisory board;

(3) limitation and/or exclusion of the practice of the applicant to specified activities of the practice as a respiratory care practitioner;

(4) remedial education; and/or

(5) such other remedial or restrictive conditions or requirements which, in the discretion of the advisory board, are necessary to ensure protection of the public and minimal competency of the applicant to safely practice as a respiratory care practitioner.

(f) After five years on inactive status, the certificate shall be canceled as if by request. The respiratory care practitioner may obtain a new certificate by complying with the requirements and procedures for obtaining an original certificate.

§186.9. Reissuance of Certificate Following Revocation.

(a) The applicant must complete in every detail the application for reissuance of a certificate following revocation including payment of the required application fee.

(b) The applicant must appear before the advisory board to state the reasons for the request for reissuance of certificate.

(c) Application for reissuance of a certificate following revocation cannot be considered more often than annually.

(d) Reissuance of a certificate following revocation shall be at the discretion of the advisory board upon a showing by the applicant that reissuance is in the best interest of the public.

(e) A person may not apply for reissuance of a certificate that was revoked before the first anniversary date on which the revocation became effective.

§186.10. Continuing Education Requirements.

(a) General. Each respiratory care practitioner is required to complete 24 contact hours of approved continuing education (CE) every two (2) years as a condition of renewal of a certificate. At least 12 contact hours must be in traditional courses. The remainder of contact hours may be in non-traditional courses or from passage of examinations detailed in subsection (b)(3) of this section.

(1) A contact hour shall be 60 minutes of attendance and participation in an acceptable continuing education experience.

(2) A retired respiratory care practitioner providing only voluntary charity care who is approved by the advisory board for renewal may complete reduced CE requirements equal to half of the number of CE hours required for renewal for a certified respiratory care practitioner.

(3) Notwithstanding paragraph (1), completion of one academic semester unit or hour shall be credited 15 contact hours.

(4) No CE hours may be carried over from one renewal period to another renewal period.

(b) Types of acceptable continuing education. Continuing education must be in skills relevant to the practice of respiratory care and must have a direct benefit to patients and clients and shall be acceptable if the experience falls in one or more of the following categories:

(1) Traditional CE. Provider-directed educational activities directly related to the profession of respiratory care that require the learner and provider to interact in real time, including, but not limited to, live lectures, courses, seminars, workshops, review sessions, or distance learning activities such as webcasts, videoconferences, and audio conferences in which the learner can interact with the provider. Traditional CE must be approved, recognized, accepted, or assigned CE credit by a professional organization or association (such as TSRC, NBRC or AARC) or offered by a federal, state, or local government entity.

(2) Non-traditional CE.

(A) Self-directed study directly related to the profession of respiratory care that does not include interaction between the learner and the instructor. A test at the conclusion of the self-directed study is required. Non-traditional CE must be approved, recognized, accepted, or assigned CE credit by a professional organization or association (such as TSRC, NBRC or AARC) or offered by a federal, state, or local government entity.

(B) A respiratory care practitioner who teaches or instructs a CE course shall be credited one (1) contact hour in non-traditional CE for each contact hour actually taught. CE credit will be given only once for teaching a particular course.

(3) Passage of an official credentialing or proctored self-evaluation examination, as follows:

(A) NBRC Therapist Multiple Choice (TMC) credentialing or re-credentialing examination - 10 contact hours;

(B) NBRC Clinical Simulation Examination (credentialing or re-credentialing) - 10 contact hours;

(C) NBRC Neonatal/Pediatric Respiratory Care Specialist (NPS) examination - 10 contact hours;

(D) NBRC Adult Critical Care Specialist (ACCS) examination - 10 contact hours;

(E) NBRC Sleep Disorder Specialist (SDS) examination - 10 contact hours;

(F) NBRC Certified Pulmonary Function Technologist (CPFT) examination or NBRC Registered Pulmonary Function Technologist (RPFT) examination - 10 contact hours

(G) Board of Registered Polysomnographic Technologists (BRPT) registration examination - 10 contact hours

(H) Initial course in advanced cardiac life-support (ACLS), pediatric advanced life-support (PALS), neonatal advanced life-support (NALS), basic trauma life-support, or pre-hospital trauma life-support - 8 contact hours;

(I) Examinations listed in subparagraphs (A)-(H) of this paragraph may be counted only once for credit.

(c) Verification of continuing education. The advisory board may conduct random audits of CE reported to be completed by respiratory care practitioners to determine compliance with this section. The advisory board may require written verification of CE hours from a respiratory care practitioner within 30 days of request. Failure to provide such verification may result in disciplinary action by the advisory board.

(d) Exemptions.

(1) A respiratory care practitioner may request in writing an exemption from the CE requirement for the following reasons:

(A) documented catastrophic illness;

(B) military service of longer than one year's duration outside the United States;

(C) residence of longer than one year's duration outside the United States; or

(D) good cause shown on written application of the respiratory care practitioner that gives satisfactory evidence to the advisory board that he or she is unable to comply with the CE requirement.

(2) Exemptions are subject to the approval of the Executive Director of the Medical Board and must be requested in writing at least 30 days prior to the expiration date of the certificate.

(3) An approved exemption may not exceed one renewal period but may be requested biennially, subject to the approval of the Executive Director of the Medical Board.

(e) CE hours that are obtained to comply with the CE requirements for the preceding renewal period as a prerequisite for obtaining the renewal of a certificate shall first be credited to meet the CE requirements for the previous renewal period. Once the previous renewal period's CE requirement is satisfied, any additional hours obtained shall be credited to meet the CE requirements for the current renewal period.

(f) A false report or statement to the advisory board by a respiratory care practitioner regarding CE hours reportedly obtained shall be a basis for disciplinary action by the board pursuant to §604.201 of the Act. A respiratory care practitioner who is disciplined by the advisory board for such a violation may be subject to the full range of actions authorized by the Act including suspension or revocation of the practitioner's certificate.

(g) A respiratory care practitioner who is a military service member may request an extension of time, not to exceed two years, to complete any CE requirements. A request for such extension is subject to the approval of the Executive Director of the Medical Board.

§186.11. Respiratory Care Practitioner Scope of Practice.

The respiratory care practitioner shall provide, within the education, training, and experience of the respiratory care practitioner, respiratory care services and procedures consistent with the practice of respiratory care, as defined in §186.2 of this chapter (relating to Definitions) and §604.001(3) and §604.001(5) of the Act, and in accordance with §604.003 of the Act.

§186.12. Tasks Not Permitted to be Delegated to a Respiratory Care Practitioner.

Except as permitted by the Medical Practice Act, Chapter 157, the directing or ordering physician shall not allow a respiratory care practitioner to prescribe or supply medication.

§186.13. Identification Requirements.

A respiratory care practitioner certified by the advisory board shall keep the respiratory care practitioner's Texas certificate available for inspection at the respiratory care practitioner's primary place of business and shall, when engaged in professional activities, wear a name tag identifying the respiratory care practitioner as a respiratory care practitioner.

§186.14. Physician Direction.

Pursuant to §604.101 of the Act, a person may not practice respiratory care other than under the direction of a qualified medical director or other physician licensed by the Medical Board. For the purpose of this chapter, "under the direction" shall have the meaning assigned in §186.2(40) of this chapter (relating to Definitions).

§186.16. Employment Guidelines.

Billing. A respiratory care practitioner may not independently bill patients for the services provided by the respiratory care practitioner except where provided by law.

§186.17. Grounds for Denial of Certification and for Disciplinary Action.

The advisory board may refuse to issue a certificate to any person and may, following notice of hearing and a hearing as provided for in the APA, take disciplinary action against any respiratory care practitioner who:

- (1) fraudulently or deceptively obtains or attempts to obtain a certificate;
- (2) fraudulently or deceptively uses a certificate;
- (3) violates the Act, or any rules relating to the practice of a respiratory care practitioner;
- (4) is convicted of a felony, or has imposition of deferred adjudication or pre-trial diversion;
- (5) habitually uses drugs or intoxicating liquors to the extent that, in the opinion of the advisory board, the person cannot safely perform as a respiratory care practitioner;
- (6) has been adjudicated as mentally incompetent or has a mental or physical condition that renders the person unable to safely perform as a respiratory care practitioner;

(7) has committed an act of moral turpitude. An act involving moral turpitude shall be defined as an act involving baseness, vileness, or depravity in the private and social duties one owes to others or to society in general, or an act committed with knowing disregard for justice, honesty, principles, or good morals;

(8) represents that the person is a physician;

(9) has acted in an unprofessional or dishonorable manner which is likely to deceive, defraud, or injure any member of the public;

(10) has failed to practice as a respiratory care practitioner in an acceptable manner consistent with public health and welfare;

(11) has committed any act that is in violation of the laws of the State of Texas if the act is connected with practice as a respiratory care practitioner; a complaint, indictment, or conviction of a law violation is not necessary for the enforcement of this provision; proof of the commission of the act while in practice as a respiratory care practitioner or under the guise of practice as a respiratory care practitioner is sufficient for action by the advisory board under this section;

(12) has had the person's certificate or other authorization to practice as a respiratory care practitioner suspended, revoked, or restricted or who has had other disciplinary action taken by another state regarding practice as a respiratory care practitioner or had disciplinary action taken by the uniformed services of the United States. A certified copy of the record of the state or uniformed services of the United States taking the action is conclusive evidence of such action;

(13) administers a drug or treatment that is nontherapeutic in nature or nontherapeutic in the manner the drug or treatment is administered;

(14) unlawfully advertises in a false, misleading, or deceptive manner. Advertisements shall be defined as false, misleading, or deceptive consistent with §101.201 of the Texas Occupations Code;

(15) alters, with fraudulent intent, any respiratory care practitioner certificate, permit, or diploma;

(16) uses any respiratory care practitioner license, certificate, temporary permit, or diploma that has been fraudulently purchased, issued, or counterfeited or that has been materially altered;

(17) aids or abets, directly or indirectly, the practice as a respiratory care practitioner by any person not duly certified to practice as a respiratory care practitioner by the advisory board;

(18) is removed or suspended or has disciplinary action taken by his peers in any professional association or society, whether the association or society is local, regional, state, or national in scope, or is being disciplined by a licensed hospital or medical staff of a hospital, including removal, suspension, or other disciplinary action, if that action, in the opinion of the advisory board, was based on unprofessional conduct or professional incompetence that was likely to harm the public. This action does not constitute state action on the part of the association, society, or hospital medical staff;

(19) has repeated or recurring meritorious health care liability claims that in the opinion of the advisory board evidence professional incompetence likely to harm the public;

(20) fails to comply with a board subpoena or request for information or action; or

(21) through his practice as a respiratory care practitioner sexually abuses or exploits another person.

§186.18. Discipline of Respiratory Care Practitioners.

(a) The advisory board, upon finding a respiratory care practitioner has committed any of the acts set forth in §186.17 of this title

(relating to Grounds for Denial of Certification and for Disciplinary Action), may enter an order or, where appropriate, remedial plan, imposing one or more of the allowable actions set forth under §604.201-202 and §604.301 of the Act.

(b) Disciplinary Guidelines.

(1) Chapter 190 of this title (relating to Disciplinary Guidelines), and including remedial plans as described in Chapter 187 of this title (relating to Procedural Rules), in certain circumstances shall apply to respiratory care practitioners regulated under this chapter to be used as guidelines for the following areas as they relate to the denial of issuance of a certificate or disciplinary action of a certificate or temporary permit holder:

- (A) practice inconsistent with public health and welfare;
- (B) unprofessional and dishonorable conduct;
- (C) disciplinary actions by state boards and peer groups;
- (D) repeated and recurring meritorious health care liability claims;
- (E) aggravating and mitigating factors; and
- (F) criminal convictions.

(2) In cases where the advisory board deems it appropriate, provided the certificate holder is not already under a remedial plan, the advisory board may enter into a non-disciplinary settlement agreement and remedial plan pursuant to §164.0015 of Occupations Code. Such remedial plan will be conducted under the supervision of the compliance program of the Medical Board in accordance with Chapter 189 of this title (relating to Compliance Program).

(c) If the provisions of Chapter 190 of this title conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

§186.19. Administrative Penalties.

(a) Pursuant to §604.301 of the Act, the advisory board by order may impose an administrative penalty, in accordance with §§187.75 - 187.82 of this title (relating to the Imposition of Administrative Penalty), against a person certified or regulated under the Act who violates the Act or a rule or order adopted under the Act. The imposition of such a penalty shall be consistent with the requirements of the Act.

(b) The penalty for a violation may be in an amount not to exceed \$1,000. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

(c) The amount of the penalty shall be based on factors set forth under §604.302(b) of the Act, and Chapter 190 of this title (relating to Disciplinary Guidelines).

§186.20. Complaints.

Chapter 178 of this title (relating to Complaints) shall govern respiratory care practitioners with regard to procedures for the initiation, filing and appeals of complaints and methods of notification for filing complaints with the agency. If the provisions of Chapter 178 conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

§186.21. Investigations.

(a) Investigation of complaints shall be conducted in accordance with Chapter 178 of this title (relating to Complaints) and Chapter 179 of this title (relating to Investigations) and referred to an informal settlement conference in accordance with Chapter 187 of this

title (relating to Procedural Rules), if appropriate. If the provisions of Chapters 178, 179 or 187 of this title conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

(b) Confidentiality. All complaints, adverse reports, investigation files, other investigation reports, and other investigative information in the possession of, or received, or gathered by the advisory board, the Medical Board, or their employees or agents relating to a person, certificate holder or temporary permit holder, an application for certificate, or a criminal investigation or proceeding are privileged and confidential and are not subject to discovery, subpoena, or other means of legal compulsion for their release to anyone other than the advisory board, the Medical Board, or their employees or agents involved in certificate holder or temporary permit holder discipline.

(c) Patient identity. In any disciplinary investigation or proceeding regarding a respiratory care practitioner conducted under or pursuant to the Act, the advisory board and Medical Board shall protect the identity of any patient whose medical records are examined and utilized in a public proceeding except for those patients who testify in the public proceeding or who submit a written release in regard to their records or identity.

(d) Permitted disclosure of investigative information. Investigative information in the possession of the advisory board, the Medical Board, or the boards' employees or agents which relates to certificate holder discipline and information contained in such files may not be disclosed except in the following circumstances:

(1) to the appropriate licensing or regulatory authorities in other states or the District of Columbia or a territory or country where the respiratory care practitioner is licensed, registered, or certified or has applied for a certificate or license or to a peer review committee reviewing an application for employment or privileges or the qualifications of the certificate holder with respect to retaining employment or privileges;

(2) to appropriate law enforcement agencies if the investigative information indicates a crime may have been committed and the advisory board shall cooperate with and assist all law enforcement agencies conducting criminal investigations of certificate holders by providing information relevant to the criminal investigation to the investigating agency and any information disclosed by the advisory board or Medical Board to an investigative agency shall remain confidential and shall not be disclosed by the investigating agency except as necessary to further the investigation;

(3) to a health-care entity upon receipt of written request. Disclosures by the advisory board or Medical Board to a health-care entity shall include only information about a complaint filed against a respiratory care practitioner that was resolved after investigation by a disciplinary order of the advisory board or by an agreed settlement, and the basis and current status of any complaint under active investigation; and

(4) to other persons if required during the investigation.

(e) Complaints. The advisory board shall keep information on file about each complaint filed with the advisory board, consistent with the Act. If a written complaint is filed with the advisory board that the advisory board has the authority to resolve relating to a person certified by the advisory board, the advisory board, at least as frequently as quarterly and until final determination of the action to be taken relative to the complaint, shall notify in a manner consistent with the Act, the parties to the complaint of the status of the complaint unless the notice would jeopardize an active investigation.

(f) Renewal of certificates. A certificate holder shall furnish a written explanation of his or her answer to any question asked on the

application for certificate renewal, if requested by the advisory board. This explanation shall include all details as the advisory board may request and shall be furnished within 30 days of the date of the advisory board's request.

§ 186.22. Impaired Respiratory Care Practitioners.

(a) Mental or physical examination requirement.

(1) The advisory board may require a practitioner/applicant to submit to a mental and/or physical examination by a physician or physicians designated by the advisory board if the advisory board has probable cause to believe that the practitioner/applicant is impaired. Impairment is present if one appears to be unable to practice with reasonable skill and safety to patients by reason of age, illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material; or as a result of any mental or physical condition.

(2) Probable cause may include, but is not limited to, any one of the following:

(A) sworn statements from two people, willing to testify before the advisory board, the Medical Board, committees of those boards, or the State Office of Administrative Hearings that a certain practitioner/applicant is impaired;

(B) a sworn statement from an official representative of the Texas Society for Respiratory Care stating that the representative is willing to testify before the advisory board that a certain practitioner/applicant is impaired;

(C) evidence that a practitioner/applicant left a treatment program for alcohol or chemical dependency before completion of that program;

(D) evidence that a practitioner/applicant is guilty of in-temperate use of drugs or alcohol;

(E) evidence of repeated arrests of a practitioner/applicant for intoxication;

(F) evidence of recurring temporary commitments of a practitioner/applicant to a mental institution;

(G) medical records indicating that a practitioner/applicant has an illness or condition which results in the inability to function properly in his or her practice; or

(H) actions or statements by a practitioner/applicant at a hearing conducted by the advisory board or the Medical Board that gives the advisory board or the Medical Board reason to believe that the practitioner or applicant has an impairment.

(3) Upon presentation to the Executive Director of probable cause, the advisory board authorizes the Executive Director to write the practitioner/applicant requesting that the practitioner/applicant submit to a physical or mental examination within 30 days of the receipt of the letter from the Executive Director. The letter shall state the reasons for the request for the mental or physical examination, the physician or physicians the Executive Director has approved to conduct such examinations, and the date by which the examination and the results are to be received by the advisory board.

(4) If the practitioner/applicant to whom a letter requiring a mental or physical examination is sent refuses to submit to the examination, the advisory board, through its Executive Director, shall issue an order requiring the practitioner/applicant to show cause why the practitioner/applicant should not be required to submit to the examination and shall schedule a hearing on the order not later than the 30 days after the date on which the notice of the hearing is provided to the practitioner. The practitioner/applicant shall be notified by either personal service or certified mail with return receipt requested.

(5) At the show cause hearing provided for in paragraph (4) of this subsection, a panel of the advisory board's representatives shall determine whether the practitioner/applicant shall submit to an evaluation or that the matter shall be closed with no examination required.

(A) At the hearing, the practitioner/applicant and the practitioner/applicant's attorney, if any, are entitled to present testimony and other evidence showing that the practitioner/applicant should not be required to submit to the examination.

(B) If, after consideration of the evidence presented at the show cause hearing, the panel determines that the practitioner/applicant shall submit to an examination, the advisory board's representatives shall, through its Executive Director, issue an order requiring the examination within 60 days after the date of the entry of the order requiring examination. A practitioner/applicant is entitled to cross-examine an expert who offers testimony at hearing before the advisory board.

(C) If the panel determines that no such examination is necessary, the panel will withdraw the request for examination.

(D) The results of any advisory board-ordered mental or physical examination are confidential shall be presented to the advisory board under seal for it to take whatever action is deemed necessary and appropriate based on the results of the mental or physical examination. A practitioner/applicant shall be provided the results of an examination and given the opportunity to provide a response at least 30 days before the advisory board takes action.

(6) In fulfilling its obligations under §604.052(1)(H) of the Act, the advisory board shall refer the practitioner/applicant to the most appropriate medical specialist for evaluation. The advisory board may not require a practitioner /applicant to submit to an examination by a physician having a specialty specified by the advisory board unless medically indicated. The advisory board may not require a practitioner /applicant to submit to an examination to be conducted an unreasonable distance from the person's home or place of business unless the practitioner /applicant resides and works in an area in which there are a limited number of physicians able to perform an appropriate examination.

(7) The guidelines adopted under this subsection do not impair or remove the advisory board's power to make an independent licensing or disciplinary decision unless a temporary suspension is convened.

(b) Chapter 180 of this title (relating to Texas Physician Health Program and Rehabilitation Orders) shall be applied to respiratory care practitioners who are believed to be impaired and eligible for the Texas Physician Health Program.

§186.23. Third Party Reports to the Advisory Board.

(a) Any medical peer review committee in this state, any respiratory care practitioner holding a certificate in this state, any respiratory care practitioner student, or any physician licensed to practice medicine or otherwise lawfully practicing medicine in this state shall report relevant information to the advisory board related to the acts of any respiratory care practitioner in this state if, in the opinion of the medical peer review committee, respiratory care practitioner, respiratory care practitioner student, or a physician, a respiratory care practitioner poses a continuing threat to the public welfare through his practice as a respiratory care practitioner. The duty to report under this section shall not be nullified through contract.

(b) Professional Review Actions. A written report of a professional review action taken by a peer review committee or a health-care entity provided to the advisory board must contain the results and cir-

circumstances of the professional review action. Such results and circumstances shall include:

(1) the specific basis for the professional review action, whether or not such action was directly related to the care of individual patients; and

(2) the specific limitations imposed upon the respiratory care practitioner's clinical privileges, upon membership in the professional society or association, and the duration of such limitations.

(c) Reporting a Respiratory Care Practitioner's Continuing Threat to the Public.

(1) Relevant information shall be reported to the advisory board indicating that a respiratory care practitioner's practice poses a continuing threat to the public welfare and shall include a narrative statement describing the time, date, and place of the acts or omissions on which the report is based.

(2) A report that a respiratory care practitioner's practice constitutes a continuing threat to the public welfare shall be made to the advisory board as soon as possible after the peer review committee or the physician involved reaches that conclusion and is able to assemble the relevant information.

(d) Reporting Professional Liability Claims.

(1) Reporting responsibilities. The reporting form must be completed and forwarded to the advisory board for each defendant respiratory care practitioner against whom a professional liability claim or complaint has been filed. The information is to be reported by insurers or other entities providing professional liability insurance for a respiratory care practitioner. If a non-admitted insurance carrier does not report or if the respiratory care practitioner has no insurance carrier, reporting shall be the responsibility of the respiratory care practitioner.

(2) Separate reports required and identifying information. One separate report shall be filed for each defendant respiratory care practitioner insured. When Part II is filed, it shall be accompanied by the completed Part I or other identifying information as described in paragraph (4)(A) of this subsection.

(3) Time frames and attachments. The information in Part I of the form must be provided within 30 days of receipt of the claim or suit. A copy of the claim letter or petition must be attached. The information in Part II must be reported within 105 days after disposition of the claim. Disposed claims shall be defined as those claims where a court order has been entered, a settlement agreement has been reached, or the complaint has been dropped or dismissed.

(4) Alternate reporting formats. The information may be reported either on the form provided or in any other legible format which contains at least the requested data.

(A) If the reporter elects to use a reporting format other than the advisory board's form for data required in Part II, there must be enough identification data available to staff to match the closure report to the original file. The data required to accomplish this include:

(i) name and certificate number of defendant respiratory care practitioner(s); and

(ii) name of plaintiff.

(B) A court order or a copy of the settlement agreement is an acceptable alternative submission for Part II. An order or settlement agreement should contain the necessary information to match the closure information to the original file. If the order or agreement is lacking some of the required data, the additional information may be legibly written on the order or agreement.

(5) Definition. For the purposes of this subsection a professional liability claim or complaint shall be defined as a cause of action against a respiratory care practitioner for treatment, lack of treatment, or other claimed departure from accepted standards of health care or safety which proximately results in injury to or death of the patient, whether the patient's claim or cause of action sounds in tort or contract.

(6) Reporting Form. The reporting form shall be as follows:  
Figure: 22 TAC §186.23(d)(6)

(7) Professional Liability Suits and Claims. Following receipt of a notice of claim letter or a complaint filed in court against a certificate holder that is reported to the advisory board, the certificate holder shall furnish to the advisory board the following information within 14 days of the date of receipt of the advisory board's request for said information:

(A) a completed questionnaire to provide summary information concerning the suit or claim;

(B) a completed questionnaire to provide information deemed necessary in assessing the certificate holder's competency;

(C) information on the status of any suit or claim previously reported to either the advisory board or the Medical Board.

(e) Immunity and Reporting Requirements. A person, health care entity, medical peer review committee, or other entity that without malice furnishes records, information, or assistance to the advisory board is immune from any civil liability arising from such act.

§186.24. Procedure.

Chapter 187 of this title (relating to Procedural Rules) shall govern procedures relating to respiratory care practitioners where applicable. If the provisions of Chapter 187 of this title conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

§186.25. Compliance.

Chapter 189 of this title (relating to Compliance) shall be applied to respiratory care practitioners who are under advisory board orders. If the provisions of Chapter 189 of this title conflict with the Act or rules under this chapter, the Act and provisions of this chapter shall control.

§186.26. Voluntary Relinquishment or Surrender of Respiratory Care Practitioner Certificate.

Pursuant to §604.2011 of the Act, the advisory board may accept the voluntary relinquishment or surrender of a respiratory care practitioner certificate. Chapter 196 of this title (relating to Voluntary Relinquishment or Surrender of a Medical License) shall govern the voluntary relinquishment or surrender of a respiratory care practitioner certificate in a similar manner as that chapter applies to a medical license. Section 186.4 of this chapter (relating to Procedural Rules and Qualifications for Certificate Applicants) shall govern reapplication after a voluntary relinquishment or surrender.

§186.27. Duty to Report Certain Conduct to the Advisory Board.

A respiratory care practitioner shall report the following to the advisory board within 30 days after the event:

(1) Any change of home or business address;

(2) Incarceration in a state or federal penitentiary;

(3) An initial conviction, final conviction, or placement on deferred adjudication, community supervision, or deferred disposition for:

(A) a felony;

(B) a misdemeanor that directly relates to the duties and responsibilities of a respiratory care practitioner certified by the advisory board;

(C) a misdemeanor involving moral turpitude;

(D) a misdemeanor under Chapter 22, Penal Code (relating to assaultive offenses), other than a misdemeanor punishable by fine only;

(E) a misdemeanor on conviction of which a defendant is required to register as a sex offender under Chapter 62, Code of Criminal Procedure;

(F) a misdemeanor under §25.07, Penal Code (relating to the violation of a protective order or a magistrate's order); or

(G) a misdemeanor under §25.071, Penal Code (relating to the violation of a protective order preventing offenses caused by bias or prejudice); or

(4) An initial finding by the trier of fact of guilt of a felony under:

(A) Chapter 481 or 483, Health and Safety Code (relating to offenses involving controlled substances and dangerous drugs);

(B) Section 485.033, Health and Safety Code (relating to offenses involving inhalant paraphernalia); or

(C) the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. §801 et seq.).

§186.28. Retired Certificate.

The registration fee shall not apply to retired respiratory care practitioners.

(1) To become exempt from the registration fee due to retirement:

(A) the respiratory care practitioner's current certificate must not be under an investigation or order with the advisory board or otherwise be restricted; and

(B) the respiratory care practitioner must request in writing on a form prescribed by the advisory board for his or her certificate to be placed on official retired status.

(2) The following restrictions shall apply to respiratory care practitioners whose licenses are on official retired status:

(A) the respiratory care practitioner must not engage in clinical activities or practice respiratory care in any state, other than providing only voluntary charity care;

(B) the respiratory care practitioner may not administer drugs to anyone; and

(C) the respiratory care practitioner's certificate may not be endorsed to any other state.

(3) A respiratory care practitioner may return to active status by applying to the advisory board, paying an application fee equal to an application fee for a respiratory care practitioner certificate, complying with the requirements for certificate renewal under the Act, demonstrating current certification by NBRC, and submitting professional evaluations from each employment held before the certificate was placed on retired status, and complying with paragraph (4) of this section.

(4) The request of a respiratory care practitioner seeking a return to active status whose certificate has been placed on official re-

tired status for two years or longer shall be submitted to the Practice Authorization Committee of the advisory board for consideration and a recommendation to the advisory board for approval or denial of the request. After consideration of the request and the recommendation of the Practice Authorization Committee, the advisory board shall grant or deny the request. If the request is granted, it may be granted without conditions or subject to such conditions which the advisory board determines are necessary to adequately protect the public including but not limited to:

(A) current certification by the NBRC;

(B) completion of approved continuing education in topics specified by the advisory board;

(C) limitation and/or exclusion of the practice of the applicant to specified activities of the practice as a respiratory care practitioner;

(D) remedial education; and/or

(E) such other remedial or restrictive conditions or requirements which, in the discretion of the advisory board are necessary to ensure protection of the public and minimal competency of the applicant to safely practice as a respiratory care practitioner.

(5) The request of a respiratory care practitioner seeking a return to active status whose certificate has been placed on official retired status for less than two years may be approved by the executive director or submitted by the executive director to the Practice Authorization Committee for consideration and a recommendation to the advisory board for approval or denial of the request. In those instances in which the executive director submits the request to the Practice Authorization Committee of the advisory board, the Practice Authorization Committee shall make a recommendation to the advisory board for approval or denial. After consideration of the request and the recommendation of the Practice Authorization Committee, the advisory board shall grant or deny the request subject to such conditions which the advisory board determines are necessary to adequately protect the public including but not limited to those options provided in paragraph (4)(A) - (E) of this section.

(6) In evaluating a request to return to active status, the Practice Authorization Committee or the advisory board may require a personal appearance by the requesting respiratory care practitioner at the offices of the advisory board, and may also require a physical or mental examination by one or more physicians or other health care providers approved in advance in writing by the executive director, the secretary-treasurer, the Practice Authorization Committee, or other designee(s) determined by majority vote of the advisory board.

(7) A respiratory care practitioner applying for retired status under paragraphs (1) and (2) of this section may be approved for emeritus retired status, a subgroup of "official retired status," provided that the respiratory care practitioner has:

(A) never received a remedial plan or been the subject of disciplinary action by the advisory board;

(B) no criminal history, including pending charges, indictment, conviction and/or deferred adjudication in Texas; and

(C) never held a license, registration or certificate that has been restricted for cause, canceled for cause, suspended for cause, revoked or subject to another form of discipline in a state, or territory of the United States, a province of Canada, a uniformed service of the United States or other regulatory agency.

§186.29. Report of Impairment on Registration Form.

(a) A respiratory care practitioner who reports an impairment that affects his or her ability to actively practice as a respiratory care practitioner as defined by §186.4(d) of this chapter (relating to Procedural Rules and Qualifications for Certificate Applicants) shall be given written notice of the following:

(1) based on the respiratory care practitioner's impairment, he or she may request:

(A) to be placed on retired status pursuant to §186.28 of this chapter (relating to Retired Certificate);

(B) to have the respiratory care practitioner's certificate converted to inactive status as defined under §186.8 of this chapter (relating to Inactive Certificate) if the respiratory care practitioner's impairment is solely physical;

(C) to voluntarily surrender the respiratory care practitioner's certificate pursuant to §186.26 of this chapter (relating to Voluntary Relinquishment or Surrender of Respiratory Care Practitioner Certificate); or

(D) to be referred to the Texas Physician Health Program pursuant to Chapter 180 of this title (relating to Texas Physician Health Program and Rehabilitation Orders); and

(2) that failure to respond to the written notice or otherwise not comply with paragraph (1) of this subsection within 45 days shall result in a referral to the advisory board's Investigation Division for possible disciplinary action.

(b) The advisory board shall provide written notice as described in subsection (a) of this section within 30 days of receipt of the certificate holder's registration form indicating the certificate holder's impairment.

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 October 31, 2016.

TRD-201605632

Mari Robinson, J.D.

Executive Director

Texas Medical Board

Earliest possible date of adoption: December 11, 2016

For further information, please call: (512) 305-7016



## **TITLE 25. HEALTH SERVICES**

### **PART 1. DEPARTMENT OF STATE HEALTH SERVICES**

#### **CHAPTER 103. INJURY PREVENTION AND CONTROL**

##### **25 TAC §§103.1 - 103.8**

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§103.1 - 103.8, concerning injury prevention and control.

##### **BACKGROUND AND PURPOSE**

Government Code, §2001.039, requires that each state agency review and consider for re-adoption of each rule adopted by that agency pursuant to Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed the rules and determined that reasons for adopting the sections continue to exist because rules on this subject are needed to administer the program effectively.

The department administers the state program for Injury Epidemiology and Surveillance. The Emergency Medical Services (EMS) & Trauma Registries system is operated by the Injury Epidemiology and Surveillance Branch (the Program) that collects data on reportable injuries and EMS runs submitted by the reporting health care providers (physicians, medical examiners, justices of the peace, hospitals, and acute and post-acute care rehabilitation facilities) and EMS providers.

The rules implement Health and Safety Code, Chapter 92 for the prevention and control of injuries in Texas by establishing and maintaining a trauma reporting and analysis system, investigating injuries, and providing injury related information for prevention. Senate Bill (SB) 219, 84th Texas Legislature, Regular Session, 2015, amended Health and Safety Code, Chapter 92 and replaced the "Texas Board of Health" that was abolished with the "Executive Commissioner" and the "department."

The Program develops reporting requirements, maintains registries operations, conducts data analysis, prepares reports, and provides information for injury prevention and control in Texas. The amendments to the rules clarify the rules for reporting entities. The rule revisions are expected to increase reporting, improve data quality (timeliness, accuracy, and completeness), improve compliance with reporting requirements, and ensure secure access to data by authorized system users.

##### **SECTION-BY-SECTION SUMMARY**

Changes made throughout the sections include various grammatical, punctuations, and formatting changes. Also, any reference to the "Texas EMS/Trauma Registry" has been changed to the "Texas EMS & Trauma Registries" or "Registries" in §§103.1 - 103.8. In addition to these changes, more specific proposed changes included in the sections are described as follows.

Section 103.1(a) is being revised to replace the "Texas Board of Health" which was abolished with the "Executive Commissioner." In subsection (b), the references to "Commissioner" were replaced with "Executive Commissioner."

Section 103.2 defines the key words and terms used in the rule. The definitions of "business associate" and "paper reporting" were deleted because they are no longer relevant terms. The definitions for "data dictionaries" and "no reportable data" were added because these terms were not previously defined and are included in the rules. The definitions of "run," "spinal cord injury," "submersion injury," "traumatic brain injury," and "traumatic injury" were removed and included in the new definition of "reportable event."

Section 103.4 specifies reporting entities and lists reportable injuries and events. The list of reportable injuries and events was clarified for hospitals. The phrase "if reporting for a physician" was added to the reporting entities for a hospital and for an acute or post-acute rehabilitation facility.

Section 103.5 specifies reporting requirements for EMS providers. The section was revised to clarify the requirements for reporting "no reportable data" (NRD) and the use of

third-party services to submit data to the department on behalf of the reporting entity.

Section 103.6 specifies the reporting requirements for physicians, medical examiners, and justices of the peace. This section was revised to clarify reporting requirements, such as the submittal of data electronically within ninety calendar days of the date of examination. The section also specifies that hospitals may fulfill reporting requirements on behalf of a physician as stated in §§103.7. Language was also added concerning the use of third-party services to submit data to the department on behalf of the reporting entity.

Section 103.7 specifies the reporting requirements for hospitals if reporting on behalf of physicians. The section was revised to clarify the requirements for reporting, including electronic reporting within ninety calendar days, submission of NRD on a monthly basis as appropriate, and use of third-party services to submit data.

Section 103.8 specifies the reporting requirements for acute or post-acute rehabilitation facilities if reporting on behalf of physicians. The section was revised to clarify the requirements for reporting including electronic reporting within ninety calendar days, submission of NRD on a monthly basis as appropriate, and use of third-party services to submit data.

#### FISCAL NOTE

Heidi Bojes, PhD, Director of the Environmental Epidemiology and Disease Registries Section, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

#### SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Bojes has also determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. Therefore, an economic impact statement and regulatory flexibility analysis for small and micro-businesses are not required.

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

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

#### PUBLIC BENEFIT

In addition, Dr. Bojes has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The rule revisions are expected to increase the required reporting from reporting entities, improve data quality (timeliness, accuracy, and completeness), improve compliance with reporting requirements, and ensure secure access to data by authorized entities. Collectively, the rule revisions will improve injury surveillance in Texas.

#### 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 as a rule with the specific intent to protect the environment or reduce risk to human health from environmental exposure 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. The proposed rule revisions are 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 rule revisions do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action; therefore, do not constitute a taking under Government Code, §2007.043.

#### PUBLIC COMMENT

Comments on the proposed rule revisions may be submitted to Dr. Prakash Patel, Environmental Epidemiology and Disease Registries Section, Mail Code 1964, Texas Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, or by email to Prakash.patel@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

#### LEGAL CERTIFICATION

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

#### STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §92.003, which requires the department to establish guidelines by rule for conducting injury surveillance by developing the reporting requirements of reportable injuries and events in Texas; Health and Safety Code, §773.112, which authorizes the department to adopt rules establishing requirements for data collection, including trauma incidence reporting; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The amendments affect Government Code, 531; and Health and Safety Code, Chapters 92, 773 and 1001.

#### §103.1. Purpose and Purview.

(a) These sections implement the following Health and Safety Codes.

(1) Chapter 92 authorizes the Executive Commissioner [Texas Board of Health] to adopt rules concerning the reporting and control of injuries.

(2) Chapter 773, §773.112(c) and §773.113(a)(3), requires the department to establish and maintain a trauma reporting and analysis system.

(3) The Texas Department of Health and the Texas Board of Health were abolished by Chapter 198, §1.18 and §1.26, 78th Legislature, Regular Session, 2003. Health and Safety Code, Chapter 1001, establishes the Department of State Health Services (department), which now administers these programs. Government Code, §531.0055, provides authority to the Executive Commissioner of the Health and Human Services Commission to adopt rules for the department.

(b) The Executive Commissioner or the Executive Commissioner's designee shall, as circumstances may require, proceed as follows.

(1) May contact a medical examiner, justice of the peace, physician, hospital, or acute or post-acute rehabilitation facility attending a person with a case or suspected case of a required reportable event.

(2) May provide aggregate data with the suppression of values at the discretion of the Texas EMS & Trauma Registries [Registry].

(3) May release data to other areas of the department.

(4) May give information concerning the injury or its prevention to the patient or a responsible member of the patient's household to prevent further injury.

(5) May collect, or cause to be collected, medical, demographic, or epidemiological information from any medical or laboratory record or file to help the department in the epidemiologic evaluation of injuries and their causes.

(6) Investigation may be made by staff of the department for verifying the diagnosis, ascertaining the cause of the injury, obtaining a history of circumstances surrounding the injury, and discovering unreported cases.

(A) May enter at reasonable times and inspect within reasonable limits, a public place or building, including a public conveyance, in the Commissioner's [eommissioner's] duty to prevent injury.

(B) May not enter a private residence to conduct an investigation about the causes of injuries without first receiving permission from a lawful adult occupant of the residence.

### *§103.2. Definitions.*

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

~~[(1) Business associate--A covered entity performing a function on behalf of an entity reporting under this chapter as defined in, 45 Code of Federal Regulation (CFR) §160.103.]~~

(1) ~~[(2)]~~ Call for assistance--An event where an Emergency Medical Services (EMS) [EMS] provider is activated via an internal communication system or by a 9-1-1 operator.

(2) ~~[(3)]~~ Case--A person in whom an injury is identified by a physician or medical examiner based upon clinical evaluation, interpretation of laboratory and/or radiological ~~[roentgenographie]~~ findings, and an appropriate exposure history.

(3) ~~[(4)]~~ Commissioner--Commissioner of the Department of State Health Services.

(4) Data dictionaries--A collection of descriptions of the data elements in the Texas EMS & Trauma Registries database.

(5) Department--The Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3180.

(6) Electronic reporting--Submitting data by computer in a format prescribed by the department.

(7) Emergency Medical Services (EMS) provider--A person or entity that [who] uses, operates or maintains EMS vehicles and EMS personnel to provide EMS; as defined by Health and Safety Code, §773.003(11) and Chapter 157, Subchapter A, §157.2 of this title (relating to Definitions).

(8) Health authority--A physician appointed as such under Texas Health and Safety Code, Chapter 121.

(9) Injury--Damage to the body resulting from intentional or unintentional acute exposure to thermal, mechanical, electrical, or chemical energy, or from the absence of essentials such as heat or oxygen.

(10) Investigation--Fieldwork designed to obtain more information about an incident.

(11) Local health department--A department created under the Texas Health and Safety Code, Chapter 121.

(12) No reportable data (NRD)--If the entity does not have any reportable event for a given month, the entity shall inform the Texas EMS & Trauma Registries monthly by providing the NRD submission.

~~[(12) Paper reporting--Submitting data on paper in a format prescribed by the Department; if sent by mail or courier, reports shall be placed in a sealed envelope, marked "Confidential Medical Records" to the following address: Attention: EMS/Trauma Registry, Texas Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3180.]~~

(13) Regional Registry--A system that collects, maintains and reports EMS provider runs and trauma data to the department for a designated area of the state.

(14) Registries [Registry]--The Texas EMS & Trauma Registries [Texas EMS/Trauma Registry] is [the staff and] the statewide database [databases] housed within the department; responsible for the collection, maintenance, and evaluation of medical and system information related to required reportable events as defined in this section.

(15) Reporting entity--An EMS provider, a justice [Justice] of the peace, [Peace;] a medical examiner, a physician, or an entity reporting on behalf of the physician including a hospital[;] or an acute or post-acute rehabilitation facility.

(16) Reportable event--Any injury or incident required to be reported under this chapter.

(A) EMS run--A resulting action from a call for assistance where an EMS provider is dispatched to, responds to, provides care to or transports a person.

(B) Traumatic brain injury (TBI)--An acquired injury to the brain, including brain injuries caused by anoxia due to submersion incidents.

(C) Spinal cord injury (SCI)--An acute, traumatic lesion of the neural elements in the spinal canal, resulting in any degree of sensory deficit, motor deficits, or bladder/bowel dysfunction.

(D) Submersion injury--The fatal or non-fatal process of experiencing respiratory impairment from submersion/immersion in liquid.

(E) Significant trauma injuries--Other severely injured trauma patients whose injury meets the department's inclusion criteria based on the data dictionaries and admitted to a hospital inpatient setting for more than 48 hours, or died after receiving any evaluation or treatment, or was dead on arrival, or transferred into or out of a hospital.

~~[(17) Run--A resulting action from a call for assistance where an EMS provider:]~~

~~[(A) is dispatched to;]~~

~~[(B) responds to;]~~

~~[(C) provides care to; or]~~

~~[(D) transports a person.]~~

~~[(18) Spinal cord injury (SCI)—An acute, traumatic lesion of the neural elements in the spinal canal, resulting in any degree of sensory deficit, motor deficits, or bladder/bowel dysfunction. The following International Classification of Diseases 9th Revision Clinical Modification (ICD-9-CM) diagnostic codes are to be used to identify cases of traumatic spinal cord injury: 806.0-806.9 and 952.0-952.9.]~~

~~[(19) Submersion injury—The process of experiencing respiratory impairment from submersion/immersion in liquid.]~~

~~[(17) [(20)] Suspected case--A case in which an injury is assumed, but a diagnosis is not yet made, as in the example of justices of the peace.~~

~~[(18) [(21)] Third-party services--Includes, but is not limited to a regional registry located in a trauma service area (TSA), a billing agency, or a data reporting agency.~~

~~[(19) [(22)] Trauma--An injury or wound to a living body caused by the application of an external force, including but not limited to violence, burns, poisonings, submersion incidents, traumatic brain injuries, traumatic spinal cord injuries, and suffocations.~~

~~[(20) [(23)] Trauma service area (TSA)--A multi-county area in which an emergency medical services and trauma care system has been developed by a Regional Advisory Council and has been recognized by the department.~~

~~[(24) Traumatic brain injury (TBI)—An acquired injury to the brain, including brain injuries caused by anoxia due to submersion incidents. The following International Classification of Diseases 9th Revision Clinical Modification (ICD-9-CM) diagnostic codes are to be used to identify cases of traumatic brain injury: 800.0-801.9, 803.0-804.9, and 850.0-854.1. The ICD-9-CM diagnostic code to be used to identify traumatic brain injury caused by anoxia due to submersion incidents is 348.1 or 994.1.]~~

~~[(25) Traumatic injury--An injury listed in the International Classification of Diseases 9th Revision Clinical Modification (ICD-9-CM) diagnostic codes between 800.0 and 959.9, excluding 905-909, 910-924, and 930-939, and admitted to a hospital inpatient setting (for more than 48 hours); or died after receiving any evaluation or treatment or was dead on arrival; or transferred into or out of the hospital.]~~

### *§103.3. Confidentiality.*

(a) All information and records relating to injuries received by the local health authority or the department, including information electronically submitted to the Texas EMS & Trauma Registries [Registry] and information from injury investigations, are sensitive, confidential, and not public records.

(b) These records shall be held in a secure place and accessed only by authorized personnel. All communications pertaining to these records shall be clearly labeled "Confidential" and will follow established departmental internal protocols and procedures.

(c) Information or records relating to any personal injury may not be released or made public on subpoena or otherwise, except that release may be made:

(1) for statistical purposes, if released in a manner that prevents the identification of any person;

(2) with the consent of each person identified in the information released; or

(3) to medical personnel in a medical emergency to the extent necessary to protect the health or life of the named person.

(d) The department may limit the release of record-level data for medical research to those studies with high scientific merit and have been approved by the department's Institutional Review Board.

(e) A reporting entity may request in writing its own reportable data that has been submitted to the Registries [Registry].

### *§103.4. Who Shall Report and List of Reportable Injuries and Events.*

Injuries and events listed below to be reported are defined in §103.2 of this title (relating to Definitions).

(1) ~~[(a)] EMS Provider--All EMS runs.~~

(2) ~~[(b)] Justice of the peace [Peace]--~~

(A) ~~[(4)] Submersion injuries.~~

(B) ~~[(2)] Traumatic brain injuries.~~

(C) ~~[(3)] Spinal cord injuries.~~

(3) ~~[(c)] Medical examiner [Examiner]--~~

(A) ~~[(4)] Submersion injuries.~~

(B) ~~[(2)] Traumatic brain injuries.~~

(C) ~~[(3)] Spinal cord injuries.~~

(4) ~~[(d)] Physician--~~

(A) ~~[(4)] Submersion injuries.~~

(B) ~~[(2)] Traumatic brain injuries.~~

(C) ~~[(3)] Spinal cord injuries.~~

~~[(D) [(4)] A [However, a] physician shall be exempt from reporting[;] if a hospital or acute or post-acute rehabilitation facility admitted the patient and fulfilled the reporting requirements as stated in §103.7 of this title (relating to Reporting Requirements for Hospitals) or §103.8 of this title (relating to Reporting Requirements for Acute or Post-Acute Rehabilitation Facilities).~~

(5) ~~[(e)] Hospital (if reporting for a physician)--~~

(A) ~~Traumatic brain injuries.~~

(B) ~~Spinal cord injuries.~~

(C) ~~Submersion injuries.~~

(D) ~~Significant trauma injuries.~~

~~[(1) Submersion injuries.]~~

~~[(2) Traumatic brain injuries.]~~

~~[(3) Spinal cord injuries.]~~

~~[(4) Other Traumatic injuries.]~~

~~[(6) [(f)] Acute or post-acute rehabilitation facility (if reporting for a physician)--~~

(A) ~~[(4)] Traumatic brain injuries.~~

(B) ~~[(2)] Spinal cord injuries.~~

~~[(7) [(g)] The professionals or organizations listed in this section must send all reports of injuries and events listed in this section to the Texas EMS & Trauma Registries [Registry]. If the above listed professionals or organizations choose to notify a local or regional health authority to respond on their behalf, the local or regional health authority must report to the Registries [Registry] within ten workdays.~~

### *§103.5. Reporting Requirements for EMS Providers.*

(a) General Information.

(1) All data must [should] be transmitted electronically to the Texas EMS & Trauma Registries within ninety calendar days of the date of call for assistance [at least quarterly]; monthly [electronic data] submissions are recommended.

~~{(2) EMS providers shall submit data to the Registry within three months of the date of call for assistance.}~~

(2) ~~{(3)}~~ EMS providers must report no reportable data [complete and submit a No Reportable Data] (NRD) [Form] to the Registries monthly for [Registry within ninety days of] any given month with no runs.

(b) Data Elements and Methods.

(1) Data elements currently [All runs, as] defined by [in] the appropriate data dictionaries [Texas EMS/Trauma Registry EMS Data Dictionary,] must be submitted [electronically] to the department's online Registries [EMS/Trauma Registry System].

(2) NRD [Form]--If an EMS provider has no [does not have] any monthly electronic records to transmit because the EMS provider did not receive any calls for assistance, the EMS provider must provide an NRD submission [submit] to the Registries [Registry, within ninety days, a completed electronic form, prescribed by the department, stating that it did not have any runs to report] for that month.

(c) Third-party Services.

(1) An EMS provider may use third-party [the] services [of a business associate] to submit [transmit an electronic] data [file] to the Registries. A legally binding agreement must exist between the EMS provider and the third-party services. Documentation of the legally binding agreement must be provided to the department for third-party services to submit the data on behalf of the EMS provider within the Registries. [department.]

(2) If an EMS provider uses the third-party services, the EMS provider is ultimately responsible for the complete, accurate and timely reporting of data to the Registries.

~~{(2) Any third-party service used by an entity reporting under this rule may be a business associate upon conclusion of a business associate agreement between the EMS provider and the third-party service.}~~

*§103.6. Reporting Requirements for Physicians, Medical Examiners, and Justices of the Peace.*

(a) General Information.

~~{(1)}~~ All data must [should] be transmitted electronically to the Texas EMS & Trauma Registries within ninety calendar days of the date of examination [at least quarterly]; monthly [electronic data] submissions are recommended.

~~{(2) Physicians, Medical Examiners, and Justices of the Peace shall submit data to the Registry within three months of the identification of a required reportable event.}~~

(b) Data Elements and Methods. [– If a specialized reporting system exists for a required reportable event, then the case or suspected case must be submitted to all relevant reporting systems as defined in its respective data dictionary]

(1) Data elements defined by the appropriate data dictionaries for all required reportable events, must be submitted to the department's online Registries.

(2) If a specialized reporting system exists for a required reportable event, then the case or suspected case must be submitted to all relevant reporting systems.

(3) Hospitals can report the data elements as defined by the appropriate data dictionaries to the Registries on behalf of physicians.

(c) Third-party Services.

(1) A physician, medical examiner or justice of the peace may use third-party services to submit data to the Registries. A legally binding agreement must exist between the physician, medical examiner or justice of the peace and the third-party services. Documentation of the legally binding agreement must be provided to the department for third-party services to submit the data on behalf of the physician, medical examiner or justice of the peace.

(2) A physician, medical examiner or justice of the peace uses the third-party services, the physician, medical examiner or justice of the peace is ultimately responsible for the complete, accurate and timely reporting of data to the Registries.

*§103.7. Reporting Requirements for Hospitals.*

(a) General Information.

(1) All data must [should] be transmitted electronically to the Texas EMS & Trauma Registries within ninety calendar days of the date of discharge from their facility [at least quarterly]; monthly [electronic data] submissions are recommended.

~~{(2) Hospitals shall submit data to the Registry within three months of a patient's discharge from their facility.}~~

(2) ~~{(3)}~~ Hospitals must report no reportable data [complete and submit a No Reportable Data] (NRD) [Form] to the Registries monthly for [Registry within ninety days of] any given month with no [that the hospital did not treat or document a] required reportable event.

(b) Data Elements and Methods.

(1) Data elements [All required reportable events, as] defined by [in] the appropriate data dictionaries for all required reportable events, [department's EMS/Trauma Registry Hospital Data Dictionary,] must be submitted [electronically] to the department's online Registries [EMS/Trauma Registry System].

(2) If a specialized reporting system exists for a required reportable event, then the case or suspected case must be submitted to all relevant reporting systems [as defined in its respective data dictionary].

~~{(3) NRD Form--If a hospital does not have any monthly electronic records to transmit or paper forms to send because the hospital did not treat or document a submersion injury, a TBI, an SCI, or any other traumatic injury, the hospital must complete and submit to the Registry within ninety days, an electronic or paper form prescribed by the department, stating that it did not have any required reportable events to report for that month.}~~

(c) Third-party Services.

(1) A hospital may use third-party [the] services [of a business associate] to submit [transmit an electronic] data [file] to the Registries. A legally binding agreement must exist between the hospital and the third-party services. Documentation of the legally binding agreement must be provided to the department for third-party services to submit the data on behalf of the hospital within the Registries. [department.]

(2) If a hospital uses the third-party services, the hospital is ultimately responsible for the complete, accurate and timely reporting of data to the Registries.

~~{(2) Any third-party service used by an entity reporting under this rule may be a business associate upon conclusion of a business associate agreement between the hospital and the third-party service.}~~

§103.8. Reporting Requirements for Acute or Post-Acute Rehabilitation Facilities.

(a) General Information.

(1) All data must [should] be transmitted electronically to the Texas EMS & Trauma Registries within ninety calendar days of the date of discharge from their facility [at least quarterly]; monthly [electronic data] submissions are recommended.

(2) Acute or post-acute rehabilitation facilities must report no reportable data (NRD) to the Registries monthly for any given month with no required reportable event.

~~[(2) A facility shall submit data to the Registry within three months of a patient's discharge from their facility.]~~

(b) Data Elements and Methods.

(1) Data elements currently defined by the appropriate data dictionaries for all required reportable events must be submitted to the department's online Registries.

~~[(1) The following data elements must be submitted to the Registry for all required reportable events:]~~

~~[(A) patient's name, race/ethnicity, sex, and date of birth;]~~

~~[(B) date of injury and cause of injury;]~~

~~[(C) date of admission, date of discharge, and discharge destination;]~~

~~[(D) functional independence measure score at admission, functional independence measure score at discharge, and diagnoses; and]~~

~~[(E) type of services provided, payor, and billed charges.]~~

(2) If a specialized reporting system exists for a required reportable event, then the case or suspected case must be submitted to all relevant reporting systems [as defined in its respective data dictionary].

(c) Third-party Services.

(1) An acute or post-acute rehabilitation facility may use third-party services to submit data to the Registries. A legally binding agreement must exist between the acute or post-acute rehabilitation facility and the third-party services. Documentation of the legally binding agreement must be provided to the department for third-party services to submit the data on behalf of the acute or post-acute rehabilitation facility within the Registries.

(2) If an acute or post-acute rehabilitation facility uses the third-party services, the acute or post-acute rehabilitation facility is ultimately responsible for the complete, accurate and timely reporting of data to the Registries.

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 October 26, 2016.

TRD-201605603

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: December 11, 2016

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



CHAPTER 295. OCCUPATIONAL HEALTH  
SUBCHAPTER C. TEXAS ASBESTOS  
HEALTH PROTECTION

**25 TAC §§295.31 - 295.73**

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§295.31 - 295.73, concerning the regulation of asbestos abatement and other asbestos-related activities in public buildings, facilities, and commercial buildings.

BACKGROUND AND PURPOSE

The Asbestos Program is housed in the Division for Regulatory Services. The purpose of the program is to protect public health by preventing the general public and persons who perform asbestos-related activities from being exposed to asbestos.

The department proposes repealing the current Texas Asbestos Health Protection Rules (TAHPR), located in 25 TAC Chapter 295, Subchapter C, Texas Asbestos Health Protection, §§295.31-295.73. The department proposes replacing the current rules with new Chapter 296, Texas Asbestos Health Protection Rules which are published in the November 11, 2016, issue of the *Texas Register*. The new chapter is divided into Subchapters A - N, including subchapters that are specific to definitions, standards of conduct, licensing, accreditation, exemptions, operations, notifications, and enforcement requirements. Most of the current rules have been updated in the proposed new rules. Some of the provisions in the current rules have been determined to be obsolete or no longer necessary and have been omitted from the proposed new rules.

The purpose of repealing sections in Chapter 295 and proposing new sections in Chapter 296 is to update training, licensing, and work practice requirements; incorporate guidance from 22 separately published rule clarifications, and implement amendments to Texas statutes. The proposed new sections implement Family Code, Chapter 232, relating to license suspension for failure to comply with court-ordered child support; Government Code, Chapter 2005, relating to refund of initial application and renewal fees for good cause; Occupations Code, Chapter 55, relating to Licensing of Military Service Members, Military Veterans, and Military Spouses (amended by Senate Bill (SB) 1733, 82nd Legislature, Regular Session, 2011; House Bill (HB) 2254, 83rd Legislature, Regular Session, 2013; SB 162, 83rd Legislature, Regular Session, 2013; SB 1307, 84th Legislature, Regular Session, 2015; and SB 807, 84th Legislature, Regular Session, 2015). In addition, moving the rules to a new chapter allows the department to increase clarity and readability of the rules, making sections easy to find and access. The department has organized the proposed rules by topic, edited for plain language and consistency, updated citations, and eliminated redundancy.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency in accordance with Government Code, Chapter 2001

(Administrative Procedure Act). The department has reviewed §§295.31 - 295.73 and has determined that rules regarding asbestos health protection continue to be necessary to administer the program.

#### SECTION-BY-SECTION SUMMARY

Sections 295.31 - 295.73 are no longer necessary because new rules are being proposed in new Chapter 296.

#### FISCAL NOTE

Jon Huss, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five years the new rules are in effect, there will be fiscal implications to state government, but no fiscal implications to local governments, as a result of enforcing or administering the rules as proposed. The effect on state government will be an increase in revenue to the state of \$9,910 during the first, third, and fifth years; and an increase in revenue of \$310 during the second and fourth years.

The department will receive an estimated additional \$310 in revenue each year of the first five years from increasing the refund processing fee for overpayment of license fees from \$30 to \$50 and implementing a returned check fee of \$30. The department will lose an estimated \$81,585 in revenue each year from decreasing the asbestos abatement supervisor fee from \$645 to \$400.

The department will receive an estimated additional \$9,600 in revenue the first, third, and fifth years from the creation of the asbestos training instructor license for which the license fee is \$100. The license is renewable every two years.

#### SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss has also determined that there will be no adverse economic impact on small businesses or micro-businesses required to comply with the proposed rules.

There will be no adverse economic impact because only licensed asbestos training providers will be required to alter their business practices in order to comply with the rules, and that alteration in business practices will not cause the licensed asbestos training providers to incur any additional costs. Proposed new §296.91 requires licensed asbestos training providers to ensure that training is provided by licensed asbestos training instructors in accordance with proposed new §296.92, but the cost of licensing for the instructors is incurred by the instructors, not the training providers.

No other small businesses and micro-businesses will be required to alter their business practices in order to comply with the rules. Therefore, an economic impact statement and regulatory flexibility analysis for small businesses and micro-businesses are not required.

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

There are anticipated costs to persons who are required to comply with the rules as proposed.

The proposed rules require current asbestos training instructors to become licensed. The fee for an initial license and a renewal license is \$100.

The proposed rules include a minor cost for photographs for license photographs. The current rules require training providers to provide the photographs. The proposed rules require appli-

cants instead of training providers to provide photographs for licenses. Applicants may incur minimal costs associated with providing a photograph of anywhere from \$.09 to \$15.00 per initial and renewal application. Companies often provide the photograph for their employees' license applications, in which case the applicant would not incur any cost.

There is no anticipated impact on local employment.

#### PUBLIC BENEFIT

In addition, Mr. Huss has determined that for each year of the first five years that the rules will be in effect, the public will benefit from adoption of the rules.

Proposed new §296.32 prohibits the asbestos abatement contractor hired to conduct the asbestos abatement project, the person who is disturbing the asbestos, from employing the air monitor, the person monitoring the level of asbestos exposure to the workers on the project. Eliminating this potential conflict of interest could improve worker health by ensuring more accurate data is being created and acted upon on the project site.

Proposed new §296.41 better ensures the safety of registered asbestos abatement workers by requiring that licensed asbestos professionals will be able to read and comprehend the rules in order to accurately explain them to the workers.

Proposed new §296.45 will result in a cost savings for persons and businesses who must comply with the insurance requirements of the new rules because the requirement for the notice of cancellation endorsement has been removed. The removal of this requirement will shorten application processing time. The current requirement to have each insurance policy endorsed to provide the department with a notice of cancellation accounted for at least 90 percent of application deficiencies.

Proposed new §296.51 will result in a cost savings to licensed asbestos abatement contractors, licensed asbestos laboratories, and licensed asbestos consultant agencies. This section also reduces the period of apprenticeship for the air monitoring technician (AMT) license from 30 to 15 days. Licensees who employ AMT trainees will be paying trainees for fewer days of shadowing licensed professionals while gaining the required experience for licensure.

Proposed new §296.71 lowers the asbestos abatement supervisor license fee from \$645 to \$400.

Proposed new §296.91 removes the requirement that training providers provide a color photograph to each trainee that is suitable to be submitted with a license application for use as the license photograph.

Proposed new §296.131 may result in license exemptions and fee waivers for military service members, military veterans, and military spouses.

Proposed new §296.195 and §§296.197 - 296.199 add options for managing asbestos in a building that is being repaired, renovated, or demolished. These options are anticipated to benefit building owners and contractors by reducing project time, cost of materials, and cost of labor.

#### REGULATORY ANALYSIS

The department has determined that this 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 ad-

versely 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. The proposed rules are 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 government action and, therefore, do not constitute a taking under Government Code, §2007.043.

#### PUBLIC COMMENT

Comments on the proposal may be mailed to the Environmental Hazards Group Rules Coordinator, Department of State Health Services, PO Box 149347, Mail Code 1987, Austin, Texas 78714-934756, or emailed to [EHGRulesCoordinator@dshs.state.tx.us](mailto:EHGRulesCoordinator@dshs.state.tx.us) with "Formal Comments on TAHPR" in the subject line. Comments will be accepted for 60 days following publication of the proposal in the *Texas Register*.

#### PUBLIC HEARING

A public meeting to receive comments on the proposal will be scheduled at the Department of State Health Services, 1100 West 49th Street, K-100 Lecture Hall, Austin, Texas 78756. The meeting date and other information will be posted on the Asbestos Program website at <http://www.dshs.texas.gov/asbestos/>. For more information, please contact Environmental Hazards Group rules coordinator at (512) 834-6787 or by email at [EHGRulesCoordinator@dshs.state.tx.us](mailto:EHGRulesCoordinator@dshs.state.tx.us).

#### STATUTORY AUTHORITY

The repeals are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The repeals affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

- §295.31. *General Provisions.*
- §295.32. *Definitions.*
- §295.33. *Adoption by Reference of Federal and Other Standards.*
- §295.34. *Asbestos Management in Facilities and Public Buildings.*
- §295.35. *Licensing and Registration: Conditions.*
- §295.36. *Licensing and Registration: Exemptions; Emergency.*
- §295.37. *Licensing and Registration: Conflict of Interests.*
- §295.38. *Licensing and Registration: Applications and Renewals.*
- §295.39. *Licensing and Registration: Out-of-State Applicants and Out-of-State Training.*
- §295.40. *Licensing, Training and Registration: Insurance Requirements.*
- §295.41. *Licensure: State Licensing Examination.*
- §295.42. *Registration: Asbestos Abatement Workers.*
- §295.43. *Licensure: Asbestos Operations and Maintenance Contractor (Restricted).*

- §295.44. *Licensure: Asbestos Operations and Maintenance Supervisor (Restricted).*
- §295.45. *Licensure: Asbestos Abatement Contractor.*
- §295.46. *Licensure: Asbestos Abatement Supervisor.*
- §295.47. *Licensure: Individual Asbestos Consultant.*
- §295.48. *Licensure: Asbestos Consultant Agency.*
- §295.49. *Licensure: Asbestos Project Manager.*
- §295.50. *Licensure: Asbestos Inspector.*
- §295.51. *Licensure: Asbestos Management Planner.*
- §295.52. *Licensure: Air Monitoring Technician.*
- §295.53. *Licensure: Asbestos Management Planner Agency.*
- §295.54. *Licensure: Asbestos Laboratory.*
- §295.55. *Licensure: Asbestos Training Provider.*
- §295.56. *Licensure: Asbestos Transporters.*
- §295.57. *Accreditation: Asbestos Abatement in Commercial Buildings.*
- §295.58. *Operations: General Requirements for Public Buildings.*
- §295.59. *Operations: Operations and Maintenance (O&M) Requirements for Public Buildings.*
- §295.60. *Operations: Abatement Practices and Procedures for Public Buildings.*
- §295.61. *Operations: Notifications.*
- §295.62. *Operations: Record keeping.*
- §295.63. *Asbestos Hazard Emergency Response Act (AHERA) Compliance.*
- §295.64. *Training: Required Asbestos Training Courses.*
- §295.65. *Training: Approval of Training Courses.*
- §295.66. *Compliance: Deaccreditation.*
- §295.67. *Compliance: Policy of the Texas Department of Health.*
- §295.68. *Compliance: Inspections and Investigations.*
- §295.69. *Compliance: Reprimand, Suspension, Revocation, Probation.*
- §295.70. *Compliance: Administrative Penalty.*
- §295.71. *National Emission Standards for Hazardous Air Pollutants (NESHAP) Compliance.*
- §295.72. *Memorandum of Understanding Between the Texas Commission on Environmental Quality (TCEQ) and the Texas Department of Health for the Regulation of the Asbestos.*
- §295.73. *Asbestos Advisory Committee.*

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 October 31, 2016.

TRD-201605641  
Lisa Hernandez  
General Counsel

Department of State Health Services

Earliest possible date of adoption: December 11, 2016

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



## CHAPTER 296. TEXAS ASBESTOS HEALTH PROTECTION RULES

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes new §§296.1 - 296.5, 296.21, 296.31, 296.32, 296.41 - 296.59, 296.71 - 296.74, 296.91 - 296.93, 296.111 - 296.118, 296.131, 296.151, 296.171 - 296.175, 296.191 - 296.200, 296.211, 296.231, and 296.251 - 296.260, concerning the regulation of asbestos abatement and other asbestos-related activities in public buildings, facilities, and commercial buildings.

### BACKGROUND AND PURPOSE

The Asbestos Program is housed in the Division for Regulatory Services. The purpose of the program is to protect public health by preventing the general public and persons who perform asbestos-related activities from being exposed to asbestos.

The department proposes repealing the current Texas Asbestos Health Protection Rules (TAHPR), located in 25 TAC Chapter 295, Subchapter C, Texas Asbestos Health Protection, §§295.31 - 295.73. The department proposes replacing the current rules with new Chapter 296, Texas Asbestos Health Protection Rules. The new chapter is divided into Subchapters A - N, including subchapters that are specific to definitions, standards of conduct, licensing, accreditation, exemptions, operations, notifications, and enforcement requirements. Most of the current rules have been updated in the proposed new rules. Some of the provisions in the current rules have been determined to be obsolete or no longer necessary and have been omitted from the proposed new rules.

The purpose of repealing sections in Chapter 295 and proposing new sections in Chapter 296 is to update training, licensing, and work practice requirements; incorporate guidance from 22 separately published rule clarifications, and implement amendments to Texas statutes. The proposed new sections implement Family Code, Chapter 232, relating to license suspension for failure to comply with court-ordered child support; Government Code, Chapter 2005, relating to refund of initial application and renewal fees for good cause; Occupations Code, Chapter 55, relating to Licensing of Military Service Members, Military Veterans, and Military Spouses (amended by Senate Bill (SB) 1733, 82nd Legislature, Regular Session, 2011; House Bill (HB) 2254, 83rd Legislature, Regular Session, 2013; SB 162, 83rd Legislature, Regular Session, 2013; S.B. 1307, 84th Legislature, Regular Session, 2015; and S.B. 807, 84th Legislature, Regular Session, 2015). In addition, moving the rules to a new chapter allows the department to increase clarity and readability of the rules, making sections easy to find and access. The department has organized the proposed rules by topic, edited for plain language and consistency, updated citations, and eliminated redundancy.

Government Code, §2001.039, requires that each state agency review and consider for reoption each rule adopted by that agency in accordance with Government Code, Chapter 2001 (Administrative Procedure Act). The department has reviewed §§295.31 - 295.73 and has determined that rules regarding asbestos health protection continue to be necessary to administer the program.

### SECTION-BY-SECTION SUMMARY

Proposed new Subchapter A, General Provisions, §§296.1 - 296.5:

Proposed new §296.1 summarizes the general provisions, scope, and license requirements of the chapter. This section excludes single private residences or single apartment buildings with no more than four dwelling units from the scope of the chapter and implements Health and Safety Code, Chapter 161, Subchapter Q, Installation of Asbestos.

Proposed new §296.2 adopts by reference particular federal regulations, informs the public where copies of the rule are available for review, and establishes that state requirements must be met when state requirements are more stringent than federal requirements.

Proposed new §296.3 adopts by reference the federal National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations, describes NESHAP compliance, and identifies a memorandum of understanding with the Texas Commission on Environmental Quality (TCEQ) concerning the inspection of solid waste facilities that receive asbestos waste.

Proposed new §296.4 adopts by reference a memorandum of understanding with TCEQ.

Proposed new §296.5 establishes that the department may take enforcement action for violation of the federal regulations implementing the Asbestos Hazard Emergency Response Act (AHERA), that local education agencies must ensure compliance with AHERA, and that the department may enter any regulated school building to determine compliance.

Proposed new Subchapter B, Definitions, §296.21:

Proposed new §296.21 defines new terms, clarifies existing terms, and removes terms that no longer need to be defined. This section defines the following new terms: aggressive air sampling, amended water, bag-out area, containment-area ventilation, critical barrier, decontamination area, emergency responder, exposure assessment, intact, miscellaneous material, MSDS, negative exposure assessment, nuisance residence demolition, permit, RFCI, RFCI contractor, SDS, and survey report. This section clarifies the definitions of the following terms: asbestos-containing material (ACM), employee, independent third-party air monitor, industrial/manufacturing facility (which is the currently defined term, "industrial building"), public building, regulated area, and survey. This section does not include definitions of the following currently defined terms: asbestos exposure, inspection, or operations and maintenance (O&M) manual.

Proposed new Subchapter C, Standards of Conduct, §296.31 and §296.32:

Proposed new §296.31 establishes a code of ethics for licensees.

Proposed new §296.32 prohibits the following conflicts of interest: a third party air monitor employed or subcontracted by the asbestos abatement contractor hired to conduct the asbestos abatement project, an asbestos consultant hired by an asbestos abatement contractor, an asbestos abatement contractor hired by an asbestos consultant, a person that is licensed as an asbestos abatement contractor and an asbestos consultant acting in both capacities on the same project, an asbestos management planner or asbestos management planner agency that is also an asbestos abatement contractor performing asbestos abatement for which he or she performed the survey or developed the management plan, or a person being the responsible person for two companies with the same type of licensure. This

section also exempts municipalities from the requirements of this section.

Proposed new Subchapter D, License and Registration, §§296.41 - 296.59:

Proposed new §296.41 establishes the general requirements for each license type, the issuance of a photo identification card, the responsibility to report violations, prohibitions related to licensure and registration, and penalty information. This section also requires individual licensees except asbestos abatement workers to read, write, and communicate effectively in English.

Proposed new §296.42 establishes general requirements for initial and renewal licenses, application processing timeframes, and reasons for denial of applications.

Proposed new §296.43 establishes the acceptable academic credit to meet license requirements. This section adopts into rule the department's current internal procedures for evaluating the equivalency of foreign degrees and course work.

Proposed new §296.44 establishes license requirements unique to out-of-state applicants. This section extends the Texas Asbestos Law and Rules course completion requirement from the current requirement of 60 days before application to one year before application.

Proposed new §296.45 establishes insurance requirements for licensees. The current rule requires licensees to obtain verification from their insurance carriers that the insurance carriers will notify the department of a policy cancellation ten days before the effective date of the cancellation. Instead of requiring licensees to provide verification that the insurance carrier will notify the department, this section requires the licensee to notify the department.

Proposed new §296.46 establishes the requirements for registration as an asbestos abatement worker along with the scope of practice and responsibilities. This section adds the responsibility for compliance with the work practices for asbestos abatement in public buildings to the list of worker responsibilities in the current rule.

Proposed new §§296.47, 296.48, and 296.49 establish the license requirements, scope of practice, and responsibilities for an asbestos abatement supervisor, asbestos abatement contractor, and asbestos operations and maintenance supervisor, respectively.

Proposed new §296.50 establishes the license requirements, scope of practice, and responsibilities for an asbestos operations and maintenance contractor. This section also adds requirements from the Texas Asbestos Health Protection Act (TAHPA), Occupations Code §1954.105(c), which requires an applicant to provide applicable certificates issued by the Secretary of State.

Proposed new §296.51 establishes the license requirements, scope of practice, and responsibilities for an asbestos air monitoring technician (AMT). This section requires an AMT employed by a licensed asbestos laboratory to be listed on the American Industrial Hygiene Association (AIHA) Asbestos Analyst Registry or to have received the NIOSH 582 or NIOSH 582 Equivalent training and participate in the AIHA Proficiency Analytical Testing (PAT) Program in order to analyze airborne fibers in the field. This section also establishes a new responsibility for AMTs analyzing in the field to demonstrate full competency in PCM analysis using the NIOSH 7400 method upon request by a department inspector, establishes time frames for recording and reporting

the results of air sampling, and reduces the apprenticeship requirement for the AMT license from 30 days to 15 days.

Proposed new §296.52 establishes the license requirements, scope of practice, and responsibilities for an asbestos inspector.

Proposed new §296.53 establishes the license requirements, scope of practice, and responsibilities for an asbestos project manager. This section also adds a new license requirement of 45 days of qualifying work experience.

Proposed new §296.54 and §296.55 establish the license requirements, scope of practice, and responsibilities for an asbestos management planner and asbestos management planner agency, respectively. Section 296.54 also adds a new license requirement of participation in conducting five asbestos surveys.

Proposed new §296.56 establishes the license requirements, scope of practice, and responsibilities for an asbestos consultant. This section revises the current list of options for meeting the professional, educational, and work experience requirement by removing the option of membership in a national professional organization and adding the new option of 60 college credit hours, which include 30 credit hours in engineering or natural or physical science and 9 credit hours in mathematics, combined with specific work experience.

Proposed new §§296.57, 296.58, and 296.59 establish the license requirements, scope of practice, and responsibilities for asbestos consultant agencies, asbestos transporters, and asbestos laboratories, respectively.

Proposed new Subchapter E, License and Registration Fees, §§296.71 - 296.74:

Proposed new §296.71 lowers the fee for the asbestos abatement supervisor license from \$645 to \$400 to better align the fee with the responsibilities of the licensee. This section also increases the fee to process refunds from the \$30 that is in current rule to \$50 to cover administrative costs and adds a fee of \$30 for each returned check.

Proposed new §296.72 establishes the circumstances that will result in late fees.

Proposed new §296.73 establishes rules related a payment device that is not honored by the issuing financial institution.

Proposed new §296.74 regarding fee reimbursement implements Government Code, Chapter 2005 by clarifying what constitutes "good cause" for denying a request for fee reimbursement.

Proposed new Subchapter F, Training Providers, Instructors, and Courses, §§296.91 - 296.93:

Proposed new §296.91 establishes the license requirements, scope of practice, and responsibilities for asbestos training providers. This section removes the responsibility for the training provider to provide a color photograph to each trainee. This section adds a requirement that for the Asbestos Abatement Worker course, the course name must specify the language in which the course will be conducted.

Proposed new §296.92 creates the new license category of asbestos training instructor and the license requirements, scope of practice, and responsibilities.

Proposed new §296.93 establishes general training requirements; initial training course requirements for the Asbestos Abatement Worker, Asbestos Contractor/Supervisor, Asbestos Air Monitoring Technician, Asbestos Inspector, Asbestos Management Planner, Asbestos Project Designer, and Texas Asbestos Law and Rules courses; and refresher training course requirements.

Proposed new Subchapter G, State Licensing Examination, §§296.111 - 296.118:

Proposed new §296.111 establishes general examination provisions and adds time frames for requirements in the current rules. This section requires an approved applicant to take the examination within six months of submitting an application. This section also requires applicants to submit all documents and fees necessary to complete the licensing process within three years of passing the examination.

Proposed new §296.112 establishes rules relating to the examination schedule.

Proposed new §296.113 establishes rules relating to examination qualifications.

Proposed new §296.114 establishes rules relating to examination registration and confirmation.

Proposed new §296.115 establishes rules relating to examination admittance and conduct.

Proposed new §296.116 establishes rules relating to grading examinations and reporting scores.

Proposed new §296.117 establishes rules regarding re-examination.

Proposed new §296.118 establishes provisions regarding analysis of examination performance and adds a new deadline by requiring a request for an analysis to be made within one-year of the examination date.

Proposed new Subchapter H, License and Registration Provisions related to Military Service Members, Military Veterans, and Military Spouses, §296.131:

Proposed new §296.131 establishes licensing procedures for military service members, military veterans, and military spouses in accordance with Occupations Code, Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses.

Proposed new Subchapter I, Accreditation, §296.151:

Proposed new §296.151 establishes requirements for accredited persons performing asbestos abatement in commercial buildings and adds the new requirement that accredited persons have a photo identification card on-site.

Proposed new Subchapter J, Exemptions, §§296.171 - 296.175:

Proposed new §296.171 establishes an exemption from license and registration requirements for persons performing resilient floor covering removal in public buildings using the Resilient Floor Covering Institute's (RFCI) work practices.

Proposed new §296.172 provides that the department may waive license requirements when asbestos abatement is required due to a catastrophic emergency affecting public health or safety.

Proposed new §296.173 exempts Texas-registered architects and Texas-licensed professional engineers from requiring a

department license in order to provide written certifications described in new §296.191, relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities.

Proposed new §296.174 exempts persons who perform small projects and repetitive tasks in accordance with new §296.198, relating to Procedures for Small Projects and Repetitive Tasks in a Public Building, from department licensure.

Proposed new §296.175 exempts a person from license, registration, and notification requirements if the operations and maintenance project or installation project is not solely for the purpose of asbestos abatement and does not disturb more than three square feet or three linear feet of nonfriable asbestos-containing building material (ACBM) per occurrence.

Proposed new Subchapter K, Operations, §§296.191 - 296.200:

Proposed new §296.191 establishes responsibilities for public building owners, commercial building owners, and facility owners. This section adds two options to the current rule requirements for an asbestos survey: the option to rebut the presence of asbestos by having a licensed inspector sample new materials before installation and the option to use an environmental assessment as a survey if it contains all of the required elements of an asbestos survey. This section also establishes mandatory abatement related to nuisance residence demolition and large construction projects. This section also adds a responsibility for public building owners to ensure the building or work area complies with air clearance requirements. For municipalities that obtain evidence that a survey was completed or a certification that the building materials do not contain asbestos before issuing renovation or demolition permits, this section requires that the evidence of a survey be in writing and a certification include specific elements.

Proposed new §296.192 establishes general requirements for asbestos abatement in public buildings. The currently existing rule requires supervisors to be in "immediate contact with" those under their supervision. To avoid the misinterpretation that remaining in cell phone contact is sufficient, this section revises the language and requires supervisors to remain in "immediate proximity" during all periods of asbestos abatement activity. This section requires the asbestos consultant or designated project manager to enter and inspect the containment before the start of the asbestos abatement daily and throughout the day to ensure the containment is in compliance with Chapter 296 and the specifications and plans. This section narrows the requirement for employers to establish and maintain written respiratory protection programs to those employers with employees involved in asbestos-related activities (removes the requirement from transporters and laboratories).

Proposed new §296.193 establishes abatement practices and procedures for full containment in public buildings. This section requires an asbestos abatement project design to be prepared by a licensed asbestos consultant. This section specifies that if a particular asbestos abatement project has specifications and plans that contain asbestos abatement activities that are more detailed than those found in this section or which are specific to that project, those specifications and plans must be met to maintain compliance with Chapter 296. This section adds improvements to decontamination shower systems, such as specifying that the shower room must be provided with soap and hot and cold water where the temperature can be adjusted by the user, and waste water must be filtered using a 2-stage filtration system with a 50 micron and a 5 micron filter. This section also improves

containment area ventilation by specifying HEPA filtration units be operated in sufficient number to provide a negative pressure of at least 0.02 inches of water column differential between the containment work space and outside and be operated with unrestricted exhaust.

Proposed new §296.194 establishes work practices specific to operations and maintenance (O&M) activities for public buildings; restricts O&M activities involving ACBM to small-scale, short duration activities; and prohibits asbestos O&M licensees from engaging any activity for which the primary purpose is asbestos abatement.

Proposed new §296.195 establishes a regulatory threshold under which department licensure, registration, and notification are not required to complete an O&M project that disturbs a small amount of nonfriable ACBM. This section applies only to maintenance or installation projects and tasks that are not asbestos abatement activities and that disturb three square feet or three linear feet or less of nonfriable material for each occurrence.

Proposed new §296.196 establishes an exemption from licensing and registration requirements for persons when they are performing resilient floor covering removal in public buildings in accordance with §296.171 of this title (relating to Removal of Resilient Floor Covering). Section 296.196 establishes the scope of the exemption and the training requirements for the persons exempted.

Proposed new §296.197 establishes abatement practices and procedures for low-risk materials such as nonfriable gaskets, adhesives, and mastics that allow for the materials to be removed without containment if certain criteria are met.

Proposed new §296.198 establishes procedures for small projects and repetitive tasks in public buildings that allow non-licensed persons to remove small amounts of friable ACBM if supervised by a licensed asbestos abatement supervisor or licensed O&M supervisor.

Proposed new §296.199 establishes exemptions for the removal of intact ACM in a public building, who may perform the activities under the exemptions, and the work practices they must use.

Proposed new §296.200 establishes recordkeeping requirements for asbestos abatement contractors, asbestos O&M contractors, and RFCI contractors and describes which records they must keep at a central location and which records they must keep on-site. This section further establishes the recordkeeping requirements for asbestos management planners, asbestos management planner agencies, asbestos consultants, asbestos consultant agencies, asbestos air monitoring technicians, asbestos laboratories, and asbestos training providers.

Proposed new Subchapter L, Notifications, §296.211:

Proposed new §296.211 establishes the general provisions for notifying the department of any asbestos abatement or demolition. This section describes completing and submitting the department's notification form; amending start dates and stop dates on the notification form; consolidated notifications; notification of emergency renovation operations, notification of demolition; notification of ordered demolitions for structurally unsound buildings; notification of abatement with demolition; and notification of phased asbestos abatement and/or demolition projects. In addition, this section creates a simplified tiered notification fee schedule, adds a graphic of the fee schedule, and describes the requirements for payment and reimbursement of fees.

Proposed new Subchapter M, Inspections and Investigations, §296.231:

Proposed new §296.231 establishes that the department has the right to inspect or investigate the practices of any person involved with asbestos abatement or related activity in a public building, commercial building, or facility. This section specifies that advance notice of inspections is not required, a person may not interfere with an inspection, and attempting to bribe or threaten a department representative is a violation of Chapter 296 and criminal law.

Proposed new Subchapter N, Enforcement, §§296.251 - 296.260:

Proposed new §296.251 describes enforcement actions that apply to Chapter 296.

Proposed new §296.252 describes enforcement actions regarding an accreditation.

Proposed new §296.253 describes enforcement actions regarding a license and reprimand of a licensee.

Proposed new §296.254 describes emergency suspension of a license, registration, or approval of an asbestos training course.

Proposed new §296.255 describes suspension of license for failure to pay child support or to comply with a court order.

Proposed new §296.256 describes probation of a person whose license or registration is suspended.

Proposed new §296.257 describes denial, withdrawal, suspension, or revocation of approval of training courses.

Proposed new §296.258 describes assessment of an administrative penalty.

Proposed new §296.259 describes revocation of an asbestos abatement supervisor's license.

Proposed new §296.260 describes notice and hearing procedures for particular enforcement actions in Subchapter N.

#### FISCAL NOTE

Jon Huss, Section Director, Environmental and Consumer Safety Section, has determined that for each year of the first five years the new rules are in effect, there will be fiscal implications to state government, but no fiscal implications to local governments, as a result of enforcing or administering the rules as proposed. The effect on state government will be an increase in revenue to the state of \$9,910 during the first, third, and fifth years; and an increase in revenue of \$310 during the second and fourth years.

The department will receive an estimated additional \$310 in revenue each year of the first five years from increasing the refund processing fee for overpayment of license fees from \$30 to \$50 and implementing a returned check fee of \$30. The department will lose an estimated \$81,585 in revenue each year from decreasing the asbestos abatement supervisor fee from \$645 to \$400.

The department will receive an estimated additional \$9,600 in revenue the first, third, and fifth years from the creation of the asbestos training instructor license for which the license fee is \$100. The license is renewable every two years.

#### SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Huss has also determined that there will be no adverse economic impact on small businesses or micro-businesses required to comply with the proposed rules.

There will be no adverse economic impact because only licensed asbestos training providers will be required to alter their business practices in order to comply with the rules, and that alteration in business practices will not cause the licensed asbestos training providers to incur any additional costs. Proposed new §296.91 requires licensed asbestos training providers to ensure that training is provided by licensed asbestos training instructors in accordance with proposed new §296.92, but the cost of licensing for the instructors is incurred by the instructors, not the training providers.

No other small businesses and micro-businesses will be required to alter their business practices in order to comply with the rules. Therefore, an economic impact statement and regulatory flexibility analysis for small businesses and micro-businesses are not required.

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

There are anticipated costs to persons who are required to comply with the rules as proposed.

The proposed rules require current asbestos training instructors to become licensed. The fee for an initial license and a renewal license is \$100.

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There is no anticipated impact on local employment.

#### PUBLIC BENEFIT

In addition, Mr. Huss has determined that for each year of the first five years that the rules will be in effect, the public will benefit from adoption of the rules.

Proposed new §296.32 prohibits the asbestos abatement contractor hired to conduct the asbestos abatement project, the person who is disturbing the asbestos, from employing the air monitor, the person monitoring the level of asbestos exposure to the workers on the project. Eliminating this potential conflict of interest could improve worker health by ensuring more accurate data is being created and acted upon on the project site.

Proposed new §296.41 better ensures the safety of registered asbestos abatement workers by requiring that licensed asbestos professionals will be able to read and comprehend the rules in order to accurately explain them to the workers.

Proposed new §296.45 will result in a cost savings for persons and businesses who must comply with the insurance requirements of the new rules because the requirement for the notice of cancellation endorsement has been removed. The removal of this requirement will shorten application processing time. The current requirement to have each insurance policy endorsed to provide the department with a notice of cancellation accounted for at least 90 percent of application deficiencies.

Proposed new §296.51 will result in a cost savings to licensed asbestos abatement contractors, licensed asbestos laboratories, and licensed asbestos consultant agencies. This section also reduces the period of apprenticeship for the air monitoring technician (AMT) license from 30 to 15 days. Licensees who employ AMT trainees will be paying trainees for fewer days of shadowing licensed professionals while gaining the required experience for licensure.

Proposed new §296.71 lowers the asbestos abatement supervisor license fee from \$645 to \$400.

Proposed new §296.91 removes the requirement that training providers provide a color photograph of each trainee that is suitable to be submitted with a license application for use as the license photograph.

Proposed new §296.131 may result in license exemptions and fee waivers for military service members, military veterans, and military spouses.

Proposed new §§296.195, 296.197, 296.198, and 296.199 add options for managing asbestos in a building that is being repaired, renovated, or demolished. These options are anticipated to benefit building owners and contractors by reducing project time, cost of materials, and cost of labor.

#### REGULATORY ANALYSIS

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

#### PUBLIC COMMENT

Comments on the proposal may be mailed to the Environmental Hazards Group Rules Coordinator, Department of State Health Services, P.O. Box 149347, Mail Code 1987, Austin, Texas 78714-9347, or emailed to [EHGRulesCoordinator@dshs.state.tx.us](mailto:EHGRulesCoordinator@dshs.state.tx.us) with "Formal Comments on TAHPR" in the subject line. Comments will be accepted for 60 days following publication of the proposal in the *Texas Register*.

#### PUBLIC HEARING

A public meeting to receive comments on the proposal will be scheduled at the Department of State Health Services, 1100 West 49th Street, K-100 Lecture Hall, Austin, Texas 78756. The meeting date and other information will be posted on the Asbestos Program website at <http://www.dshs.texas.gov/asbestos/>. For more information, please contact Environmental Hazards Group rules coordinator at (512) 834-6787 or by email at [EHGRulesCoordinator@dshs.state.tx.us](mailto:EHGRulesCoordinator@dshs.state.tx.us).

#### SUBCHAPTER A. GENERAL PROVISIONS

## 25 TAC §§296.1 - 296.5

### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12, 161, and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### §296.1. General Provisions

(a) Purpose. Asbestos is a known carcinogen and health hazard. Preventing asbestos disease depends on limiting the exposure of an individual to asbestos fibers. The purpose of this chapter is to control and minimize public exposure to airborne asbestos by regulating asbestos-related activities in public buildings, commercial buildings, and facilities, as defined in §296.21 of this title (relating to Definitions). This chapter implements Occupations Code, Chapter 1954 (relating to Asbestos Health Protection); Health and Safety Code, Chapter 161, Subchapter Q (relating to Installation of Asbestos); federal regulations of the United States Environmental Protection Agency (EPA) adopted by reference in §296.2 of this title (relating to Adoption by Reference of Federal and Other Standards); and federal regulations of the Occupational Safety and Health Administration referenced in this chapter.

#### (b) Scope.

(1) This chapter applies to persons disturbing, removing, encapsulating, or enclosing any amount of asbestos within public buildings for any purpose, including repair, renovation, dismantling, demolition, installation, or maintenance operations, or any other activity that may involve the disturbance or removal of any amount of asbestos-containing building material whether intentional or unintentional. This chapter establishes:

- (A) licensing requirements;
- (B) building owner and facility owner responsibilities;
- (C) work practices and procedures; and
- (D) notification requirements.

(2) For the purposes of enforcing the federal National Emission Standards for Hazardous Air Pollutants, this chapter applies to all facilities as defined in §296.21(46) of this title.

(3) For the purposes of enforcing the federal EPA Asbestos Model Accreditation Plan, this chapter applies to commercial buildings as defined in §296.21(26) of this title.

(4) For the purposes of enforcing the federal regulations adopted to implement the Asbestos Hazard Emergency Response Act of 1986, this chapter applies to all local education agencies as defined in §296.21(57) of this title.

(c) Exclusions. This chapter does not apply to a single private residence or a single apartment building with no more than four

dwelling units, except as provided under NESHAP for structures defined as installations.

(d) Severability. If any provision of this chapter is held invalid for any reason, the invalidity would not affect the remaining provisions. The valid provisions are severable and would remain in effect.

(e) License possession requirements. Anyone engaged in asbestos-related activities that require a license must provide proof of a current license to any inspecting official from the department, to an employer, or to a prospective employer upon request. All licensed individuals must carry the identification card issued by the department on-site at all times while engaged in any asbestos-related activity.

#### §296.2. Adoption by Reference of Federal and Other Standards.

(a) Adoption by reference. The department adopts by reference and enforces the following federal regulations, as amended:

(1) 40 CFR Part 61, National Emission Standards for Hazardous Air Pollutants (NESHAP), Subpart M (relating to National Emission Standard for Asbestos); and

(2) 40 CFR Part 763, Subpart E with Appendices A, C, D, and E (relating to Asbestos-Containing Materials in Schools), adopted under the Asbestos Hazard Emergency Response Act.

(b) Availability. Copies of the documents in subsection (a) of this section are available for review on the department's Asbestos Program website, <http://www.dshs.texas.gov/asbestos/>; and are available for review during normal business hours at the department's Division for Regulatory Services office in Austin, Texas, and at department regional offices.

(c) State and federal standards. State requirements in the Act or this chapter may be more stringent than the federal standards listed in subsection (a) of this section. In such cases, the state requirements must be met.

#### §296.3. National Emission Standards for Hazardous Air Pollutants (NESHAP) Compliance.

(a) The department adopts by reference the following federal regulations regarding demolition and renovation activities: 40 CFR Part 61, Subpart M, §§61.140, 61.141, 61.145, 61.146, 61.148, 61.150, 61.152, and 61.157 (NESHAP).

(b) An owner or operator of a demolition or renovation activity, as defined in §296.21(79) of this title (relating to Definitions), shall ensure compliance with NESHAP for all covered activities.

(c) The department may enter any facility to inspect and investigate conditions to determine compliance in accordance with §296.231(c) of this title (relating to Inspections and Investigations).

(d) The department has developed a memorandum of understanding with the Texas Commission on Environmental Quality concerning the inspection of solid waste facilities that receive asbestos waste, set forth in §296.4 of this title (relating to Memorandum of Understanding between the Texas Commission on Environmental Quality and the Texas Department of State Health Services for the Regulation of the National Emission Standards for Hazardous Air Pollutants for Asbestos).

(e) The department may take enforcement action as set forth in Subchapter N of this chapter (relating to Enforcement) for violations of NESHAP.

#### §296.4. Memorandum of Understanding between the Texas Commission on Environmental Quality and the Texas Department of State Health Services for the Regulation of the National Emission Standards for Hazardous Air Pollutants for Asbestos.

The department adopts by reference a memorandum of understanding with the Texas Commission on Environmental Quality adopted by rule in 30 TAC §7.122 (relating to Adoption of Memorandum of Understanding between the Texas Natural Resource Conservation Commission (commission) and the Texas Department of Health (TDH) Regarding Emissions Related to Asbestos Demolition and Renovation Activities).

§296.5 Compliance with Federal Regulations Implementing the Asbestos Hazard Emergency Response Act (AHERA).

(a) The department adopts by reference 40 CFR Part 763, Subpart E (relating to Asbestos-Containing Materials in Schools).

(b) A local education agency shall ensure compliance with AHERA for all schools under its administrative control.

(c) The department may enter any regulated school building to inspect and investigate conditions to determine compliance.

(d) The department may take enforcement action as set forth in Subchapter N of this chapter (relating to Enforcement) for violations of AHERA.

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 October 31, 2016.

TRD-201605642

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: December 11, 2016

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



## SUBCHAPTER B. DEFINITIONS

### 25 TAC §296.21

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

§296.21. Definitions.

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

(1) ACBM--Asbestos-containing building material. Surfacing, TSI, or miscellaneous ACM that is found in or on interior structural members or other parts of a public or commercial building and contains greater than 1.0% asbestos.

(2) Accredited person--A person who has attended and passed, within the last year, the appropriate asbestos course as described in the MAP, approved by the department and offered by a department-licensed asbestos training provider, approved by another state that has the authority from EPA to approve courses, or that has been approved directly by EPA.

(3) ACM--Asbestos-containing material. Materials or products, including any single material component of a structure or any layer of a material sample, that contain greater than 1.0% of any kind or combination of asbestos, as determined by using the method specified in 40 CFR Part 763, Subpart E, Appendix E, Section 1 (relating to Polarized Light Microscopy), by a laboratory accredited by the NVLAP for polarized light microscopy (PLM), or by using the EPA-recommended method listed in EPA/600/R-93/116, July 1993, "Method for the Determination of Asbestos in Bulk Building Materials" for transmission electron microscopy (TEM).

(4) Act--The Texas Asbestos Health Protection Act, Chapter 1954, Occupations Code.

(5) ACWM--Asbestos-containing waste material. Includes mill tailings or any waste that contains asbestos and is generated by a source subject to the provisions of NESHAP. This term includes filters from control devices, friable asbestos waste material, and bags or other similar packaging contaminated with asbestos. As applied to demolition and renovation operations, this term also includes RACM and materials contaminated with asbestos including containment materials, disposable equipment, and clothing.

(6) Adequately wet--Sufficiently mixed or penetrated with liquid to prevent the release of particulates. If visible emissions are observed coming from ACM, then that material has not been adequately wetted. However, the absence of visible emissions is not sufficient evidence of being adequately wet.

(7) Aggressive air sampling--Collecting air samples after walls, ceilings, and floors are swept with the exhaust of an unaltered leaf blower that has at least a one horsepower engine, is operated as it comes from the factory, and is directed at all surfaces to cause loose asbestos fibers to become airborne.

(8) AHERA--EPA regulations, 40 CFR Part 763, Subpart E (relating to Asbestos-Containing Materials in Schools). AHERA implements the Asbestos Hazard Emergency Response Act of 1986, 15 USC §2641, et seq.

(9) Airlock--A system for permitting movement into and out of the containment, consisting of doors and/or curtains that control air-flow patterns in the doorway.

(10) Air monitoring--The collection of air samples for the analysis of fibers.

(11) Amended water--Water to which a surfactant (wetting agent) has been added to increase the ability of the liquid to penetrate ACM.

(12) Asbestos--The asbestiform varieties of chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite.

(13) Asbestos abatement--The removal, encapsulation, or enclosure of ACBM.

(14) Asbestos abatement activity--Asbestos abatement, or any on-site preparations or cleanup related to the abatement.

(15) Asbestos abatement contractor--A person who performs asbestos removal, enclosure, or encapsulation for others under contract or other agreement.

(16) Asbestos abatement project design--Includes the survey report of public buildings for ACBM; the evaluation and selection of appropriate asbestos abatement methods; the project layout; the preparation of specifications and plans and contract documents; and the review of environmental controls, abatement procedures, and personal protection equipment.

(17) Asbestos abatement supervisor--An individual who is responsible for the personnel, practices, and procedures of an asbestos abatement activity or project.

(18) Asbestos-related activity--The removal (whether intentional or unintentional), encapsulation, or enclosure of asbestos, including preparations or final clearance; the performance of asbestos surveys; the development of asbestos survey reports, management plans, or response actions; asbestos abatement project design; the collection or analysis of bulk asbestos samples; monitoring for airborne asbestos; or any other activity for which a license is required under the Act.

(19) Asbestos removal--Any action that dislodges, strips, or otherwise takes away ACBM.

(20) ASTM E1494--The current edition of the Standard Practice for Encapsulation Testing of Friable Asbestos-Containing Surfacing Materials published by ASTM International.

(21) Bag-out area--An area distinct from the decontamination area that is used to decontaminate asbestos waste bags before placing them into outer bags. At a minimum, a bag-out area is a two-stage area connected to the containment, separated by airlocks, with a rinse station separated from the bagging-room.

(22) Building owner--The owner of record of a building.

(23) Category I nonfriable ACM--Asbestos-containing packings, gaskets, resilient floor covering, and asphalt roofing products containing greater than 1.0% asbestos as determined using polarized light microscopy or transmission electron microscopy.

(24) Category II nonfriable ACM--Any material, excluding Category I nonfriable ACM, containing greater than 1.0% asbestos as determined using polarized light microscopy or transmission electron microscopy that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(25) CFR--The Code of Federal Regulations.

(26) Commercial building--The interior space of any building that is not a public building. Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space. The term includes, but is not limited to, industrial buildings, federal-government-owned buildings, warehouses, and factories. The term does not include detached single private residences.

(27) Commissioner--The commissioner of state health services.

(28) Competent person--As defined in 29 CFR §1926.1101 (relating to Asbestos). The competent person has completed the appropriate level of training as required by the MAP for the class of asbestos-related activity being performed and is capable of identifying existing asbestos hazards in the workplace and taking the appropriate action to eliminate them. For a NESHAP project, this is a person with MAP supervisor training.

(29) Containment--A portion of the regulated area that has been sealed and placed under negative air pressure using negative air machines with HEPA filters.

(30) Containment-area ventilation--Ventilation of the containment area to move contaminated air away from the breathing zone of employees and toward a negative air machine equipped with a HEPA filter and in sufficient number to provide negative pressure of at least 0.02 inches of water column differential between the containment work space and outside, and a minimum of four containment air changes per hour.

(31) Contractor--A person who is under contract to perform a service with wage or income reporting and tax responsibility to the state or federal government. The term may include, but is not limited to, a general contractor, demolition contractor, or subcontractor.

(32) Critical barrier--An impermeable barrier, such as plastic sheeting, sealing penetrations between the containment and adjacent areas.

(33) Decontamination area--An enclosed area consisting of an equipment room, shower room, and clean room that is used for the decontamination of workers, materials, and equipment that are contaminated with asbestos. This area is adjacent to, and where feasible, connected to the regulated area.

(34) Demolition--The wrecking or removal of any load-supporting structural member of a public building or facility for the purpose of razing the building or portion of the building to the ground, or the intentional burning of any public building or facility. The removal of load-supporting structural members followed by resupport of the structure is considered renovation, not demolition. Moving a building from its foundation is considered demolition.

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

(36) Designated person--The individual designated by an LEA in accordance with 40 CFR Part 763, Subpart E to ensure compliance with all AHERA requirements.

(37) Disturbance--Activities that disrupt the matrix of ACM, render ACM friable, or generate visible debris from ACM.

(38) Emergency renovation operation--A renovation operation that was not planned but results from a sudden, unexpected event that, if not immediately attended to, presents a safety or public health hazard, is necessary to protect equipment from damage, or is necessary to avoid imposing an unreasonable financial burden. This term includes operations necessitated by nonroutine failures of equipment or systems, such as water, steam, and electrical systems.

(39) Emergency responder--Any person responsible for mitigation activities in a medical emergency, fire emergency, hazardous material emergency, or natural disaster.

(40) Employee--A person who works in the service of an employer and whose work performance the employer has the right to control.

(41) Encapsulation--A method of control of asbestos fibers in which the surface of ACM is penetrated by or covered with a liquid coating prepared for that purpose. Materials that do not conform to ASTM E1494 are not considered encapsulating materials. Painting with a non-encapsulant that does not disturb asbestos is not an asbestos-related activity.

(42) Enclosure--The construction of an airtight, impermeable, permanent barrier surrounding ACBM to prevent the release of asbestos fibers into the air.

(43) EPA--The United States Environmental Protection Agency.

(44) EPA regulations--Federal regulations found in 40 CFR Parts 61-62 (relating to Air Programs) and Parts 700-789 (relating to Toxic Substances Control Act).

(45) Exposure assessment--A determination of the level of exposure to asbestos fibers by analyzing breathing zone air samples that are representative of an 8-hour time-weighted average and a 30-minute representative short-term exposure of each employee.

(46) Facility--Any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding a single residential building having four or fewer dwelling units); any ship; and any active or inactive disposal site. Any structure, installation, or building that was previously subject to NESHAP is not excluded, regardless of its current use or function. A project involving a single private residence or a single apartment building with no more than four dwelling units is excluded from coverage by this chapter. When there are two or more of these buildings on the same site that are controlled by the same owner or operator, the buildings are considered an installation under NESHAP, and NESHAP regulations apply.

(47) Facility owner--The owner of record of any facility or any person who exercises control over a facility to the extent that the person contracts for or permits renovation to or demolition of the facility.

(48) Federal-government-owned building--Any building owned by the United States Federal Government. This term does not include space leased by the United States Federal Government.

(49) Friable asbestos material--Any asbestos material containing greater than 1.0% asbestos that, when dry, can be crumbled, pulverized, or reduced to powder by hand pressure.

(50) HEPA--A high-efficiency particulate air filtration, capable of trapping and retaining 99.97% of mono-dispersed airborne particles 0.3 micron or larger in diameter.

(51) HVAC--Heating, ventilation, and air conditioning.

(52) Independent third-party air monitor--A person retained to collect air samples to be analyzed for the owner of the building or facility being abated.

(53) Industrial/manufacturing facility--Any facility where industrial or manufacturing operations or processes are conducted and to which access is limited principally to employees and contractors of the facility operator or to invited guests under controlled conditions because of processes or functions that are hazardous to human safety or health.

(54) Installation--As defined by NESHAP, a building or structure, or group of buildings or structures, at a single demolition or renovation site controlled by the same owner or operator.

(55) Intact--As defined in 29 CFR §1926.1101(b), ACM that has not crumbled, been pulverized, or otherwise deteriorated so that the asbestos is no longer likely to be bound with its matrix.

(56) Layer--Any constituent of an asbestos bulk sample that exhibits different physical properties such as color or composition and can be separated from the rest of the sample with an instrument such as a modeler's knife.

(57) LEA--Local education agency. An LEA includes:

(A) a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary

or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools;

(B) any other public institution or agency having administrative control and direction of a public elementary or secondary school; and

(C) the owner or governing authority of any nonpublic, nonprofit elementary or secondary school building.

(58) License--Any license or registration issued in accordance with this chapter.

(59) Licensee--A person who meets all qualifications and has been issued a license or registration by the department in accordance with this chapter.

(60) Major fiber release episode--Any uncontrolled or unintentional disturbance of ACBM, resulting in a visible emission, which involves the falling or dislodging of more than three square feet or three linear feet of friable ACBM.

(61) Management plan--A written plan for a public building that describes appropriate actions for surveillance and management of ACM in the building.

(62) MAP--Asbestos Model Accreditation Plan. An EPA plan that provides standards for initial training, examinations, refresher training courses, applicant qualifications, decertification, and reciprocity, as described in 40 CFR Part 763, Subpart E, Appendix C (relating to Asbestos Model Accreditation Plan).

(63) Mini-containment--A small walk-in enclosure that accommodates no more than two people and conforms to its localized work area. A mini-containment is constructed of 6-mil thick plastic sheeting or the equivalent and is kept under negative pressure by means of a HEPA vacuum or similar ventilation unit as described in 29 CFR §1926.1101(g)(5)(vi).

(64) Minor fiber release episode--Any uncontrolled or unintentional disturbance of ACBM, resulting in a visible emission, which involves the falling or dislodging of three square feet or three linear feet or less of friable ACBM.

(65) Miscellaneous material--Interior building material that is found on structural components, structural members, or fixtures, such as floor and ceiling tiles, and does not include surfacing material or TSI.

(66) MSDS--Material safety data sheet.

(67) Municipality--A general-law, home-rule, or special-law municipality as defined in the Local Government Code §1.005 (relating to Definitions). A legally created body politic providing local government functions in a community.

(68) Negative exposure assessment--Air monitoring investigations that determine potential exposure to asbestos by asbestos professionals. It is a demonstration by the employer that complies with the criteria in 29 CFR §1926.1101(f) that employee exposure during an operation is expected to be consistently below the PEL.

(69) NESHAP--The EPA National Emission Standards for Hazardous Air Pollutants, as described in 40 CFR Part 61, Subpart M (relating to National Emission Standards for Asbestos).

(70) NIOSH--The National Institute for Occupational Safety and Health.

(71) Nonfriable asbestos material--Asbestos material containing greater than 1.0% asbestos that, when dry, cannot be crumbled, pulverized, or reduced to powder by hand pressure.

(72) Nonscheduled renovation operation--A renovation operation necessitated by the routine failure of equipment, which is expected to occur within a given period based on past operating experience, but for which an exact date cannot be predicted.

(73) Nuisance residence demolition--Single private residences that are demolished by municipalities for reasons of public health, welfare, or safety.

(74) NVLAP--National Voluntary Laboratory Accreditation Program. NVLAP is a federal program administered by the National Institute of Standards and Technology, an agency of the U.S. Department of Commerce. NVLAP provides third-party accreditation to testing and calibration laboratories based on evaluation of their technical qualifications and competence to carry out specific calibrations or tests. Accreditation requirements are established in accordance with 15 CFR Part 285 (relating to National Voluntary Laboratory Accreditation Program) and encompass the requirements of the international standard, ISO/IEC 17025.

(75) O&M activity--Operations and maintenance activity. O&M activities are repairs, maintenance, renovation, installation, replacement, or cleanup of building materials or equipment.

(76) O&M contractor--A person who holds an Asbestos Operations & Maintenance Contractor license for general asbestos operations and maintenance work in a public building, as a building owner or agent, or as a contractor, if working for others.

(77) OSHA--The Occupational Safety and Health Administration, part of the United States Department of Labor.

(78) OSHA regulations--Regulations found in Title 29 of the Code of Federal Regulations (relating to Labor), including 29 CFR §1926.1101 and portions of 29 CFR §1910 (relating to Occupational Safety and Health Standards), as referenced in this chapter.

(79) Owner or operator of a demolition or renovation activity--Any person who owns, leases, operates, controls, or supervises a commercial building or facility being demolished or renovated or any person who owns, leases, operates, controls, or supervises the demolition or renovation operation or both.

(80) PEL--Permissible exposure limit as defined in 29 CFR §1926.1101.

(81) Permit--A license, certificate, approval, registration, consent, or other form of authorization that a person is required by law, rule, regulation, order, or ordinance to obtain in order to perform an action, or to initiate, continue, or complete a project.

(82) Person--A person is:

(A) an individual;

(B) an organization such as a corporation, partnership, sole proprietorship, governmental subdivision, or agency; or

(C) any other legal entity recognized by law as having rights and duties.

(83) Planned renovation operation--A renovation operation, or a number of renovation operations, in which some RACM will be removed or stripped within a given period of time and that can be predicted. Individual nonscheduled operations are included if a number of renovation operations can be predicted to occur during a given period of time based on operating experience.

(84) Preparation--Preparation for asbestos abatement activity, which includes, but is not limited to, the following activities:

(A) removing any moveable items from the interior space of a public building once an asbestos abatement contractor takes control of that space for the purpose of asbestos abatement. Control occurs when the area has been established by the asbestos abatement contractor as a regulated area;

(B) pre-cleaning; wet wiping; HEPA vacuuming; sealing penetrations and openings; installing polyethylene; installing isolation barriers (critical barriers, dividing walls, etc.); installing any part of a decontamination system or any part of the water line connections to the showers, drains, and/or filtration; set-up or use of any load-out or bag-out systems; selection, installation, or maintenance of respiratory systems or fiber reduction systems (misting, spraying, etc.); and positioning of warning signs; and

(C) installing engineering controls (local exhaust ventilation equipped with HEPA filter dust collection systems, construction of containments or isolation mechanisms to control processes producing asbestos dust, ventilation of the regulated area to move contaminated air away from the breathing zone of employees and toward a filtration or collection device equipped with a HEPA filter); installing scaffolding (in an area in which asbestos may be disturbed during the installation); installing, setting-up, and calibrating monitoring devices (including sampling systems and manometers).

(85) Public building--The interior space of a building used or to be used for purposes that provide for public access or occupancy, including but not limited to, schools, hospitals, prisons and similar buildings. Interior space includes exterior hallways connecting buildings, porticos, and mechanical systems used to condition interior space. The term includes any such interior space during a period of vacancy, including the period during preparations prior to actual demolition. The term does not include:

(A) an industrial facility to which access is limited principally to employees of the facility because of processes or functions that are hazardous to human safety or health;

(B) a federal-government-owned building or installation (civilian or military);

(C) a private residence;

(D) an apartment building with no more than four dwelling units;

(E) a manufacturing facility or building that is part of a facility to which access is limited to workers and invited guests under controlled conditions because of processes or functions that are hazardous to human safety or health;

(F) a building, facility, or any portion of which, prior to demolition, has been determined to be structurally unsound and in danger of imminent collapse by a professional engineer or a city, county, or state government official; or

(G) the portion of a building that has become structurally unsound due to demolition.

(86) Public school--Any elementary or secondary school operated by publicly elected or appointed school officials in which the program and activities are under the control of these officials and which is supported primarily by public funds.

(87) RACM--Regulated asbestos-containing material. RACM means:

(A) friable asbestos material;

(B) Category I nonfriable ACM that has become friable;

(C) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading; or

(D) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of the demolition or renovation operations regulated by NESHAP.

(88) Regulated area--An area where asbestos-related activity is performed, and any adjoining area where debris and waste from such asbestos-related activity accumulate. This includes any area that requires monitoring for airborne concentrations of asbestos when there is a reasonable possibility the concentration may exceed 0.01 f/cc.

(89) Renovation--Additions to or alterations of a building by removal, repairing, and rebuilding.

(90) Response action--A method, including removal, encapsulation, enclosure, repair, and operations and maintenance that protects human health and the environment from friable ACBM.

(91) Responsible person--The individual that is appointed by the licensed asbestos abatement contractor, asbestos operations and maintenance contractor, asbestos laboratory, asbestos consultant agency, asbestos management planner agency, or asbestos training provider as responsible for their operations and compliance with this chapter.

(92) RFCI--Resilient Floor Covering Institute.

(93) RFCI contractor--A contractor that removes resilient floor covering using the work practices published in the current edition of the Resilient Floor Covering Institute's "Recommended Work Practices for Removal of Resilient Floor Coverings."

(94) School--Any public or private, non-profit, elementary or secondary school, kindergarten through grade 12.

(95) School building--Any structure suitable for use as a classroom, including a school facility such as a laboratory, library, school eating facility, or facility used for the preparation of food. Any gymnasium or other facility that is specially designed for athletic or recreational activities for an academic course in physical education. Any other facility used for the instruction or housing of students or for the administration of educational or research programs. Any maintenance, storage, or utility facility, including any hallway, essential to the operation of any facility described in this definition of "school building." Any portico or covered exterior hallway or walkway. Any exterior portion of a mechanical system used to condition interior space.

(96) SDS--Safety data sheet. This term is synonymous with MSDS and reflects a change in terminology with the adoption of the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals (GHS).

(97) Specifications and plans--Site-specific asbestos abatement description, which includes drawings, floor plans or equivalent of sufficient size and detail that display the location of asbestos abatement activities, the location of regulated areas, and a clear and understandable written description of the work to be performed and requirements that address unusual or unique circumstances of an asbestos abatement project.

(98) SSSD activities--Tasks such as, but not limited to, removal of asbestos-containing insulation on pipes, removal of small quantities of asbestos-containing insulation on beams or above ceilings, replacement of an asbestos-containing gasket on a valve, installation or removal of a small section of drywall, or installation of electrical

conduits through or proximate to ACM. SSSD activities may be further defined as the following:

(A) removal of small quantities of ACM only if required in the performance of another maintenance activity not intended as asbestos abatement;

(B) removal of asbestos-containing TSI on pipes not to exceed amounts greater than those that can be contained in a single, standard (60 inches by 60 inches) glove bag;

(C) minor repairs to damaged TSI that do not require removal;

(D) repairs to a piece of asbestos-containing wallboard; and

(E) repairs, involving encapsulation, enclosure, or removal, to small amounts of friable ACBM only if required in the performance of emergency or routine maintenance activity and not intended solely as asbestos abatement. Such work may not exceed amounts greater than those which can be contained in a single prefabricated mini-containment.

(99) Start date--The dates defined as:

(A) Asbestos abatement start date--For the purpose of notification to the department in accordance with §296.211 of this title (relating to Notifications), the date on which the actual disturbance of asbestos begins. Preparation that does not disturb asbestos is not the asbestos abatement start date.

(B) Demolition start date--The date on which the demolition begins.

(100) Stop date--The dates defined as:

(A) Asbestos abatement stop date (completion date)--For the purpose of notification to the department in accordance with §296.211 of this title, the date on which air monitoring clearance of asbestos abatement is achieved. For removal of resilient floor covering material in accordance with §296.171 of this title (relating to Removal of Resilient Floor Covering), the asbestos abatement stop date is the date that the ACBM is removed from the substrate and properly containerized as required in the RFCI work practices. For NESHAP projects, the asbestos abatement stop date is the date that all RACM is removed from the substrate and properly containerized.

(B) Demolition stop date (completion date)--In public buildings, commercial buildings, or facilities that do not contain RACM, the date on which the wrecking and/or removal operations of load-bearing structural components are complete. In structurally unsound buildings or facilities that contain RACM, the demolition stop date is the date on which load-bearing structural components are removed, and RACM is disposed of or removed from the site in accordance with 40 CFR §61.150 (relating to Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation, and Spraying Operations).

(101) Surfacing material--Material that is sprayed on, troweled on, or otherwise applied to surfaces such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials on surfaces for acoustical, fireproofing, or other purposes.

(102) Survey--An inspection activity undertaken in a building to determine the quantities and locations of homogeneous areas of ACBM by assuming suspect material or collecting samples of such material and to assess its condition, whether by visual or physical examination. This term includes reinspections of friable and nonfriable known or assumed ACBM that has been previously

identified as described in 40 CFR §763.85(b) (relating to Inspection and Reinspections). The term does not include the following:

(A) periodic surveillance of the type described in 40 CFR §763.92(b) (relating to Training and Periodic Surveillance) solely for the purpose of recording or reporting a change in the condition of known or assumed ACBM;

(B) inspections performed by employees or agents of federal, state, or local government solely for the purpose of determining compliance with applicable statutes or regulations; or

(C) visual inspections of the type described in 40 CFR §763.90(i) (relating to Response Actions) solely for the purpose of determining completion of response actions.

(103) Survey report--A report that shows by diagram and narrative the sampling locations and the boundaries of the homogeneous areas of ACBM; the estimated amount of ACM in each homogeneous area; and a written inventory of the locations where samples were taken, the type of material sampled, and the condition of the ACBM.

(104) TAHPR--The Texas Asbestos Health Protection Rules, 25 TAC Chapter 296.

(105) TSI--Thermal system insulation. TSI is material applied to pipes, fittings, boilers, breeching, tanks, ducts, or other interior structural components to prevent heat loss, or gain, or for other purposes.

(106) USC--The United States Code.

(107) Working days--Monday through Friday, including holidays that fall on those days.

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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General Counsel

Department of State Health Services

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



## SUBCHAPTER C. STANDARDS OF CONDUCT

### 25 TAC §296.31, §296.32

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### §296.31. Code of Ethics for Licensees.

(a) Purpose. The purpose of this section is to establish the requirements for professional and ethical conduct for licensed persons performing asbestos-related activities in a public building.

(b) The persons described in subsection (a) of this section who perform asbestos-related activities shall:

(1) be qualified by training or possess licenses specific to the asbestos-related activity;

(2) meet or exceed the minimum standards for asbestos-related activities in this chapter;

(3) not participate in activities where a conflict of interest might arise, in accordance with §296.32 of this title (relating to Conflict of Interest) and disclose any known or potential conflicts of interest to any party affected or potentially affected by such conflicts;

(4) not make any false, misleading, or deceptive claims in any asbestos-related advertising, announcement, presentation, or competitive bidding;

(5) not misrepresent any asbestos-related professional qualifications or credentials;

(6) not provide deceptive, false, or misleading information to the department; and

(7) not work if impaired by drugs, alcohol, or other conditions that may pose a risk to workplace safety or public health, and not allow those under their supervision to work if they are known to be impaired.

#### §296.32. Conflict of Interest.

(a) Independent third-party air monitoring. The public building owner or authorized representative must provide for a third party to perform area monitoring and project clearance monitoring for airborne concentrations of asbestos fibers during an abatement project. The third party must not be employed or subcontracted by the asbestos abatement contractor hired to conduct the asbestos abatement project.

(1) The building owner may hire a third party to collect personal samples for the contractor in accordance with §296.51(b)(1)(A)(iii) of this title (relating to Asbestos Air Monitoring Technician).

(2) Building owners who are licensed and who are performing asbestos abatement in their own buildings shall use a licensed asbestos consultant or a licensed asbestos consultant agency for the purpose of obtaining area monitoring and final clearance.

(b) Licensee conflict of interest.

(1) On any given project in a public building:

(A) a licensed asbestos consultant may not hire a licensed asbestos abatement contractor;

(B) a licensed asbestos abatement contractor may not hire a licensed asbestos consultant;

(C) a person that is a licensed asbestos abatement contractor and licensed asbestos consultant may not act in both capacities on the same project; and

(D) a licensed asbestos management planner or licensed asbestos management planner agency that is also a licensed asbestos abatement contractor may not perform an asbestos abatement for which the licensee performed a survey or developed the management plan.

(2) Conflict of interest provisions under this subsection do not apply to municipalities as described in subsection (c) of this section.

(3) A person may not be the responsible person for two companies with the same type of license.

(c) Municipality exemption. Municipalities may hire a licensed person who may perform asbestos inspections and surveys, write management plans, design abatement projects, and abate asbestos in the same building or facility. This exemption does not allow a licensee who engages in these activities to conduct air monitoring or abatement project clearance procedures on the same project, which includes performing visual inspection and collecting and analyzing air samples for clearance in accordance with §296.192(h)(1) of this title (relating to General Requirements for Asbestos Abatement in Public Buildings). Air monitoring activities, except as required by 29 CFR §1926.1101 (relating to Asbestos), must be performed by an independent third party who is not an employee of the municipality.

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 D. LICENSE AND REGISTRATION

### 25 TAC §§296.41 - 296.59

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### *§296.41. License and Registration Requirements.*

(a) License and registration requirements. A person must be licensed or registered in compliance with this chapter to perform asbestos abatement or any asbestos-related activity within the scope of this chapter unless exempt in accordance with §296.195 of this title (relating to Guidance for Regulatory Threshold for Nonfriable Material in a Public Building), §296.196 of this title (relating to Resilient Floor Covering Removal in Public Buildings), or §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings). The department will not issue a license or registration to an individual who is not eligible for employment in the United States.

(b) Age requirement. An individual applying for a license or registration under this chapter must be at least 18 years old.

(c) Language requirement. All individual licensees, except asbestos abatement workers, must be able to read, write, and communicate effectively in English.

(d) Term and expiration. The term of a new license or registration is two years and expires on the second anniversary of the issue date. The term of a renewal license or registration is two years from the previous expiration date.

(e) License or registration card. A license or registration identification card issued by the department is valid for the person named on the card until the card expires or is revoked. The department may revoke any cards that have been altered.

(f) Responsibility to report violations. Licensees who become aware of violations of this chapter must report these violations within 24 hours to the department if the violations are not immediately corrected by the responsible party. The phone number to report a violation is on the Violation Notification Procedure poster that is required to be posted at the entrance to the regulated area in accordance with §296.192(i) of this title (relating to General Requirements for Asbestos Abatement in Public Buildings).

(g) Prohibition. Performing asbestos-related activities with a lapsed or invalid license or registration is prohibited. A license becomes invalid if the licensee allows qualifications (such as accreditations, the department's Physician's Written Statement form, or insurance requirements) to expire. A license or registration issued in accordance with this chapter may not be altered, sold, assigned, or transferred. Any license or registration that has been altered, sold, assigned, or transferred is invalid.

(h) Penalties. Submitting fraudulent documentation or false information to obtain a license, attempting to bribe a state employee, or threatening a state employee is a violation of this chapter and criminal law. State or federal violations and citations become a part of the department's records.

#### *§296.42. Initial and Renewal Applications.*

(a) General requirements. To apply for a license or registration in accordance with this chapter, an applicant must submit a completed and signed application on the form provided by the department. A completed application includes all required documentation and payment of the application fee by check, money order, or proof of online payment. An applicant who applies for more than one license or registration must submit all required documentation with each application.

#### (b) Processing applications.

(1) An application is not complete until the department receives all required documentation and fees. The following time periods apply, beginning on the date the department receives the application:

(A) letter of acceptance of application for an initial or renewal registration or license (receipt of license or identification card may serve as notice of acceptance of a complete application)--45 days;

(B) letter of initial or renewal application deficiency--45 days;

(C) letter of approval for examination--30 days;

(D) letter of acceptance of application for an initial training provider license (receipt of license may serve as notice of acceptance of a complete application)--90 days;

(E) letter of acceptance of application for a training provider license renewal (receipt of license may serve as notice of acceptance of a complete application)--45 days;

(F) approval of additional training course--90 days;

(G) issuance of duplicate license or identification card--30 days; and

(H) letter of denial of examination, license, or registration--180 days. The time period for issuing a notice of proposed denial includes, if required, the opportunity to show compliance with the law and the opportunity for a formal hearing.

(2) After the department issues a notice of deficiency, the following time periods apply, beginning on the date the department receives the last item that completes the application:

(A) letter of acceptance of application for an initial or renewal registration or license (receipt of license or ID card may serve as notice of acceptance of a complete application)--20 days;

(B) letter of approval for examination--20 days;

(C) letter of acceptance of application for an initial training provider license (receipt of license may serve as notice of acceptance of a complete application)--30 days;

(D) letter of acceptance of application for a training provider license renewal (receipt of license may serve as notice of acceptance of a complete application)--20 days;

(E) approval of additional training course--30 days;

(F) issuance of duplicate license or ID card--20 days; and

(G) letter of denial of examination, license, or registration--180 days. The time period for issuing a notice of proposed denial includes, if required, the opportunity to show compliance with the law and the opportunity for a formal hearing.

(c) Denial. The department may deny an application for license or registration to persons who fail to meet the standards established by this chapter, including, but not limited to, the provisions of §296.253 of this title (relating to Denial, Suspension, or Revocation of License or Reprimand of Licensee) and §296.255 of this title (relating to Suspension of License for Failure to Pay Child Support or Comply with a Court Order).

(d) Enforcement action. The department may take enforcement action for fraud or misrepresentation in obtaining, attempting to obtain, or renewing a license or registration, as set forth in Subchapter N of this chapter (relating to Enforcement).

(e) Renewal notices. The department will send a renewal notice to the licensee before the license expires. All licensees must renew their licenses before the license expiration date, even if the licensee does not receive a renewal notice. The renewal notice will include the following:

(1) license type;

(2) time period allowed for renewal; and

(3) renewal fee.

(f) Renewal requirements.

(1) A license may not be renewed more than 60 days before or more than one year after the license expires. An applicant may renew a license if the applicant:

(A) meets the requirements to renew the license;

(B) pays the required fee;

(C) submits a renewal application along with all required and acceptable documentation; and

(D) has complied with all final orders resulting from any violations of this chapter.

(2) If a licensee submits a complete renewal application with the required fee and documentation before the license expires, the current license will not expire until the department:

(A) approves the application;

(B) finds the application to be deficient, and the deficiency is not cleared before the license expiration date; or

(C) denies the application.

(g) Re-application for license. A person whose license has been expired for more than one year may not renew the license. The person may obtain a new license by complying with the requirements and procedures, including the examination requirements, for obtaining an initial license.

(h) Application for duplicate license. A licensee or registrant may obtain a duplicate or replacement license by submitting:

(1) an application;

(2) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application; and

(3) the required fee.

(i) Name change. A licensee shall submit a name change application and required fee to change the name currently on record. The department will waive the fee for a name change if the applicant submits the name change application with the renewal application. If the tax identification number for a company has changed, a new license must be obtained. The name change application must be submitted with a copy of a divorce decree, marriage certificate, legal name change document, driver's license, or social security card showing the new name.

(j) Physician's written statement. A copy of the department's completed Physician's Written Statement form must be submitted with all individual applications to document that the applicant has received a medical examination within the past 12 months, in accordance with 29 CFR §1926.1101(m) (relating to Asbestos) or 40 CFR §763.122 (relating to What Does This Subpart Require Me to Do?). A current copy of the individual's Physician's Written Statement form must be on-site while performing asbestos-related activities.

§296.43. Acceptable Academic Credit and Qualifying Work Experience.

(a) Degrees and academic credit earned in the United States must be from colleges and universities that have programs accredited by a national accrediting organization that is also recognized by the United States Secretary of Education under the Higher Education Act of 1965 (20 USC §1001, et seq.).

(b) Degrees and academic credits received from universities outside the United States may apply toward the education requirement for a license only if the course work and degrees could be counted as transfer credits by universities described in subsection (a) of this section. Applicants must furnish, at their own expense, an original or certified copy of an evaluation of each foreign degree from a credential evaluation service that is acceptable to the department. Applicants must show proof of each degree and the date it was awarded by submitting original or certified copies of transcripts. Documents written in languages other than English must also be accompanied by a certified English translation.

(c) High school diplomas or equivalency diplomas received from schools outside the United States may apply toward the education requirement for a license only if the education is equivalent to a diploma or equivalency diploma issued in the United States. Applicants must furnish, at their own expense, an original or certified copy of an evaluation of each foreign diploma from a credential evaluation service. Applicants must show proof of each diploma and the date it was awarded by submitting original or certified copies of the diploma. Documents written in languages other than English must also be accompanied by a certified English translation.

(d) Work experience requirement. For the purpose of determining the work experience required for an initial license, eight hours of qualifying on-the-job work experience equals one day of the required experience.

§296.44. Out-of-State Applicants.

(a) Qualifications. Out-of-state applicants must comply with all licensing qualifications which are required for Texas residents.

(b) Documentation of education, experience, training, and medical examinations acquired out of state must be verifiable. The department may approve applications with out-of-state documentation on a case-by-case basis. If the department is unable to verify the documentation, the applicant is responsible for verifying the documentation.

(c) Texas Asbestos Law and Rules course. Persons applying for an initial or renewal license or registration who did not receive any of the required training for that license or registration from a department-licensed training provider must complete a three-hour Texas Asbestos Law and Rules course. The Texas Asbestos Law and Rules course must be completed within one year of applying for a department license or registration. A training course taken from a Texas licensed training provider in any other asbestos discipline may substitute for the Texas Asbestos Law and Rules course.

(d) Interstate commerce. An out-of-state corporation that engages only in interstate commerce may qualify as not transacting business in Texas if the corporation submits a sworn affidavit from a corporate officer stating that the corporation engages only in interstate commerce and does not transact business in Texas.

(e) Formerly licensed in Texas. A person who was licensed by the department, moved to another state, and is currently licensed and has been in practice in the other state for the two years preceding the date of application may obtain a new license without reexamination. The person must pay to the department a fee that is equal to two times the normally required renewal fee for the license term. The person must meet all other qualifications applicable to the new license.

§296.45. Insurance Requirements.

(a) Licensees who perform asbestos-related activities and who are required to maintain insurance as a condition of licensure must meet the insurance requirements in this section and the applicable insurance requirements for their licenses in accordance with §1954.105(c) of the Act and this chapter.

(b) Liability insurance must include coverage in the amount of at least \$1 million per occurrence.

(c) Licensees required to have insurance must obtain individual coverage unless covered under the policy of the individual's employer or employed by an entity that qualifies for insurance exemption.

(d) Licensees must obtain policies that are written by:

(1) an insurance company authorized to do business in Texas;

(2) an eligible surplus lines insurer as defined in the Insurance Code, §981.002 (relating to Definitions);

(3) a Texas-registered risk retention group; or

(4) a Texas-registered purchasing group.

(e) Before a policy is canceled by the licensee or the insurance company, the licensee shall notify the department at least 10 days before the effective date of the cancellation. The licensee shall promptly replace the policy without lapse in coverage.

(f) Before a policy expires, the licensee shall promptly replace or renew the policy without lapse in coverage.

(g) Exemptions.

(1) A governmental entity applying for a license is exempt from the insurance requirements in this chapter.

(2) A non-governmental entity (company or individual) applying for a license may be exempted from the insurance requirements in this chapter by submitting to the department for approval a notarized affidavit stating a net worth of at least \$1 million dollars accompanied by a current financial statement that documents the net worth. A new affidavit and current financial statement must be submitted with each application.

§296.46. Asbestos Abatement Worker.

(a) Registration required. A person must be registered as an asbestos abatement worker to perform asbestos abatement work in a public building, including, but not limited to, performing any maintenance, repair, installation, renovation, or cleaning that dislodges, breaks, cuts, abrades, or impinges on asbestos material.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos abatement worker may perform asbestos abatement activities or O&M activities only while supervised by a licensed asbestos abatement supervisor or licensed asbestos O&M supervisor.

(B) An asbestos abatement worker may not:

(i) perform asbestos abatement activities with expired training or an expired medical examination; or

(ii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos abatement worker shall:

(A) comply with standards of operation, including the EPA regulations adopted by reference in §296.2 of this title (relating to Adoption by Reference of Federal and Other Standards) and the OSHA regulations as referenced in this chapter;

(B) comply with the work practices described in §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);

(C) comply with the work practices described in §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings);

(D) comply with the standards and practices for O&M activities, in accordance with §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings);

(E) comply with the work practices described in §296.197 of this title (relating to Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material);

(F) comply with the work practices described in §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings);

(G) comply with the work practices described in §296.199 of this title (relating to Exemptions for the Removal of Intact Asbestos-Containing Materials in a Public Building);

(H) cooperate with department personnel during inspections and investigations, in accordance with §296.231 of this title (relating to Inspections and Investigations); and

(I) properly wear personal protective equipment as provided by the asbestos abatement contractor.

(c) Initial and renewal registration requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a training certificate for the initial Asbestos Abatement Worker course and any refresher training courses to show current accreditation, in accordance with §296.93 of this title (relating to Asbestos Training Courses). The Contractor/Supervisor course may be substituted for the Asbestos Abatement Worker course. All subsequent refresher training courses must be in the same discipline as the initial training course;

(C) a copy of the current photo-identification card issued by the training provider; and

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a current training certificate for the Asbestos Abatement Worker course or the Contractor/Supervisor course, if the Contractor/Supervisor course was used to meet requirements for the initial asbestos abatement worker license, in accordance with §296.93 of this title;

(C) a copy of the current photo-identification card issued by the training provider; and

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application.

*§296.47. Asbestos Abatement Supervisor.*

(a) License required. A person must be licensed as an asbestos abatement supervisor to directly oversee personnel and work practices during an asbestos abatement project conducted in a public building.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos abatement supervisor must be employed by a licensed asbestos abatement contractor or operations and maintenance (O&M) contractor to supervise or perform asbestos abatement activities in a public building, except when performing activities in accordance with §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings). An asbestos abatement supervisor employed by an O&M contractor is limited to SSSD activities.

(B) An asbestos abatement supervisor may perform the duties of an asbestos abatement worker on any project.

(C) An asbestos abatement supervisor may not:

(i) perform asbestos abatement activities when the asbestos project manager or asbestos consultant is not on-site, except during asbestos O&M activities and activities performed in accordance with §296.197 of this title (relating to Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material), §296.198 of this title, and §296.199 of this title (relating to Exemptions for the Removal of Intact Asbestos-Containing Materials in a Public Building);

(ii) supervise or perform asbestos abatement activities with expired training or an expired medical examination; or

(iii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos abatement supervisor shall:

(A) comply with standards of operation, including the EPA regulations adopted by reference in §296.2 of this title (relating to Adoption by Reference of Federal and Other Standards) and the OSHA regulations as referenced in this chapter;

(B) comply with the work practices described in §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);

(C) comply with the work practices described in §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings);

(D) comply with the standards and practices for O&M activities, in accordance with §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings);

(E) comply with the work practices described in §296.197 of this title (relating to Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material);

(F) comply with the work practices described in §296.198 of this title;

(G) comply with the work practices described in §296.199 of this title;

(H) maintain records at the work site location, in accordance with §296.200 of this title (relating to Recordkeeping);

(I) cooperate with department personnel during inspections and investigations, in accordance with §296.231 of this title (relating to Inspections and Investigations);

(J) comply with personal protective equipment (PPE) requirements for employees who perform asbestos-related activities to ensure that PPE is worn in accordance with 29 CFR §1926.1101 (relating to Asbestos);

(K) be on the project site at all times when asbestos abatement activities are being performed;

(L) control access to the regulated area and entrance into containment;

(M) ensure asbestos abatement activities are performed only when the asbestos project manager or asbestos consultant is on-site, except during asbestos O&M activities and activities performed in accordance with §§296.197, 296.198, or 296.199 of this title; and

(N) immediately correct conditions not in compliance with this chapter. If these conditions are related to removal of ACBM, then removal must stop and may not resume until all identified conditions have been corrected.

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a training certificate for the initial Asbestos Contractor/Supervisor course and any refresher training courses to show current accreditation, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(C) a copy of the current photo-identification card issued by the training provider;

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application;

(E) proof of passing the department's Asbestos Contractor/Supervisor examination, in accordance with Subchapter G of this chapter (relating to State Licensing Examination); and

(F) verifiable written documentation of at least 90 days of qualifying work experience gained within the past 24 months that includes:

(i) contact information for the person who supervised the applicant and can verify the work experience; and

(ii) proof of any combination of the following qualifying work experiences:

(I) experience as a licensed asbestos consultant, asbestos project manager, asbestos abatement supervisor, or asbestos abatement worker or experience as an accredited asbestos project designer, asbestos project monitor, asbestos abatement supervisor, or asbestos abatement worker in Texas or another state. Experience must have been gained while accreditation was current as required in the MAP; and

(II) experience as a licensed or trained asbestos air monitoring technician on at least five asbestos abatement projects. Experience must be gained after completion of appropriate training. No more than 30 days may be counted as qualifying experience under this category.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a current training certificate for the Asbestos Contractor/Supervisor course, in accordance with §296.93 of this title;

(C) a copy of the current photo-identification card issued by the training provider; and

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application.

§296.48. Asbestos Abatement Contractor.

(a) License required. A person must be licensed as an asbestos abatement contractor to conduct asbestos abatement in a public building.

(b) Scope of practice.

(1) Practice and limitations.

(A) Asbestos abatement contractors shall employ licensed asbestos abatement supervisors and registered asbestos abatement workers to perform asbestos abatement activities.

(B) An asbestos abatement contractor must employ a responsible person trained in accordance with subsection (c)(1)(A) or (c)(2)(A) of this section to engage in asbestos abatement activities.

(C) Asbestos abatement contractors may employ licensed asbestos operations and maintenance (O&M) supervisors to supervise O&M activities or to work as asbestos abatement workers.

(D) Asbestos abatement contractors may not:

(i) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees);

(ii) engage in the acts prohibited in §296.32 of this title (relating to Conflict of Interest); or

(iii) engage in asbestos abatement activities when the asbestos project manager or asbestos consultant is not on-site.

(2) Responsibilities. An asbestos abatement contractor shall:

(A) comply with EPA regulations adopted by reference in §296.2 of this title (relating to Adoption by Reference of Federal and Other Standards);

(B) ensure that each employee who performs asbestos-related activities has a current Physician's Written Statement, in accordance with §296.42(j) of this title (relating to Initial and Renewal Applications);

(C) maintain liability insurance, in accordance with §296.45 of this title (relating to Insurance Requirements);

(D) comply with the work practices described in §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);

(E) comply with the work practices described in §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings);

(F) comply with the standards and practices for O&M activities, in accordance with §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings);

(G) comply with the work practices described in §296.197 of this title (relating to Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material);

(H) comply with the work practices described in §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings);

(I) comply with the work practices described in §296.199 of this title (relating to Exemptions for the Removal of Intact Asbestos-Containing Materials in a Public Building);

(J) ensure that all training is current for each employee who performs asbestos-related activities, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(K) comply with recordkeeping requirements, in accordance with §296.200 of this title (relating to Recordkeeping);

(L) comply with the notification requirements, in accordance with §296.211 of this title (relating to Notifications);

(M) cooperate with department personnel during inspections and investigations, in accordance with §296.231 of this title (relating to Inspections and Investigations);

(N) comply with 29 CFR §1926.1101 (relating to Asbestos);

(O) appoint at least one responsible person who will comply with the training requirements specified in subsection (c)(1)(A) or (c)(2)(A) of this section, oversee the operations for the asbestos abatement activities, and ensure compliance with this chapter;

(P) report changes of responsible person in writing to the department within 10 working days;

(Q) employ at least one licensed asbestos abatement supervisor to oversee asbestos abatement activity for each project where asbestos abatement activity is occurring;

(R) at no cost to the employee, comply with personal protective equipment (PPE) requirements in accordance with 29 CFR §1910.132(h) (relating to General Requirements) and §1926.1101(h) and (i) for employees who perform asbestos-related activities by:

(i) providing and maintaining PPE for employees;

(ii) training employees on the proper use, care, and inspection of PPE;

(iii) documenting training of the proper use, care, and inspection of PPE;

(iv) inspecting respirators every six months and documenting the inspections; and

(v) ensuring compliance with the use of PPE;

(S) provide and maintain in good working condition the necessary equipment for performing asbestos abatement activities; and

(T) provide for disposal of ACWM, in accordance with 40 CFR §61.150 (relating to Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation, and Spraying Operations):

(i) complete and provide a waste shipment record (manifest) for the asbestos transporter before the transporter departs with the waste on a form as described for the waste generator in 40 CFR §61.150(d);

(ii) contact the waste site if a copy of the manifest signed by the owner or operator of the designated waste disposal site has not been received within 35 days from the date the waste was accepted by the transporter;

(iii) report in writing to the department in accordance with 40 CFR §61.150(d)(4) if a copy of the manifest signed by the owner or operator of the designated waste disposal site is not obtained by the 45th day from the date the waste was accepted by the transporter;

(iv) provide a copy of the manifest signed by the owner or operator of the designated waste disposal site to the project consultant, or the building owner if there is no consultant; and

(v) maintain records in accordance with 40 CFR §61.150(d)(5) and §296.200 of this title.

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) current training certificate for the Asbestos Contractor/Supervisor course for the appointed responsible person, in accordance with §296.93 of this title;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas;

(D) a taxpayer identification number;

(E) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(F) physical address of office where asbestos records are maintained in accordance with §296.200 of this title;

(G) evidence of asbestos abatement liability insurance coverage in accordance with §1954.105(c) of the Act and §296.45 of this title;

(H) a copy of the applicant's standard operating procedures relating to activities involving ACBM, specifically:

(i) a written respiratory protection plan to be maintained and adhered to during periods of abatement activity;

(ii) a description of the on-site personnel decontamination procedures;

(iii) a description of the procedures for handling and disposal of ACWM;

(iv) a description of the engineering controls and work practices for asbestos abatement;

(v) a description of the personal air monitoring procedures;

(vi) a description of final cleanup procedures; and

(vii) a description of the provisions for recordkeeping.

(2) Renewal requirements: An applicant renewing a license shall submit the following:

(A) current training certificate for the Asbestos Contractor/Supervisor course for the appointed responsible person, in accordance with §296.93 of this title;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas;

(D) physical address of office where asbestos records are maintained in accordance with §296.200 of this title; and

(E) evidence of asbestos abatement liability insurance coverage in accordance with §1954.105(c) of the Act and §296.45 of this title.

§296.49. Asbestos Operations and Maintenance Supervisor.

(a) License required. A person must be licensed as an asbestos operations and maintenance (O&M) supervisor to directly oversee personnel and work practices during O&M activities that affect ACBM in public buildings. A licensed asbestos abatement supervisor may also perform these same duties.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos O&M supervisor must be employed by a licensed asbestos O&M contractor or by a licensed asbestos abatement contractor to perform or supervise asbestos O&M activities in a public building, except when performing activities in accordance with §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings).

(B) An asbestos O&M supervisor may perform the duties of an asbestos abatement worker on any project.

(C) An asbestos O&M supervisor may not:

(i) supervise asbestos abatement projects, which are larger than SSSD activities as defined in §296.21(98) of this title (relating to Definitions);

(ii) supervise any activity for which the sole purpose is removing ACBM;

(iii) supervise or perform asbestos abatement activities with expired training or medical examination; or

(iv) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos O&M supervisor shall:

(A) comply with the EPA regulations for standards of small-scale, short-duration work practices that are adopted by reference in §296.2 of this title (relating to Adoption by Reference of Federal and Other Standards);

(B) comply with 29 CFR §1926.1101(g)(9) (relating to Asbestos);

(C) comply with the work practices described in §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);

(D) comply with the work practices described in §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings);

(E) comply with the work practices described in §296.197 of this title (relating to Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material);

(F) comply with the work practices described in §296.198 of this title;

(G) comply with the work practices described in §296.199 of this title (relating to Exemptions for the Removal of Intact Asbestos-Containing Materials in a Public Building);

(H) maintain records at both the central office and work site locations in accordance with §296.200 of this title (relating to Recordkeeping);

(I) cooperate with department personnel during inspections and investigations in accordance with §296.231 of this title (relating to Inspections and Investigations);

(J) comply with personal protective equipment (PPE) requirements for employees who perform asbestos-related activities to ensure that PPE is worn in accordance with 29 CFR §1926.1101; and

(K) immediately correct conditions not in compliance with this chapter. If these conditions are related to removal of ACBM, then removal must stop and may not resume until all identified conditions have been corrected.

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a training certificate for the initial Asbestos Contractor/Supervisor course and any refresher training courses to show current accreditation, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(C) a copy of the current photo-identification card issued by the training provider;

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application; and

(E) proof of passing the department's Asbestos Contractor/Supervisor examination, in accordance with Subchapter G of this chapter (relating to State Licensing Examination).

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a current training certificate for the Asbestos Contractor/Supervisor course in accordance with §296.93 of this title;

(C) a copy of the current photo-identification card issued by the training provider; and

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application.

§296.50. Asbestos Operations and Maintenance Contractor.

(a) License required. A person must be licensed as an asbestos abatement contractor or as an asbestos operations and maintenance (O&M) contractor to conduct asbestos O&M activities. Building owners that have their own employees perform such activities for their buildings shall be licensed according to this section.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos O&M contractor is restricted to small-scale, short-duration work activities and engineering controls for tasks that result in the disturbance or removal of asbestos in the course of performing repairs, maintenance, renovation, installation, replacement, or cleanup operations in accordance with §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings).

(B) The asbestos O&M contractor's employees who perform asbestos O&M activities must be registered asbestos abatement workers, licensed O&M supervisors, or licensed asbestos abatement supervisors.

(C) An asbestos O&M contractor must employ a responsible person trained in accordance with subsection (c)(1)(A) or (c)(2)(A) of this section to engage in asbestos O&M activities.

(D) An asbestos O&M contractor may not:

(i) conduct asbestos abatement activities in a public building where the primary purpose of the activity is abatement;

(ii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees); or

(iii) engage in the acts prohibited by §296.32 of this title (relating to Conflict of Interest).

(2) Responsibilities. An asbestos O&M contractor shall:

(A) ensure that all training is current for each employee who performs asbestos-related activities in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(B) comply with standards of operation in accordance with §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings) and §296.194 of this title for the asbestos activity being performed;

(C) provide for temporary storage of ACWM, in accordance with §296.193(j)(9) of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings);

(D) comply with the work practices described in §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings);

(E) comply with the work practices described in §296.199 of this title (relating to Exemptions for the Removal of Intact Asbestos-Containing Materials in a Public Building);

(F) comply with recordkeeping requirements in accordance with §296.200 of this title (relating to Recordkeeping);

(G) comply with the notification requirements in accordance with §296.211 of this title (relating to Notifications);

(H) cooperate with department personnel during inspections and investigations, in accordance with §296.231 of this title (relating to Inspections and Investigations);

(I) comply with 29 CFR §1926.1101(g)(9), (relating to Asbestos);

(J) employ at least one licensed asbestos O&M supervisor or licensed asbestos abatement supervisor to oversee or perform O&M activities involving asbestos abatement;

(K) appoint at least one responsible person who will comply with the training requirements specified in subsection (c)(1)(A) of this section, oversee the operations for the asbestos O&M activities, and ensure compliance with this chapter;

(L) report changes of responsible person in writing to the department within 10 working days;

(M) at no cost to the employee, comply with personal protective equipment (PPE) requirements in accordance with 29 CFR §1910.132(h) and §1926.1101(h) and (i) for employees who perform asbestos-related activities by:

(i) providing and maintaining PPE for employees;

(ii) training employees in the proper use, care, and inspection of PPE;

(iii) documenting training of the proper use, care, and inspection of PPE;

(iv) documenting respirator inspections; and

(v) ensuring compliance with the use of PPE;

(N) provide and maintain in good working condition, and free of asbestos contamination, the necessary equipment for performing asbestos O&M activities;

(O) provide for disposal of ACWM, in accordance with 40 CFR §61.150 (relating to Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation, and Spraying Operations):

(i) complete and provide a waste shipment record (manifest) for the asbestos transporter before the transporter departs with the waste;

(ii) contact the waste site if a copy of the manifest has not been received within 35 calendar days from the date the waste was accepted by the transporter;

(iii) report in writing to the department in accordance with 40 CFR §61.150(d)(4) if a copy is not obtained by the 45th calendar day from the date the waste was accepted by the transporter; and

(iv) maintain records in accordance with 40 CFR §61.150(d)(5).

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) a current training certificate for the Asbestos Contractor/Supervisor course for the appointed responsible person, in accordance with §296.93 of this title;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a valid certificate of authority issued by the Secretary of State authorizing the applicant to do business in Texas if the applicant is located outside of Texas;

(D) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(E) a taxpayer identification number;

(F) physical address of office where asbestos records are maintained in accordance with §296.200 of this title;

(G) evidence of asbestos abatement liability insurance as required in §296.45 of this title (relating to Insurance Requirements); and

(H) a copy of the company's standard operating procedures relating to O&M activities involving ACBM as referenced in 29 CFR §1926.1101(g)(9), must include:

(i) a written respiratory protection plan to be maintained and adhered to during periods of abatement activity;

(ii) a description of the on-site personnel decontamination procedures;

(iii) a description of the procedures for handling and disposal of ACWM;

(iv) a description of the engineering controls and work practices for asbestos abatement;

(v) a description of the personal air monitoring procedures;

(vi) a description of final cleanup procedures; and

(vii) a description of the provisions for recordkeeping.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) a current training certificate for the Asbestos Contractor/Supervisor course for the appointed responsible person, in accordance with §296.93 of this title;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a valid certificate of authority issued by the Secretary of State authorizing the applicant to do business in Texas if the applicant is located outside of Texas;

(D) physical address of office where asbestos records are maintained in accordance with §296.200 of this title; and

(E) evidence of asbestos abatement liability insurance as required in §296.45 of this title.

§296.51. Asbestos Air Monitoring Technician.

(a) License required. A person must be licensed as an asbestos air monitoring technician (AMT) to perform air monitoring services for the presence of airborne asbestos in a public building. A licensed asbestos consultant may also perform these same services.

(b) Scope of practice.

(1) Practice and limitations.

(A) An AMT may:

(i) collect baseline, area, and clearance samples, if employed by an asbestos consultant agency or an asbestos laboratory;

(ii) collect personal samples, if employed by an asbestos abatement contractor or asbestos operations and maintenance (O&M) contractor, for compliance with 29 CFR §1926.1101 (relating to Asbestos);

(iii) be employed by a building owner to collect personal air samples on behalf of the contractor on the same project for which the AMT is collecting baseline, area, and clearance samples for the asbestos consultant agency; and

(iv) analyze airborne fibers in the field, if employed by a licensed asbestos laboratory, and the AMT:

(I) is listed on the American Industrial Hygiene Association Asbestos Analyst Registry in accordance with §296.59 of this title (relating to Asbestos Laboratory); or

(II) has received the NIOSH 582 or NIOSH 582 Equivalent training and participates in the AIHA Proficiency Analytical Testing (PAT) Program.

(B) An AMT may not:

(i) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees);

(ii) engage in the acts prohibited in §296.32 of this title (relating to Conflict of Interest); or

(iii) be employed by an asbestos abatement contractor to collect personal air samples on the same project for which the AMT is collecting baseline, area, and clearance samples for the asbestos consultant agency.

(2) Responsibilities. An AMT shall:

(A) collect area, baseline, and clearance air samples either:

(i) as described in the asbestos abatement project specifications and plans; or

(ii) in accordance with §296.192(h) of this title (relating to General Requirements for Asbestos Abatement in Public Buildings) when specifications and plans are not required; and

(B) collect personal air samples in accordance with 40 CFR Part 763, Subpart G (relating to Asbestos Worker Protection) or 29 CFR §1926.1101 (relating to Asbestos);

(C) record the results of area, baseline, clearance, and personal air sampling in writing and report the results in writing to the asbestos abatement contractor within:

(i) 24 hours after sampling if the air samples were analyzed on-site; or

(ii) 72 hours after sampling if the air samples were analyzed in an asbestos laboratory off-site;

(D) comply with recordkeeping requirements, in accordance with §296.200 of this title (relating to Recordkeeping); and

(E) if analyzing air samples in the field, demonstrate full competency in PCM analysis using the NIOSH 7400 method upon request by a department inspector.

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) training certificates for the initial Asbestos Air Monitoring Technician course and any refresher training courses to show current accreditation, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(C) copy of the current photo-identification card issued by the training provider;

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application;

(E) a high school diploma or equivalent;

(F) proof of passing the department's Asbestos Air Monitoring Technician examination, in accordance with Subchapter G of this chapter (relating to State Licensing Examination); and

(G) proof of work experience performing air monitoring on at least three asbestos abatement projects for a total of at least 15 days under the direct supervision of a licensed air monitoring technician working for a licensed asbestos laboratory, asbestos abatement contractor, or asbestos consultant agency. Experience must be gained after completion of appropriate training.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) current training certificate for the Asbestos Air Monitoring Technician course, in accordance with §296.93 of this title;

(C) copy of the current photo-identification card issued by the training provider; and

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph

may be submitted in digital format with an electronically submitted application.

§296.52. Asbestos Inspector.

(a) License required. A person must be licensed as an asbestos inspector to conduct asbestos surveys in public buildings.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos inspector may:

(i) determine the location and condition of suspect ACBM in a public building;

(ii) determine that ACBM is present in a public building by collecting bulk samples of suspected ACBM or assuming the suspected ACBM contains greater than 1.0% asbestos; and

(iii) develop an asbestos survey report.

(B) An asbestos inspector may not:

(i) perform asbestos surveys in public buildings if not employed by a licensed asbestos consultant agency or licensed asbestos management planner agency;

(ii) perform asbestos surveys if the required training or medical examination has expired; or

(iii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos inspector shall:

(A) comply with standards of operation and sampling schemes, as described in §296.191 of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities);

(B) sign, date, and print name and license number on the cover page of each asbestos survey report; and

(C) cooperate with department personnel during compliance inspections and investigations, as described in §296.231 of this title (relating to Inspections and Investigations).

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a training certificate for the initial Asbestos Inspector course and any refresher training courses to show current accreditation, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(C) a copy of the current photo-identification card issued by the training provider;

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph

may be submitted in digital format with an electronically submitted application;

(E) proof of high school diploma or equivalent;

(F) proof of passing the department's Asbestos Inspector examination, in accordance with Subchapter G of this chapter (relating to State Licensing Examination); and

(G) proof of work experience that includes participation in at least five asbestos surveys performed under the direct supervision of a licensed management planner, licensed asbestos inspector, or licensed asbestos consultant. Experience must be gained after completion of appropriate training.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a current training certificate for the Asbestos Inspector course, in accordance with §296.93 of this title;

(C) a copy of the current photo-identification card issued by the training provider; and

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application.

§296.53. Asbestos Project Manager.

(a) License required. A person must be licensed as an asbestos project manager and must be employed by a licensed asbestos consultant agency and have written delegated authority in accordance with §296.56(b)(1)(A)(ix) of this title (relating to Asbestos Consultant) to perform asbestos project management in a public building.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos project manager must be employed by a licensed asbestos consultant agency to perform in the capacity of the building owner's representative to evaluate the quality of the work being performed during an asbestos abatement project.

(B) An asbestos project manager may:

(i) monitor an asbestos abatement project and document whether the asbestos abatement contractor is complying with the asbestos abatement specifications and plans and this chapter and report observations to the asbestos abatement contractor and asbestos consultant;

(ii) recommend changes to the asbestos abatement specifications and plans to the asbestos consultant. Changes to specifications and plans must be made in writing by the licensed asbestos consultant and be available on-site; and

(iii) assist the asbestos consultant in the development of an asbestos exposure assessment.

(C) An asbestos project manager may not:

(i) conduct visual inspections without written authorization by the licensed asbestos consultant for the project;

(ii) perform project management if the required training or medical examination has expired; or

(iii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos project manager shall:

(A) ensure compliance with regulations adopted by reference in §296.2 of this title (relating to Adoption by Reference of Federal and Other Standards);

(B) ensure compliance with standards of operation, as described in §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);

(C) ensure compliance with standards of operation and that asbestos abatement controls are implemented for the asbestos activity being performed, as described in §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings);

(D) ensure compliance with the contract documents, specifications and plans, and relevant regulations for the duration of the project from the beginning of containment construction through completion of the removal of containment and final visual inspection of the project site. The asbestos project manager must be on the project site at all times when asbestos abatement activities are being performed and when ACWM is being loaded for transport;

(E) maintain records at both the central office and on-site locations, as described in §296.200 of this title (relating to Recordkeeping); and

(F) cooperate with department personnel during compliance inspections and investigations, as described in §296.231 of this title (relating to Inspections and Investigations).

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a training certificate for the initial Asbestos Contractor/Supervisor course and any refresher training courses to show current accreditation, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(C) a copy of the current photo-identification card issued by the training provider;

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application;

(E) proof of high school diploma or equivalent;

(F) proof of passing the department's Asbestos Contractor/Supervisor examination, in accordance with Subchapter G of this chapter (relating to State Licensing Examination); and

(G) verifiable written documentation of at least 45 days of qualifying work experience gained within the past 24 months that includes:

(i) contact information for the person who supervised the applicant and can verify the work experience; and

(ii) proof of any combination of the following qualifying work experiences:

(I) experience as a licensed asbestos consultant, project manager, asbestos abatement supervisor, or asbestos abatement worker or experience as an accredited asbestos project designer, asbestos project monitor, asbestos abatement supervisor, or asbestos abatement worker in Texas or another state. Experience must have been gained while accreditation was current as required in the MAP; and

(II) experience as a licensed or trained asbestos air monitoring technician on at least five asbestos abatement projects. Experience must be gained after completion of appropriate training. No more than 15 days may be counted as qualifying experience for this category.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) a current training certificate for the Asbestos Contractor/Supervisor course, in accordance with §296.93 of this title;

(C) a copy of the current photo-identification card issued by the training provider; and

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application.

§296.54. Asbestos Management Planner:

(a) License required. A person must be licensed as an asbestos management planner to develop plans to manage asbestos in public buildings.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos management planner may:

(i) develop a management plan; and

(ii) act as a licensed asbestos inspector.

(B) An asbestos management planner may not:

(i) be employed as a management planner at a company that employs another asbestos management planner, asbestos consultant, or an asbestos inspector, unless the company is licensed as an asbestos management planner agency, in accordance with §296.55 of this title (relating to Asbestos Management Planner Agency), or an asbestos consultant agency, in accordance with §296.57 of this title (relating to Asbestos Consultant Agency);

(ii) perform asbestos surveys or develop management plans if any required training or medical examination has expired; or

(iii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos management planner shall:

(A) prepare management plans that include, at a minimum:

(i) the date of asbestos survey;

(ii) a blueprint, diagram, or written description of each building that identifies clearly each location and approximate square or linear footage of any homogeneous or sampling area where material was sampled for ACBM;

(iii) sample information, specifically:

(I) a drawing and description of the exact locations where bulk samples were collected and the dates of collection;

(II) a copy of the analyses of any bulk samples and the dates of analyses; and

(III) a copy of any other laboratory reports pertaining to the analyses;

(iv) a description of assessments:

(I) in a public building that is not a school, the assessment must include all ACBM; or

(II) in a school, the assessment must be done as required by 40 CFR §763.88 (relating to Assessment), of material that was identified before December 14, 1987, as friable ACBM or friable suspected ACBM assumed to be ACM;

(v) for each person making the assessment:

(I) name and signature; and

(II) Texas license number;

(vi) a description of any required response action or preventative measures needed to reduce asbestos exposure or address potential hazards related to asbestos; and

(vii) a description of any response actions or preventive measures taken to reduce asbestos exposure, including:

(I) the names and addresses of all contractors involved;

(II) start and stop dates of the work; and

(III) results of any air samples analyzed during and upon completion of the work;

(B) prepare asbestos survey reports as defined in §296.21(103) of this title (relating to Definitions);

(C) advise the building owner in writing of the requirement to address ACBM that is damaged or separating from building material or equipment, or that will be disturbed during operations and maintenance, renovation, or demolition;

(D) sign, date, and print name and license number on all drawings and the cover page of asbestos survey reports and management plans; and

(E) comply with recordkeeping requirements, in accordance with §296.200 of this title (relating to Recordkeeping).

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relat-

ing to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) training certificates for the initial Asbestos Inspector and Asbestos Management Planner courses and any refresher training courses to show current accreditation, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(C) copies of the current photo-identification cards issued by the training provider;

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application;

(E) proof of an associate's degree or successful completion of a minimum of 60 credit hours from an accredited college or university;

(F) proof of passing the department's Asbestos Management Planner examination, in accordance with Subchapter G of this chapter (relating to State Licensing Examination);

(G) proof of professional liability insurance coverage for errors and omissions if performing work for hire, or coverage under the applicant's employer's policy, in accordance with §1954.105(c) of the Act and §296.45 of this title (relating to Insurance Requirements); and

(H) verifiable work experience that includes participation in the development of at least five management plans as a licensed asbestos management planner or under the direct supervision of a licensed asbestos management planner or licensed asbestos consultant and participation in conducting five asbestos surveys, including development of asbestos survey reports, as a licensed asbestos inspector, licensed asbestos management planner, licensed asbestos consultant or under the direct supervision of a licensed asbestos inspector, licensed asbestos management planner, or licensed asbestos consultant. The department will accept experience developing a management plan and participating in the asbestos survey on the same project for both the management plan and the asbestos survey. Experience must be gained after completion of appropriate training.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title;

(B) copies of current training certificates for the Asbestos Inspector and Asbestos Management Planner courses in accordance with §296.93 of this title;

(C) copies of the current photo-identification cards issued by the training provider;

(D) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that

may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application; and

(E) proof of professional liability insurance coverage for errors and omissions if performing work for hire, or coverage under the applicant's employer's policy, in accordance with §1954.105(c) of the Act and §296.45 of this title.

§296.55. Asbestos Management Planner Agency.

(a) License required. A person employing an asbestos management planner and one or more additional asbestos management planners, asbestos consultants, or asbestos inspectors must be licensed as an asbestos management planner agency.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos management planner agency may employ:

(i) licensed asbestos management planners and licensed asbestos consultants to conduct surveys, develop asbestos survey reports, and develop management plans;

(ii) licensed asbestos inspectors to conduct surveys and develop asbestos survey reports; and

(iii) licensed asbestos consultants only when the consultants' duties are limited to those of management planners.

(B) An asbestos management planner agency may not:

(i) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees);

(ii) engage in the acts prohibited in §296.32 of this title (relating to Conflict of Interest);

(iii) perform asbestos management planning if not insured in accordance with §1954.105(c) of the Act and §296.45 of this title (relating to Insurance Requirements); or

(iv) perform asbestos management planning or surveys without a licensed asbestos management planner appointed as the responsible person.

(2) Responsibilities. An asbestos management planner agency shall:

(A) appoint one employee who is a licensed asbestos management planner to be the responsible person. Any changes of responsible person must be reported in writing to the department within ten working days of the change;

(B) use generally accepted principles and practices in performing asbestos surveys and producing management plans, as described in §296.191 of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities);

(C) ensure that each employee who performs asbestos-related activities receives an annual medical examination, provided at no cost to the employee, in accordance with §296.42(j) of this title (relating to Initial and Renewal Applications);

(D) maintain professional liability insurance coverage for errors and omissions, in accordance with §1954.105(c) of the Act and §296.45 of this title;

(E) comply with the responsibilities for licensed asbestos inspectors, in accordance with §296.52 of this title (relating to

Asbestos Inspector), and for licensed asbestos management planners in accordance with §296.54 of this title (relating to Asbestos Management Planner);

(F) comply with standards of operation, in accordance with §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);

(G) comply with personal protective equipment (PPE) requirements in 29 CFR §1926.1101(h) and (i) (relating to Asbestos), for employees who perform asbestos-related activities to include:

(i) providing and maintaining PPE for employees;

(ii) training employees in the proper use, care, and inspection of PPE;

(iii) documenting training of the proper use, care, and inspection of PPE;

(iv) inspecting respirators every six months and documenting the inspections; and

(v) ensuring compliance with the use of PPE;

(H) acquire the necessary equipment for performing asbestos-related activities and maintain equipment in good working condition;

(I) ensure each employee who performs asbestos-related activities receives annual training in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(J) comply with recordkeeping requirements, as described in §296.200 of this title (relating to Recordkeeping); and

(K) cooperate with department personnel during inspections and investigations, as described in §296.231 of this title (relating to Inspections and Investigations).

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) name and license number of the asbestos management planner appointed as the responsible person;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(D) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas; and

(E) evidence of professional liability insurance coverage for errors and omissions, in accordance with §1954.105(c) of the Act and §296.45 of this title.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) name and license number of the asbestos management planner appointed as the responsible person;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(D) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas; and

(E) evidence of professional liability insurance coverage for errors and omissions, in accordance with §1954.105(c) of the Act and §296.45 of this title.

§296.56. Asbestos Consultant.

(a) License required. A person must be licensed as an asbestos consultant to provide asbestos consulting services relating to a public building.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos consultant may:

(i) prepare an asbestos abatement project design;

(ii) collect bulk material samples and plan sampling strategies;

(iii) develop management plans;

(iv) perform asbestos surveys, develop an asbestos survey report, and report the results;

(v) provide consultation regarding compliance with asbestos regulations and standards;

(vi) recommend abatement options, prepare contract documents for asbestos abatement projects, and provide technical specifications and plans to include engineering controls, project layout, and abatement methods;

(vii) provide the building owner with asbestos project management services, asbestos air monitoring services, and sampling strategies to be used during asbestos abatement projects;

(viii) recommend appropriate personal protective equipment for asbestos abatement activities;

(ix) designate a project manager and delegate specific responsibilities and authority to the project manager in writing; and

(x) design and direct an exposure assessment in accordance with §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings).

(B) An asbestos consultant may not:

(i) design an asbestos abatement project that includes alterations to a building's structure, or its electrical, mechanical, or safety systems or their components, unless the consultant is, or works together with, a licensed professional engineer (PE) in Texas. The specifications and plans for such alterations must be prepared as required by the Occupations Code, Chapter 1001 (relating to Engineers) and 22 TAC Chapters 131-139 (relating to Texas Board of Professional Engineers);

(ii) prepare a design for an asbestos abatement project that specifies work practices that vary from the requirements of §296.193(a)(2) of this title (relating to Abatement Practices and

Procedures for Full Containment in Public Buildings) unless the work practices are as protective of public health and are approved by the department;

(iii) employ asbestos inspectors, asbestos project managers, asbestos air monitoring technicians, asbestos management planners, or additional asbestos consultants to work in the capacity of their licenses unless licensed as an asbestos consultant agency in accordance with §296.57 of this title (relating to Asbestos Consultant Agency);

(iv) perform consulting activities if any required training or medical examination has expired;

(v) perform consulting activities if not properly insured in accordance with §1954.105(c) of the Act and §296.45 of this title (relating to Insurance Requirements);

(vi) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees); or

(vii) engage in the acts prohibited in §296.32 of this title (relating to Conflict of Interest).

(2) Responsibilities. An asbestos consultant shall:

(A) provide the following professional services to the building owner or the owner's authorized representative:

(i) project air monitoring, in accordance with §296.51(b) of this title (relating to Asbestos Air Monitoring Technician);

(ii) asbestos surveys and assessments, in accordance with §296.52(b) of this title (relating to Asbestos Inspector);

(iii) project management, in accordance with §296.53(b) of this title (relating to Asbestos Project Manager);

(iv) management plans, in accordance with §296.54(b) of this title (relating to Asbestos Management Planner);

(v) a written report after completion of an asbestos survey advising the building owner of the requirement to address ACBM or assumed ACBM that is damaged or separating or that will be disturbed as part of any renovation, demolition, or O&M;

(vi) progress records and, when necessary, photographs;

(vii) ensuring that ACWM is properly transported and disposed of by:

(I) observing that ACWM containers are properly labeled, in accordance with 40 CFR §61.150(a)(iv) - (v) (relating to Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation, and Spraying Operations);

(II) observing that vehicles used to transport ACWM are marked, in accordance with 40 CFR §61.150(c);

(III) obtaining a copy of a waste shipment record (manifest) signed by the owner or operator of the designated disposal site from the licensed asbestos contractor on a form as described in 40 CFR §61.150(d) before the removal of the waste from the site; and

(IV) ensuring the building owner receives a manifest from the contractor, signed by the disposal site owner or operator, for each load of ACWM abated from the building; and

(viii) final close-out documents for each asbestos abatement project to the building owner or operator, which include:

(I) baseline and area air monitoring results;

(II) clearance documentation including visual inspections and clearance air monitoring results, in accordance with §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);

(III) signed manifest from the contractor;

(IV) copies of licenses, certifications, and registrations for all personnel; and

(V) daily logs;

(B) prepare specifications and plans, schedules, and contract options for asbestos abatement projects, in accordance with §296.192 of this title:

(i) for specifications and plans prepared by the consultant, the consultant must:

(I) sign every page that addresses the scope of work or contains drawings related to the abatement work;

(II) prepare a cover page with the consultant's signature, date, license number, and license expiration date; and

(III) provide the specifications and plans to the building owner before the asbestos abatement begins; and

(ii) for specifications and plans developed by another consultant or an asbestos consultant agency, the consultant must:

(I) review every page that addresses the scope of work or contains drawings related to the abatement work, and

(-a-) amend, as needed; and

(-b-) sign every reviewed page;

(II) prepare a separate cover page that indicates the adequacy of the specifications and plans, references any amendments, and includes the consultant's signature, date, license number, and license expiration date. By signing the cover page, the consultant assumes responsibility for the content; and

(III) provide the specifications and plans to the building owner before the asbestos abatement begins;

(C) consult with the asbestos abatement contractor and oversee the contractor to ensure:

(i) compliance with regulations and specifications and plans; or

(ii) for noncompliance issues, corrections are made or reported as violations;

(D) inspect the containment during every day of asbestos abatement activity, before the start of the asbestos abatement activity for the day and routinely throughout the day, to ensure the containment is in compliance with this chapter and the specifications and plans;

(E) specify the selection and use of appropriate personal protective equipment for all asbestos abatement activities;

(F) ensure compliance with the contract documents, specifications and plans, and relevant regulations for the duration of the project from the beginning of containment preparation through completion of the removal of containment and final visual inspection of the project site and loading of ACWM for transport;

(G) remain on-site and in immediate proximity during all periods of asbestos abatement activity and when ACWM is being loaded for transport;

(H) receive written approval from the department for a design prepared for an asbestos abatement project that specifies work practices that vary from the requirements of §296.193(a)(2) of this title before releasing specifications and plans to the asbestos abatement contractor;

(I) supervise exposure assessments performed in accordance with §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings). This responsibility may not be delegated; and

(J) comply with recordkeeping requirements, in accordance with §296.200 of this title (relating to Recordkeeping).

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) proof of one of the combinations of professional or educational achievement and/or work experience as described in paragraph (2)(A) - (C) of this subsection. Asbestos-related experience must be gained after completion of any training that is required to perform an asbestos-related activity and while the training is current;

(B) proof of passing the department's Asbestos Consultant examination, in accordance with Subchapter G of this chapter (relating to State Licensing Examination);

(C) copies of training certificates for the initial Asbestos Project Designer, Asbestos Inspector, Asbestos Management Planner, and Asbestos Air Monitoring Technician courses and any refresher training courses to show current accreditation, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(D) a copy of the current photo identification cards issued by the training provider;

(E) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application;

(F) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title; and

(G) proof of professional liability insurance coverage for errors and omissions if performing work for hire, or coverage under the applicant's employer's policy, in accordance with §1954.105(c) of the Act and §296.45 of this title.

(2) Acceptable professional or educational achievement and/or work experience. An applicant for an initial license shall submit documentation of one of the following combinations of professional or educational achievement and/or work experience as described in subparagraphs (A) - (C) of this paragraph:

(A) current status as a Texas-registered architect or a Texas-licensed professional engineer combined with at least 180 days of experience performing asbestos-related activities in public buildings, in accordance with this chapter, and gained within the past four years. The asbestos-related experience:

(i) must include the following:

(I) developing at least six specifications and plans under the direct supervision of a licensed asbestos consultant;

(II) conducting at least three asbestos surveys that include collecting bulk samples as a licensed asbestos inspector or licensed asbestos management planner or under the direct supervision of a licensed asbestos inspector, licensed asbestos management planner, or licensed asbestos consultant;

(III) performing the duties of an asbestos project manager for at least ten days under the direct supervision of a licensed asbestos project manager or consultant; and

(IV) performing air monitoring for ten days under the direct supervision of a licensed air monitoring technician or a licensed asbestos consultant; and

(ii) may include the following:

(I) developing management plans as a licensed management planner or under the direct supervision of a licensed asbestos management planner or licensed asbestos consultant;

(II) work experience as a licensed asbestos abatement supervisor; and

(III) work experience as a registered asbestos abatement worker, limited to no more than 30 days;

(B) a bachelor's degree in architecture, engineering, or a physical or natural science from an accredited college or university combined with the following work experience:

(i) 2 years of experience in an environmental field or in occupational health; and

(ii) at least 180 days of experience performing asbestos-related activities in public buildings, in accordance with this chapter, and gained within the past four years. The asbestos-related experience:

(I) must include the following:

(-a-) developing at least six specifications and plans under the direct supervision of a licensed asbestos consultant;

(-b-) conducting at least three asbestos surveys that includes collecting bulk samples as a licensed asbestos inspector or licensed asbestos management planner or under the direct supervision of a licensed asbestos inspector, licensed asbestos management planner, or licensed asbestos consultant;

(-c-) performing the duties of an asbestos project manager for at least ten days under the direct supervision of a licensed asbestos project manager or consultant; and

(-d-) performing air monitoring for ten days under the direct supervision of a licensed air monitoring technician or a licensed asbestos consultant; and

(II) may include the following:

(-a-) developing management plans under the direct supervision of a licensed asbestos management planner or licensed asbestos consultant;

(-b-) experience as a licensed asbestos abatement supervisor; and

(-c-) experience as a licensed asbestos abatement worker, limited to no more than 30 days; or

(C) completion of 60 college credit hours, which include 30 credit hours in engineering or natural or physical science and 9 credit hours in mathematics, from an accredited college or university, combined with the following work experience;

(i) 3 years of experience in an environmental field or in occupational health; and

(ii) at least 250 days of experience performing asbestos-related activities in public buildings, in accordance with this chapter, and gained within the past four years. The asbestos-related experience:

(I) must include the following:

(-a-) developing at least six specifications and plans under the direct supervision of a licensed asbestos consultant;

(-b-) conducting at least three asbestos surveys that includes collecting bulk samples as a licensed asbestos inspector or licensed asbestos management planner or under the direct supervision of a licensed asbestos inspector, licensed asbestos management planner, or licensed asbestos consultant;

(-c-) performing the duties of an asbestos project manager for at least ten days under the direct supervision of a licensed asbestos project manager or consultant; and

(-d-) performing air monitoring for ten days under the direct supervision of a licensed air monitoring technician or a licensed asbestos consultant; and

(II) may include the following:

(-a-) developing management plans under the direct supervision of a licensed asbestos management planner or licensed asbestos consultant;

(-b-) work experience as a licensed asbestos abatement supervisor; and

(-c-) work experience as a registered asbestos abatement worker, limited to no more than 30 days.

(3) Renewal requirements. An applicant renewing a license shall submit the following:

(A) copies of current training certificates for the Asbestos Project Designer, Asbestos Inspector, Asbestos Management Planner, and Asbestos Air Monitoring Technician courses, in accordance with §296.93 of this title;

(B) a copy of the current photo-identification cards issued by the training provider;

(C) an unaltered, 2-inch by 3-inch, color photograph of the face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) with a white background on photo quality paper that was taken within the past 12 months. This photograph may be submitted in digital format with an electronically submitted application;

(D) a copy of the department's Physician's Written Statement form that documents a medical examination performed within the past 12 months, in accordance with §296.42(j) of this title; and

(E) proof of professional liability insurance coverage for errors and omissions if performing work for hire, or coverage under the applicant's employer's policy, in accordance with §1954.105(c) of the Act and §296.45 of this title.

§296.57. Asbestos Consultant Agency.

(a) License required. A person employing an asbestos consultant and one or more asbestos inspectors, asbestos project managers, asbestos air monitoring technicians, asbestos management planners, or additional asbestos consultants, who are working in the capacity of their licenses, must be licensed as an asbestos consultant agency.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos consultant agency may:

(i) employ asbestos consultants, asbestos management planners, asbestos inspectors, asbestos project managers, and asbestos air monitoring technicians who are currently licensed in accordance with this chapter and working in the capacity of their licenses; and

(ii) represent a building owner by providing asbestos project management services and asbestos air monitoring services during asbestos abatement projects.

(B) An asbestos consultant agency may not:

(i) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees);

(ii) engage in the acts prohibited in §296.32 of this title (relating to Conflict of Interest);

(iii) perform asbestos consulting activities if not properly insured, in accordance with §1954.105(c) of the Act and §296.45 of this title (relating to Insurance Requirements); or

(iv) perform asbestos consulting activities without employing a licensed asbestos consultant appointed as the responsible person.

(2) Responsibilities. An asbestos consultant agency shall:

(A) use generally accepted principles and practices in designing asbestos abatement projects;

(B) ensure all asbestos abatement projects are monitored by the designated asbestos consultant or asbestos project manager for general compliance with the contract documents, specifications and plans, and relevant regulations for the duration of the project from the beginning of containment construction through final visual inspection after the removal of the containment;

(C) obtain a waste shipment record (manifest) signed by the owner or operator of the designated disposal site from the licensed asbestos contractor on a form as described in 40 CFR §61.150(d) (relating to Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation, and Spraying Operations);

(D) contact the asbestos abatement contractor and/or the owner or operator of the designated disposal site to determine the status of the waste shipment, if a copy of the manifest has not been received from the contractor within 35 days from the date the waste was accepted by the transporter;

(E) report in writing to the department in accordance with 40 CFR §61.150(d)(4), if a copy of the manifest has not been received from the contractor by the 45th day from the date the waste was accepted by the transporter;

(F) appoint one employee who is a licensed asbestos consultant to be the responsible person as defined in §296.21(91) of this title (relating to Definitions). Any changes of responsible person must be reported in writing to the department within 10 working days of the change;

(G) ensure that each employee who performs asbestos-related activities receives an annual medical examination, provided at no cost to the employee, in accordance with §296.42(j) of this title (relating to Initial and Renewal Applications);

(H) maintain professional liability insurance coverage for errors and omissions in accordance with §1954.105(c) of the Act and §296.45 of this title;

(I) ensure each employee who performs asbestos-related activities receives annual training in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(J) maintain workers' compensation insurance as described in §296.191(a)(5) of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities);

(K) comply with the relevant requirements in §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);

(L) comply with the abatement practices and procedures in §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings);

(M) comply with recordkeeping requirements, in accordance with §296.200 of this title (relating to Recordkeeping);

(N) cooperate with department personnel during inspections and investigations, as described in §296.231 of this title (relating to Inspections and Investigations);

(O) comply with personal protective equipment (PPE) requirements in 29 CFR §1926.1101(h) and (i) (relating to Asbestos), for employees who perform asbestos-related activities to include:

(i) providing and maintaining PPE for employees;

(ii) training employees in the proper use, care, and inspection of PPE;

(iii) documenting training of the proper use, care, and inspection of PPE;

(iv) inspecting respirators every six months and documenting the inspections; and

(v) ensuring compliance with the use of PPE; and

(P) acquire the necessary equipment for performing asbestos-related activities and maintain equipment in good working condition.

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) name and license number of the asbestos consultant appointed as the responsible person;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(D) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas; and

(E) evidence of professional liability insurance coverage for errors and omissions, in accordance with §1954.105(c) of the Act and §296.45 of this title.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) name and license number of the asbestos consultant appointed as the responsible person;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(D) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas; and

(E) evidence of professional liability insurance coverage for errors and omissions, in accordance with §1954.105(c) of the Act and §296.45 of this title.

§296.58. Asbestos Transporter.

(a) License required. A person must be licensed as an asbestos transporter to transport ACWM removed from a public building.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos transporter may transport ACWM to a permitted waste disposal facility that accepts ACWM or to temporary storage off-site.

(B) An asbestos transporter may not:

(i) transport ACWM that is not properly labeled or without a waste shipment record (manifest); or

(ii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos transporter shall:

(A) comply with federal regulations in 49 CFR Parts 100-199 (relating to Pipeline and Hazardous Materials Safety Administration, Department of Transportation); 40 CFR Part 61 (relating to National Emission Standards for Hazardous Air Pollutants), specifically the provisions concerning asbestos transport; and, where applicable, 40 CFR Part 763, Subpart E, Appendix D, (relating to Transport and Disposal of Asbestos Waste);

(B) ensure that all employees who will be transporting, loading, or unloading asbestos are fully trained in accordance with 49 CFR Parts 171-177 (relating to Hazardous Materials Regulations);

(C) at no cost to the employee, comply with personal protective equipment (PPE) requirements in 29 CFR §1926.1101(h) and (i) (relating to Asbestos) for employees who will handle asbestos by:

(i) providing and maintaining PPE for employees;

(ii) training employees on the proper use, care, and inspection of PPE;

(iii) documenting training on the proper use, care, and inspection of PPE;

(iv) inspecting respirators every six months and documenting the inspections; and

(v) ensuring employees use PPE properly;

(D) acquire and maintain the necessary equipment for performing asbestos-related activities. Equipment must be in good working condition;

(E) cooperate with department personnel during inspections and investigations, in accordance with §296.231 of this title (relating to Inspections and Investigations);

(F) in anticipation of possible spills of ACWM, train employees on hazardous materials and emergency response operations, in accordance with 29 CFR §1910.120(a)(1)(v) (relating to Occupational Safety and Health Standards) or 49 CFR Part 172, Subpart H (relating to Training), as applicable;

(G) ensure ACWM is properly labeled with warning labels, in accordance with 29 CFR §1926.1101(k), and generator labels, in accordance with 40 CFR §61.150(a)(1)(v) (relating to Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation, and Spraying Operations);

(H) obtain a manifest from the asbestos abatement contractor on a form as described for the waste generator in 40 CFR §61.150(d) before transporting ACWM and deliver the ACWM with the manifest to a waste disposal facility on the approved list provided by the Texas Commission on Environmental Quality. If transporting out-of-state, the asbestos transporter shall follow the regulations of the receiving state;

(I) provide copies of manifests signed by the owner or operator of the designated disposal site to the asbestos abatement contractor and/or the building owner within 14 days from the date the ACWM was accepted for disposal; and

(J) keep proof of pollution liability insurance and a copy of the current asbestos transporter license in the transport vehicle.

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(B) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(C) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas;

(D) physical address of the office where asbestos records are maintained, in accordance with §296.200 of this title (relating to Recordkeeping);

(E) proof of liability insurance to transport for hire ACM for purposes of disposal, in accordance with §1954.105(c) of the Act and §296.45 of this title (relating to Insurance Requirements); and

(F) a copy of the company's emergency response plan, in accordance with 29 CFR §1910.120(q), specifically:

(i) pre-emergency planning and coordination with outside parties;

(ii) personnel roles, lines of authority, training, and communication;

(iii) emergency recognition and prevention;

(iv) safe distances and places of refuge;

(v) site security and control;

(vi) evacuation routes and procedures;

(vii) decontamination;

(viii) emergency medical treatment and first aid;

(ix) emergency alerting and response procedures;

(x) critique of response and follow-up; and

(xi) PPE and emergency equipment.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(B) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(C) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas;

(D) physical address of the office where asbestos records are maintained in accordance with §296.200 of this title; and

(E) proof of liability insurance to transport for hire ACM for purposes of disposal, in accordance with §1954.105(c) of the Act and §296.45 of this title.

§296.59. Asbestos Laboratory.

(a) License required. A laboratory must be licensed as an asbestos laboratory before providing polarized light microscopy (PLM), phase contrast microscopy (PCM), or transmission electron microscopy (TEM) analysis of bulk or air samples collected in public buildings.

(b) Scope of practice.

(1) Practice and limitations.

(A) Each branch office of a licensed asbestos laboratory must be separately licensed and accredited for the types of analyses it will perform.

(B) An asbestos laboratory must be appropriately accredited by the NVLAP in order to perform the following types of analysis:

(i) PLM analysis of bulk samples; or

(ii) TEM analysis of air samples.

(C) An asbestos laboratory may analyze air samples by PCM:

(i) in the laboratory if accredited by the American Industrial Hygiene Association (AIHA) or if the laboratory's individual analysts performing the analysis are listed on the AIHA Asbestos Analyst Registry (AAR) or the laboratory is enrolled and proficient in the AIHA PAT Program; and

(ii) in the field only if the laboratory's individual analysts performing the analysis are licensed asbestos air monitoring technicians and:

(I) listed on the AIHA AAR; or

(II) the laboratory is enrolled in the AIHA PAT Program and performs quality-control analysis on at least 10% of the samples analyzed.

(D) An asbestos laboratory or a laboratory's individual analyst may not perform asbestos analysis if the laboratory or analyst loses accreditation or proficiency.

(E) An asbestos laboratory may not engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos laboratory shall:

(A) employ one individual as the responsible person as defined in §296.21(91) of this title (relating to Definitions) who is responsible for the asbestos laboratory's operations and compliance with this chapter. Any changes of responsible person must be reported in writing to the department within ten working days of the change;

(B) maintain the proficiency and accreditation requirements specified in subsection (c)(1) of this section for each analytical method performed. Any change in accreditation or proficiency must be reported in writing to the department within ten working days of the change; and

(C) comply with recordkeeping requirements as described in §296.200 of this title (relating to Recordkeeping).

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) evidence of at least one of the following:

(i) accreditation by the NVLAP for analysis of bulk samples by PLM if the laboratory is applying for a PLM bulk analysis license;

(ii) accreditation by the NVLAP for analysis of air samples by TEM if the laboratory is applying for a TEM air analysis license;

(iii) accreditation by the AIHA Industrial Hygiene Laboratory Accreditation Program and most recent proficiency testing results if the laboratory is applying for a PCM air analysis license;

(iv) proficiency according to the standards of the AIHA Proficiency Analytical Testing (PAT) Program which includes quarterly proficiency testing for airborne fibers by PCM and a quality assurance/quality control program as required by the NIOSH 7400 method if the laboratory is applying for a PCM air analysis license; or

(v) proficiency of the individual laboratory analysts through the AIHA Asbestos Analyst Registry (AAR) and most recent proficiency testing results if the laboratory is applying for a PCM air analysis license;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(D) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas;

(E) physical address of the principal place of business where asbestos samples are analyzed and asbestos records are maintained, in accordance with §296.200 of this title; and

(F) evidence of professional liability insurance for errors and omissions, in accordance with §1954.105(c) of the Act and §296.45 of this title (relating to Insurance Requirements).

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) evidence of at least one of the following:

(i) accreditation by the NVLAP for analysis of bulk samples by PLM if the laboratory is applying for a PLM bulk analysis license;

(ii) accreditation by the NVLAP for analysis of air samples by TEM if the laboratory is applying for a TEM air analysis license;

(iii) accreditation by the AIHA Industrial Hygiene Laboratory Accreditation Program and most recent proficiency testing results if the laboratory is applying for a PCM air analysis license;

(iv) proficiency according to the standards of the AIHA PAT Program which includes quarterly proficiency testing for airborne fibers by PCM and a quality assurance/quality control program as required by the NIOSH 7400 method if the laboratory is applying for a PCM air analysis license; or

(v) proficiency of the individual laboratory analysts through the AIHA Asbestos Analyst Registry (AAR) and most recent proficiency testing results if the laboratory is applying for a PCM air analysis license;

(B) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(C) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(D) a valid certificate of authority issued by the Secretary of State authorizing the company to do business in Texas if the applicant is located outside of Texas;

(E) physical address of the principal place of business where asbestos samples are analyzed and asbestos records are maintained, in accordance with §296.200 of this title; and

(F) evidence of professional liability insurance for errors and omissions, in accordance with §1954.105(c) of the Act and §296.45 of this title.

(d) Asbestos laboratories that do not meet the requirements of this section are not eligible to renew the license after August 31, 2018.

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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Lisa Hernandez  
General Counsel  
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For further information, please call: (512)776-6972



## SUBCHAPTER E. LICENSE AND REGISTRATION FEES

### 25 TAC §§296.71 - 296.74

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### §296.71. Fees.

(a) All applicable fees must be paid to the department before the department will issue a registration or license.

(b) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Department of Information Resources, to recover costs associated with electronic application and renewal application processing.

(c) The fees, not including subscription and convenience fees, are as follows:

- (1) asbestos abatement contractor initial or renewal--\$1,070;
- (2) asbestos abatement supervisor initial or renewal--\$400;
- (3) asbestos abatement worker initial or renewal--\$65;
- (4) asbestos air monitoring technician initial or renewal--\$110;
- (5) asbestos consultant initial or renewal--\$645;
- (6) asbestos consultant agency initial or renewal--\$430;
- (7) asbestos inspector initial or renewal--\$130;
- (8) asbestos training instructor initial or renewal--\$100;
- (9) asbestos laboratory initial or renewal--\$430;
- (10) asbestos management planner initial or renewal--\$260;
- (11) asbestos management planner agency initial or renewal--\$430;
- (12) asbestos operations and maintenance contractor initial or renewal--\$260;

(13) asbestos operations and maintenance supervisor initial or renewal--\$225;

(14) asbestos project manager initial or renewal--\$320;

(15) asbestos training provider initial or renewal--\$1,070;

(16) asbestos transporter initial or renewal--\$430;

(17) refund processing--\$50;

(18) approval of additional training course--\$200;

(19) examination--\$25;

(20) identification card replacement--\$20;

(21) license replacement--\$20;

(22) name change--\$20;

(23) returned check--\$30; and

(24) special examination request--\$50.

#### §296.72. Late Fees.

Licensees who do not submit a timely renewal application are subject to late fees. A renewal application is considered timely if the application, fee, and all required documents are received by the department or postmarked before the license expires. If the application, fee, or required documents are deficient and the deficiency is not cleared before the license expires, the renewal is not timely and is subject to late fees. Late fees are assessed as follows:

(1) A renewal received 1 to 90 days after license expiration is assessed a late fee that is equal to 1.5 times the normal renewal fee.

(2) A renewal received 91 to 365 days after license expiration is assessed a late fee that is equal to 2 times the normal renewal fee.

#### §296.73. Dishonored Payment Device.

(a) If an applicant's payment device is not honored by the issuing financial institution, the department will consider the application to be deficient and will notify the applicant. Not later than 30 days after the date of the department's notice, the applicant must submit to the department a money order or cashier's check in the amount of the dishonored payment device plus the fee of \$30 for each dishonored payment device.

(b) If the department has issued a license obtained with a dishonored payment device and the person does not pay the full amount due by the 30-day payment deadline specified in the department's notice, the person will be in violation of this chapter and subject to enforcement action, including license revocation and administrative penalties, as set forth in Subchapter N of this chapter (relating to Enforcement).

(c) If an applicant has taken an examination, the department will not release the examination score or approve the initial license until the department receives all fees.

#### §296.74. Reimbursement of Fees.

(a) Application fees paid to the department are not transferable and may be refunded only if:

(1) fee amounts are paid in excess of the required fee. The department will deduct an administrative fee of \$50 and subscription and convenience fees from an excess payment before issuing a refund;

(2) an error in the online payment system results in excess payments; or

(3) an application is not processed within the time periods in §296.42(b) of this title (relating to Initial and Renewal Applications),

the applicant has the right to request reimbursement of the application fee. Requests for reimbursement must be submitted in writing. If the department does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the department will deny the request. Good cause exists if:

(A) the number of license applications exceeds by 15% or more the number of applications processed in the same calendar quarter of the preceding year;

(B) another public or private entity, relied upon by the department in the application process, caused the delay; or

(C) any other condition, such as a contested case involving a violation of this chapter, exists that gives the department good cause for exceeding the time period.

(b) Subscription and convenience fees are not refundable.

(c) Appeal process for denied reimbursement. If the department denies a request for reimbursement in accordance with subsection (a)(3) of this section, the applicant may appeal to the commissioner. The applicant shall give written notice to the commissioner of the request for full reimbursement of all fees paid, claiming that the department exceeded the applicable time period without good cause. The department will submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The commissioner will notify the applicant in writing of the decision. If the commissioner decides the appeal in favor of the applicant, the department will process the reimbursement of the application fee after deducting the subscription and convenience fee.

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



## SUBCHAPTER F. TRAINING PROVIDERS, INSTRUCTORS, AND COURSES

### 25 TAC §§296.91 - 296.93

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

### §296.91. *Asbestos Training Provider.*

(a) License required. A person licensed as an asbestos training provider may offer training to an individual who seeks MAP accreditation or a department license.

(b) Scope of practice.

(1) Practice and limitations.

(A) A licensed asbestos training provider, after receiving course approvals from the department, may offer, schedule, and conduct:

(i) asbestos training courses for the purpose of meeting accreditation requirements in accordance with the MAP;

(ii) the Asbestos Air Monitoring Technician course in accordance with §296.93 of this title (relating to Asbestos Training Courses); and

(iii) the Texas Asbestos Law and Rules course in accordance with §296.93 of this title.

(B) An asbestos training provider may not:

(i) allow instructors to self-train in order to qualify for a license or accreditation;

(ii) combine course disciplines or hands-on training sessions or other aspects of two courses. For example, the Asbestos Abatement Worker course and the Asbestos Contractor/Supervisor course may not be taught in a combined course;

(iii) combine an initial training course with a refresher training course;

(iv) combine the Asbestos Abatement Worker course taught in one language with an Asbestos Abatement Worker course taught in another language;

(v) allow an instructor to teach the Asbestos Abatement Worker course in a language other than English unless the instructor can speak, read, and write in that language;

(vi) allow a guest speaker to present more than 15% of a course; or

(vii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos training provider shall:

(A) ensure that promotional materials specify course prerequisites for admission, the content of the course, and requirements for successful completion;

(B) ensure that training is provided by licensed asbestos training instructors who:

(i) are licensed by the department to teach the course; and

(ii) possess current accreditation or training for the course being taught;

(C) inform each prospective trainee, in the language of the course being taught, of the following:

(i) individuals who are not eligible for employment in the United States will not be licensed;

(ii) the requirements and qualifications that apply to the category of license being sought;

(iii) the initial management planner training course requires a current and valid inspector accreditation at the time of course admission;

(iv) to maintain accreditation, refresher training must be taken before the accreditation expiration date. After the accreditation expiration date, there is a 12-month grace period to take the refresher training course to renew the accreditation. After the 12-month grace period, initial training must be completed again in order to obtain accreditation; and

(v) a trainee may miss up to 10% of a training course. A trainee is not eligible to complete the course if a trainee misses more time than is allowed;

(D) refund any course-related fees to a prospective trainee due to the training provider's failure to provide the information listed in subparagraph (C) of this paragraph;

(E) ensure that licensed asbestos training instructors employed by the training provider:

(i) present all course materials as outlined in the syllabus and as presented to the department for approval;

(ii) provide a course review to improve comprehension before administering the course examination; and

(iii) administer a closed-book examination at the conclusion of each initial training course;

(F) confirm that trainees possess current and valid accreditation, or are within the 12-month grace period, before granting admission to a refresher training course;

(G) ensure that training is provided in an environment that is conducive to learning and without any external distractions. A classroom may not be utilized for other purposes while training is being conducted. Facilities must have the following:

(i) adequate lighting;

(ii) adequate seating and workspace for each trainee;

(iii) a comfortable temperature that is maintained in all areas used for training; and

(iv) clean restrooms that are readily accessible and in proper working order;

(H) ensure necessary training equipment is on-site and in proper working order;

(I) record each trainee's examination score;

(J) comply with requirements for asbestos training courses in accordance with §296.93 of this title, including ensuring the instructor-to-trainee ratio is not exceeded and that a trainee who has not met attendance standards or who has not passed the required final examination is not issued a training certificate;

(K) appoint a responsible person who will be responsible for compliance with this chapter. Any changes of responsible person must be reported in writing to the department within 10 working days of the change;

(L) comply with recordkeeping requirements as described in §296.200 of this title (relating to Recordkeeping);

(M) cooperate with department personnel during inspections and investigations as described in §296.231 of this title (relating to Inspections and Investigations);

(N) provide instructions for locating the registration form for the state licensing examination and examination schedule on the department's website;

(O) permit department representatives to observe, evaluate, and monitor training courses;

(P) issue training certificates that meet the requirements in subsection (d)(1)(N) of this section at the conclusion of each course to trainees who have completed the course and passed the required final examination;

(Q) issue wallet-size photograph identification (ID) cards that meet the requirements in subsection (d)(1)(O) of this section at the conclusion of each training course to trainees who have completed the course and passed the required final examination;

(R) maintain security of the training certificates to ensure that trainees do not have access to the certificates until completion of the course;

(S) submit a training course roster to the department within 10 working days of the completion date of each course. The course roster must include:

(i) the name of each trainee;

(ii) the unique identifier of each trainee determined by the training provider;

(iii) indication of successful or unsuccessful course completion for each trainee; and

(iv) a color group photograph, of trainees who successfully completed the course, taken at the end of the training course; and

(T) comply with course notification requirements in subsection (c) of this section.

(c) Course notification requirements.

(1) Training providers shall notify the department of each scheduled course. The department must receive the notification at least 10 working days before the start date of the course. A notification may include multiple courses. The notification must include:

(A) name and contact phone number of training provider;

(B) name, license number, and contact phone number of instructor;

(C) name of course (for the Asbestos Abatement Worker course, the course name must specify the language in which the course will be conducted);

(D) physical location (address and room number or name of conference room) where training will be held, including all off-site field trip locations;

(E) start and end dates for training course; and

(F) start and end times for each day of training.

(2) Amendments. Notified courses may be amended by notifying the department by email or fax at least 5 working days before the start date of the course.

(A) Amendments are accepted for the following changes:

(i) instructor;

(ii) location;

(iii) times; and

(iv) dates.

(B) Amendments are not accepted for the following changes:

(i) name of training course; or

(ii) language of the course.

(C) Notified courses may not be amended less than 5 working days before the start date. The course must be cancelled and notified as an emergency request.

(3) Emergency notifications. A training provider may request emergency approval of a course if unforeseen circumstances prevent the training provider from meeting the 10-business-day notification requirement. The emergency notification must be submitted to the department by email or fax and must include a justification of why the 10-business-day notification requirement could not be met and the information listed in subsection (c)(1)(A) - (F) of this section. The emergency notification must be submitted at least 3 working days prior to the start date of the course. The training provider must receive written approval from the department before conducting the course.

(4) Cancellation notifications. A training provider shall notify the department of a course cancellation by email or fax as soon as possible but no later than 2 hours after the scheduled start time of the course.

(d) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(B) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(C) if the applicant is located outside of Texas:

(i) a valid certificate of authority issued by the Secretary of State, authorizing the company to do business in Texas; or

(ii) a notarized letter from an official of the corporation certifying that the applicant is incorporated outside of Texas and shall not provide training courses within the state;

(D) name(s) and mailing address(es) of owner(s);

(E) list of courses to be offered that includes the name and license number of each licensed asbestos instructor that will teach each course;

(F) a list of guest speakers the training provider intends to use in the asbestos training courses that includes the topics that each guest speaker will present;

(G) name of the responsible person as described in subsection (b)(2)(K) of this section;

(H) description of equipment and accessories that will be used for course instruction (including hands-on items, audiovisual aids, brochures, etc.);

(I) refund and cancellation policies. If the applicant will provide the Asbestos Abatement Worker course in a language other than English, the refund and cancellation policies must be submitted in that language;

(J) detailed course outline for each day that includes start and end times for each topic covered, scheduled break times, and specific hands-on training activities for each course;

(K) training manuals and related course materials that include all required elements listed in §296.93 of this title for each initial and refresher training course to be offered. If the applicant will provide the Asbestos Abatement Worker course in a language other than English, the training manuals and all related course materials must be submitted in that language. If the applicant will use an EPA-developed manual, the applicant may submit a statement attesting to its use in place of submitting the manual;

(L) policy regarding the administration of the multiple-choice examination to be given at the conclusion of training, in accordance with §296.93 of this title. The policy must state the following:

(i) each trainee must obtain a passing score of at least 70% on the multiple-choice examination before receiving a training certificate;

(ii) one multiple-choice re-examination is allowed per trainee for each course;

(iii) questions from the original examination will not be used for the re-examination;

(iv) if a trainee fails the re-examination, the trainee shall repeat the course and pass a new examination before issuance of the training certificate; and

(v) a trainee shall read the examination and mark the answers on a score sheet unless the trainee requests a reasonable accommodation under the Americans with Disabilities Act and is a qualified individual with a disability;

(M) copy of each examination and re-examination that will be administered at the end of each course. If the applicant will provide the Asbestos Abatement Worker course in a language other than English, examinations must be submitted in that language;

(N) sample of the training certificate that will be issued to each trainee who completes the course and passes the final course examination. The certificate must include:

(i) a unique certificate number;

(ii) the school's name, address, and phone number;

(iii) printed name of accredited person;

(iv) discipline (name) of the training course completed;

(v) printed name and signature of instructor;

(vi) start and end dates of the training course;

(vii) expiration date of one year after the date upon which the person successfully completed the training course;

(viii) printed name and signature of the responsible person, principal officer, owner, or chief executive officer; and

(ix) statement that trainee:

(I) "has successfully completed the requisite training for asbestos accreditation under the Toxic Substances Control

Act, Title II and meets the requirements of the Texas Asbestos Health Protection Rules," for accredited courses; or

(II) "has successfully completed training that meets the requirements in accordance with the Texas Asbestos Health Protection Rules," for the Asbestos Air Monitoring Technician course or the Texas Asbestos Law and Rules course; and

(O) sample of the training ID card that will be issued to each trainee who completes the course and passes the final course examination. The training ID card must include:

(i) the name of the training provider;

(ii) a color photo of the trainee's face (without tinted glasses, hats, bandanas, or other articles that may obscure the head and face) taken on a white background;

(iii) the name of the accredited person;

(iv) the discipline of the training course completed;

(v) the effective date of the accreditation;

(vi) the unique certificate number shown on the training certificate for the accredited person; and

(vii) the signature of the instructor.

(2) Renewal requirements. An applicant renewing a license shall submit the following:

(A) proof of active tax account status or tax exempt status from the Texas Comptroller of Public Accounts if the applicant is a Texas corporation;

(B) a copy of the assumed name certificate issued by the Secretary of State if the applicant conducts business under an assumed name (commonly referred to as a DBA or "doing business as");

(C) if the applicant is located outside of Texas:

(i) a valid certificate of authority issued by the Secretary of State, authorizing the company to do business in Texas; or

(ii) a notarized letter from an official of the corporation certifying that the applicant is incorporated outside of Texas and shall not provide training courses within the state;

(D) a copy of all policies, training resources, training certificates, or training manuals that the applicant would like to amend, with a detailed description of the specific changes. All amendments must be approved before the training provider may implement the changes; and

(E) a list of all licensed asbestos instructors and guest speakers the training provider intends to use in the asbestos training courses. The list must include the courses that each instructor will teach and the topics that each guest speaker will present.

(e) Approval of additional training courses.

(1) Licensed training providers may request approval for additional training courses that were not submitted as part of the initial application for license by submitting:

(A) an Asbestos Course Approval Application for each course;

(B) the fee as outlined in §296.71 of this title (relating to Fees);

(C) training manuals and related course materials that include all required elements listed in §296.93 of this title for each initial and refresher training course to be offered. If the applicant will pro-

vide the Asbestos Abatement Worker course in a language other than English, the training manuals and all related course materials must be submitted in that language. If the applicant will use an EPA-developed manual, the applicant may submit a statement attesting to its use in place of submitting the manual;

(D) a detailed course outline for each day that includes start and end times for each topic covered, scheduled break times, and specific hands-on training activities for each course;

(E) a copy of each required examination that will be administered at the end of each course, if applicable. If the applicant will provide the Asbestos Abatement Worker course in a language other than English, examinations must be submitted in that language;

(F) the name and license number of the licensed asbestos instructor who will teach the additional course; and

(G) the name of any guest speaker.

(2) The licensed training provider will be notified in writing once the department grants approval of the additional course. Training providers may not add the additional training course to their schedule, advertise, accept payment for, or conduct the course until approved by the department.

(f) Guest speaker approval, revocation, and suspension.

(1) Approval. Prior approval of a guest speaker is required. A guest speaker may be used to supplement and enhance learning objectives. A guest speaker shall have knowledge based on education, research, or experience in a particular area of study related to the course content being taught. Training providers seeking approval for a guest speaker must submit a completed Asbestos Guest Speaker Approval Application Form and sufficient documentation to show the person's knowledge, experience, and expertise. Acceptable documentation may include:

(A) official academic transcripts or diploma specifying major;

(B) technical experience;

(C) a verifiable resume; and

(D) relevant, verifiable work experience.

(2) Revocation or suspension of approval. The department may revoke guest speaker approval if the guest speaker is not providing training that meets the requirements of the MAP or this chapter, or if it is discovered that the guest speaker's qualifications are no longer valid or current.

§296.92. *Asbestos Training Instructor.*

(a) License required. A person must be licensed as an asbestos training instructor to teach asbestos training courses for a licensed asbestos training provider, except as provided by subsection (d) of this section.

(b) Scope of practice.

(1) Practice and limitations.

(A) An asbestos training instructor must:

(i) teach department-approved asbestos training courses, in accordance with the MAP and this subchapter; and

(ii) be able to read, write, and communicate effectively in the language in which the course is taught.

(B) An asbestos training instructor may not:

(i) teach courses for accreditation under the MAP or courses required for a license from the department:

(I) independent of a licensed training provider;

(II) that the department has not approved;

(III) without possessing current accreditation for that course; and

(IV) without submitting notification to the department, in accordance with §296.91(c) of this title (relating to Asbestos Training Provider);

(ii) self-train in order to qualify to teach a training course or qualify for a license or accreditation; or

(iii) engage in acts prohibited in §296.31 of this title (relating to Code of Ethics for Licensees).

(2) Responsibilities. An asbestos training instructor shall:

(A) confirm with each trainee that the training provider has informed the trainee of the requirements in §296.91(b)(2)(C) of this title;

(B) inform each trainee of the following:

(i) for an initial training course each trainee shall achieve at least 70% on the course examination;

(ii) if a trainee fails the course examination, a second examination will be administered; and

(iii) a trainee must retake the initial training course if the trainee does not achieve 70% on the second examination;

(C) coordinate with the responsible person to ensure that:

(i) each trainee possesses valid accreditation, or is within the 12-month grace period, before granting admission to a refresher training course;

(ii) necessary training equipment is on-site and in good working order; and

(iii) the required instructor-to-trainee ratio is not exceeded, in accordance with §296.93 of this title (relating to Asbestos Training Courses);

(D) take an attendance record at the beginning of each four-hour segment of course instruction;

(E) document a trainee's absence from the course on the attendance record;

(F) provide attendance records to the training provider upon completion of each course;

(G) ensure attendance and course completion standards are met;

(H) administer a closed-book examination at the conclusion of each initial training course;

(I) administer a second examination to each trainee who fails the first examination, in accordance with §296.91(d)(1)(L) of this title;

(J) record each trainee's examination score;

(K) comply with requirements for training courses in §296.93 of this title;

(L) present all course materials as outlined in the syllabus and as presented to the department for approval;

(M) provide a course review to improve comprehension before administering the examination;

(N) cooperate with department personnel during inspections, audits, and investigations, in accordance with §296.231 of this title (relating to Inspections and Investigations); and

(O) provide instructions for locating the registration form for the state licensing examination and examination schedule on the department's website.

(c) Initial and renewal license requirements. To receive or renew a license in accordance with this section, all applicants shall submit a completed application in accordance with §296.42 of this title (relating to Initial and Renewal Applications) and documentation required in this section. An out-of-state applicant must comply with §296.44 of this title (relating to Out-of-State Applicants).

(1) Initial requirements. An applicant for an initial license shall submit the following:

(A) An applicant for an initial license must have achieved one of the following combinations of education, work experience, and teaching experience:

(i) a bachelor's degree in a natural or physical science with at least three months of teaching experience at the secondary education level, post-secondary education level, or teaching adult learners at a vocational school, a trade school, or other similar setting approved by the department;

(ii) a bachelor's degree with at least six months of experience performing asbestos-related activities and at least three months of teaching experience at the secondary education level, post-secondary education level, or teaching adult learners at a vocational school, a trade school, or other similar setting approved by the department;

(iii) an associate's degree or successful completion of 60 college credit hours with at least one year of experience performing asbestos-related activities and at least three months of teaching experience at the secondary education level, post-secondary education level, or teaching adult learners at a vocational school, a trade school, or other similar setting approved by the department; or

(iv) a high school diploma or equivalent with at least two years of experience performing asbestos-related activities and at least three months of teaching experience at the secondary education level, post-secondary education level, or teaching adult learners at a vocational school, a trade school, or other similar setting approved by the department.

(B) Applicants may take a train-the-trainer course approved by the department to meet the three months of teaching experience required under subparagraph (A) of this paragraph.

(C) An applicant for initial license must submit acceptable documentation of the relevant education, work, and teaching experience as described in subparagraph (A) of this paragraph. The documentation may include:

(i) official academic transcript or diploma that verifies the major;

(ii) description of experience performing asbestos-related activities that includes:

(I) project name and location;

(II) start and end date;

(III) description of duties performed; and

(IV) name and contact information of individual or office that can verify the experience;

(iii) description of teaching experience that includes:

(I) course title and description;

(II) start and end date;

(III) location or institution; and

(IV) name and contact information of individual or office that can verify the teaching experience; and

(iv) proof of license and/or accreditation to verify that work was performed in accordance with applicable laws and rules.

(D) An applicant for an initial license must submit training certificates for the initial asbestos training courses and all subsequent refresher training courses to show current and valid accreditation for the courses the instructor will teach;

(2) Renewal requirements. An applicant for a renewal license shall submit proof of current and valid accreditation for the courses the applicant will teach.

(d) Instructors approved before the effective date of this section. An instructor who has been approved to teach a department-approved training course on the effective date of this section may continue to teach the course for up to six months from the effective date without a license. By the end of the six-month period, the instructor must have applied for and received an initial license to continue teaching. An instructor who was approved to teach before the effective date of this section does not need to meet the education, work experience, and teaching experience required in accordance with subsection (c) of this section. An instructor seeking a license under this subsection must show proof of current accreditation for the courses he or she will teach. If the instructor has not applied for and received a license by the end of the six-month period, the instructor may not continue teaching.

§296.93. Asbestos Training Courses.

(a) General training requirements.

(1) The MAP requires that each of the approved training disciplines be separate and distinct from the others. Training courses for all disciplines must be in accordance with the MAP, except the Asbestos Air Monitoring Technician and Texas Asbestos Law and Rules courses, which are specific to Texas.

(2) Each initial and refresher training course, including hands-on-training, must be specific to a single discipline and not combined with other training.

(3) The Asbestos Air Monitoring Technician and Texas Asbestos Law and Rules courses are department-approved courses and not MAP courses. Any such courses conducted by training providers not licensed by the department will not apply toward license requirements.

(4) The training certificate expires one year after the date upon which the person successfully completed the course. Training must be renewed annually by completing the appropriate refresher training course. The initial training course must be repeated if the refresher training course is not completed within one year of the expiration date of the training certificate.

(5) Initial training courses must be conducted as follows:

(A) one day of training must be a minimum of eight hours and include:

(i) at least 6 hours and 40 minutes of classroom instruction, hands-on training, and field trips (excluding field trip travel time); and

(ii) 80 minutes for breaks and lunch. No more than four hours of instruction may be given without at least a 30-minute break;

(B) trainees will not be allowed to attend more than eight hours of classroom instruction, hands-on training, and field trips in a 24-hour period;

(C) evening instruction must not exceed 4 hours in any single session; and

(D) the course must be completed within 14 calendar days of the first class.

(6) Refresher training courses must be conducted as follows:

(A) one day of training must be a minimum of eight hours and include:

(i) at least 6 hours and 40 minutes of classroom instruction, hands-on training, and field trips (excluding field trip travel time); and

(ii) 80 minutes for breaks and lunch;

(B) one half-day of training must be a minimum of four hours and include:

(i) at least 3 hours and 40 minutes of classroom instruction; and

(ii) 20 minutes for breaks.

(7) A trainee may miss up to 10% of a training course. A trainee is not eligible to complete the course if a trainee misses more time than allowed.

(8) During hands-on training, each trainee must physically perform activities specific to the asbestos training discipline. Demonstrations and audiovisuals are not substitutes for required hands-on training.

(9) Student to instructor ratios must be as follows:

(A) hands-on training activities must not exceed 15 to 1; and

(B) all other training course sessions must not exceed 25 to 1.

(10) Methods of instruction.

(A) At least 50% of the classroom instruction must be presented by the instructor. Instructors must direct and oversee 100% of the hands-on training.

(B) Audiovisual materials are not substitutes for the instructor-led portion of the class or the required hands-on training.

(11) All training courses must be taught in English, except the Asbestos Abatement Worker course. The Asbestos Abatement Worker course may be taught in another language, provided the instructor is able to speak, read, and write in that language, and training materials and examinations are in the same language.

(b) Initial training course requirements.

(1) Asbestos Abatement Worker course. The Asbestos Abatement Worker course must be at least four training days. This course must include lectures, demonstrations, at least 14 hours of

hands-on training, individual respirator fit-testing, course review, and a written examination of 50 multiple-choice questions. Successful completion of the course will require passing the examination with a score of at least 70%. The course must adequately address the following in accordance with the MAP:

- (A) physical characteristics of asbestos and ACBM;
- (B) potential health effects related to asbestos exposure;
- (C) employee personal protective equipment;
- (D) state-of-the-art work practices;
- (E) personal hygiene;
- (F) additional safety hazards;
- (G) medical monitoring;
- (H) air monitoring;
- (I) relevant federal, Texas, and local regulatory requirements, procedures and standards;
- (J) establishment of respiratory protection programs and medical surveillance programs;
- (K) hands-on training that includes work area preparation, decontamination chamber construction, cleaning and disposal, and respirator fit-testing and maintenance; and
- (L) course review.

(2) Asbestos Contractor/Supervisor course. The Asbestos Contractor/Supervisor course must be at least five training days. The course must include lectures, demonstrations, at least 14 hours of hands-on training, individual respirator fit-testing, course review, and a written examination of 100 multiple-choice questions. Successful completion of the course will require passing the examination with a score of at least 70%. The course must adequately address the following in accordance with the MAP:

- (A) physical characteristics of asbestos and ACBM;
- (B) potential health effects related to asbestos exposure;
- (C) employee personal protective equipment;
- (D) state-of-the-art work practices;
- (E) personal hygiene;
- (F) additional safety hazards;
- (G) medical monitoring;
- (H) air monitoring;
- (I) relevant federal, Texas, and local regulatory requirements and standards;
- (J) establishment of respiratory protection programs and medical surveillance programs;
- (K) hands-on training that includes work area preparation, decontamination chamber construction, cleaning and disposal, and respirator fit-testing and maintenance;
- (L) insurance and liability issues;
- (M) recordkeeping for asbestos abatement projects;
- (N) supervisory techniques for asbestos abatement activities;
- (O) contract specifications; and
- (P) course review.

(3) Asbestos Air Monitoring Technician course. The Asbestos Air Monitoring Technician course must be at least three training days. The course must include lectures, demonstrations, hands-on individual respirator fit-testing, course review, and a written examination consisting of 50 multiple-choice questions. Successful completion of the course will require passing the examination with a score of at least 70%. The course must adequately address the following:

- (A) the health effects of asbestos exposure including:
  - (i) the nature of asbestos-related diseases;
  - (ii) routes of exposure;
  - (iii) no known safe exposure level;
  - (iv) the synergistic effect between cigarette smoking and asbestos exposure;
  - (v) the latency periods for asbestos-related diseases;
- and
  - (vi) a discussion of the relationship of asbestos exposure to asbestosis, lung cancer, mesothelioma, and cancers of other organs;
- (B) the following OSHA regulations:
  - (i) 29 CFR §1910.134 (relating to Respiratory Protection), OSHA's standard for respirators;
  - (ii) 29 CFR §1910.1001, Appendix A, (relating to OSHA Reference Method-Mandatory);
  - (iii) 29 CFR §1910.1001, Appendix B (relating to Detailed Procedure for Asbestos Sampling and Analysis-Non-Mandatory);
  - (iv) 29 CFR §1910.1200 (relating to Hazard Communication); and
  - (v) 29 CFR §1926.1101 (relating to Asbestos), OSHA's asbestos standard for the construction industry;
- (C) the following sections of TAHPR:
  - (i) §296.21 of this title (relating to Definitions);
  - (ii) §296.51 of this title (relating to Asbestos Air Monitoring Technician);
  - (iii) §296.192 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings);
  - (iv) §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings);
  - (v) §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings); and
  - (vi) §296.200 of this title (relating to Recordkeeping);
- (D) 40 CFR Part 763, Subpart E, Appendix A (relating to Interim Transmission Electron Microscopy Analytical Methods--Mandatory and Nonmandatory--and Mandatory Section to Determine Completion of Response Actions), overview of AHERA air monitoring requirements and AHERA sampling;
- (E) asbestos sampling methods including:
  - (i) calibration of air sampling pumps;
  - (ii) air sample volume calculations;
  - (iii) sampling strategies for clearance monitoring;

(iv) types of air samples (personal breathing zone versus fixed-station area);

(v) sampling location and objectives (pre-abatement, during abatement, and clearance monitoring);

(vi) number of samples to collect;

(vii) minimum and maximum air volumes per the NIOSH 7400 method;

(viii) period of sampling;

(ix) aggressive clearance sampling;

(x) interpretations of sampling results;

(xi) quality assurance (for example, Z-test); and

(xii) special sampling problems (crawl spaces, unacceptable samples for laboratory analysis, sampling in occupied buildings);

(F) evaluation methods including:

(i) transmission electron microscopy (analysis feedback affecting flow rates, EPA's recommended technique for analysis of final air clearance samples);

(ii) phase contrast microscopy;

(iii) AHERA's limits on the use of phase contrast microscopy;

(iv) what each technique measures (phase contrast microscopy versus transmission electron microscopy);

(v) analytical methodologies;

(vi) AHERA transmission electron microscopy protocol;

(vii) NIOSH 7400 method;

(viii) OSHA reference method (non-clearance); and

(ix) EPA recommendation for clearance (transmission electron microscopy);

(G) sampling equipment including:

(i) sampling pumps (low volume versus high volume, battery versus plugin);

(ii) flow regulating devices;

(iii) sampling media;

(iv) types of filters;

(v) types of cassettes and how to prepare for the type of analysis;

(vi) filter orientation;

(vii) storage and shipment of filters;

(viii) calibration techniques;

(ix) primary and secondary calibration standards;

(x) temperature and pressure effects;

(xi) environmental conditions that prohibit analysis;

and

(xii) frequency of calibration;

(H) calculating sampling times including:

(i) documenting start time and end time; and

(ii) calculating total time;

(I) time weighted average (TWA) calculation including 8-hour TWA and TWA formula;

(J) calibration of air sampling pumps including:

(i) primary versus secondary calibration standards;

(ii) soap film flowmeter (SFF);

(iii) in-line and inlet rotameter positioning;

(iv) rotameter calibration worksheet;

(v) electronic calibrators;

(vi) temperature and pressure correction and effects on sample integrity;

(vii) high volume air sampling pumps and calibration; and

(viii) critical orifices;

(K) air sampling logs and records including:

(i) data elements;

(ii) air sample labeling;

(iii) chain of custody forms;

(iv) shipping and handling methods;

(v) cassette labeling; and

(vi) recordkeeping and field work documentation;

(L) types of air sampling including:

(i) baseline;

(ii) area;

(iii) personal;

(iv) clearance;

(v) area sampling during glove bag operations; and

(vi) upwind and downwind; and

(M) course review.

(4) Asbestos Inspector course. The Asbestos Inspector course must be at least three training days. The course must include lectures, demonstrations, 4 hours of hands-on training, individual respirator fit-testing, course review, and a written examination consisting of 50 multiple choice questions. Successful completion of the course will require passing the examination with a score of at least 70%. The course must adequately address the following in accordance with the MAP:

(A) background information on asbestos;

(B) potential health effects related to asbestos exposure;

(C) functions/qualifications and role of inspectors;

(D) legal liabilities and defenses;

(E) understanding building systems;

(F) public/employee/building occupant relations;

(G) pre-survey planning, and review of previous survey records;

(H) inspecting for friable and nonfriable ACM;

(I) assessing the condition of friable ACM;

- (J) bulk sampling/documentation of asbestos;
- (K) respiratory protection;
- (L) personal protective equipment;
- (M) hands-on training that includes a pre-field-trip simulated asbestos survey with bulk sampling of non-ACBM, and respirator fit-testing and maintenance;
- (N) recordkeeping and writing the asbestos survey report;
- (O) federal, state, and local regulations;
- (P) field trip that includes a building walk-through at a suitable location outside of the classroom; and
- (Q) course review.

(5) Asbestos Management Planner course. The Asbestos Management Planner course must be two training days. The prerequisite for admission to the course is to provide a copy of a current and valid asbestos inspector training certificate. The course must include lectures, demonstration, course review, and a written examination consisting of 50 multiple choice questions. Successful completion of the course will require passing the examination with a score of at least 70%. The course must adequately address the following in accordance with the MAP:

- (A) course overview;
- (B) evaluation and interpretation of survey results;
- (C) hazard assessment;
- (D) legal implications;
- (E) evaluation and selection of control options;
- (F) role of other professionals;
- (G) developing an operations and maintenance (O&M) plan;
- (H) regulatory review;
- (I) recordkeeping for the management planner;
- (J) assembling and submitting the management plan;
- (K) financing abatement actions; and
- (L) course review.

(6) Asbestos Project Designer course. The Asbestos Project Designer course must be at least three training days. This course must include lectures, demonstrations, a field trip, course review, and a written examination of 100 multiple-choice questions. Successful completion of the course will require passing the examination with a score of at least 70%. The course must adequately address the following in accordance with the MAP:

- (A) background information on asbestos;
- (B) potential health effects related to asbestos exposure;
- (C) overview of abatement construction projects to include clearance of the project area;
- (D) safety system design specifications, including written sampling rationale for air clearance;
- (E) field trip;
- (F) employee personal protective equipment;
- (G) additional safety hazards;

- (H) fiber aerodynamics and control;
- (I) designing abatement solutions to include removal, encapsulation, and enclosure methods;
- (J) final clearance process to include discussion of the need for a written sampling rationale for aggressive final air clearance, requirements of a complete visual inspection, and the relationship of the visual inspection to final air clearance;
- (K) budgeting and cost estimating;
- (L) writing abatement specifications and plans;
- (M) preparing abatement drawings;
- (N) contract preparation and administration;
- (O) legal/liabilities/defenses;
- (P) replacement of asbestos with asbestos-free substitutes;

- (Q) role of other consultants;
- (R) occupied buildings, special design procedures required in occupied buildings, education of occupants, extra monitoring recommendations, staging of work to minimize occupant exposure, and scheduling of renovation to minimize exposure;
- (S) how to accomplish a complete visual inspection;
- (T) relevant federal, Texas, and local regulatory requirements; and
- (U) course review.

(7) Texas Asbestos Law and Rules course. The Texas Asbestos Law and Rules course must be three hours. The course must adequately address the law and rules for the following:

- (A) asbestos management in public buildings;
- (B) notification requirements for public buildings;
- (C) operations and maintenance (O&M) requirements for public buildings;
- (D) abatement practices and procedures for public buildings;
- (E) asbestos licensing requirements;
- (F) recordkeeping requirements;
- (G) exemptions; and
- (H) conflicts of interest.

(c) Refresher training course requirements.

(1) An annual refresher training course is required for each discipline to maintain accreditation or licensure. Each refresher training course must adequately address the following:

- (A) federal, state, and local regulations;
  - (B) developments in state-of-the-art procedures; and
  - (C) key aspects of the initial training course.
- (2) Refresher training courses must be at least the following:
- (A) asbestos abatement worker--one day of training;
  - (B) asbestos contractor/supervisor--one day of training;
  - (C) asbestos inspector--one half-day of training;

(D) asbestos management planner--one half-day of training;

(E) asbestos project designer--one day of training; and

(F) asbestos air monitoring technician--one half-day of training.

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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Department of State Health Services

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



## SUBCHAPTER G. STATE LICENSING EXAMINATION

### 25 TAC §§296.111 - 296.118

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### §296.111. General Examination Provisions.

(a) All license applicants, except asbestos abatement worker applicants, must pass the examination to qualify for a license.

(b) A passing examination score may not be used to obtain more than one license.

(c) Applicants must submit all documents and fees necessary to complete the licensing process within three years after passing the required examination. If the applicant does not complete the application process within three years, the applicant must prepare and submit a new application with the application fee and retake the examination.

(d) The department will withdraw examination approval and void an application to take the examination if an applicant:

(1) fails to show for a scheduled examination; or

(2) does not take an examination within six months of submitting the application.

(e) The department will make reasonable modifications for a qualified person with a disability during the licensing examination process. Applicants must follow the Health and Human Services

System's Reasonable Modifications in the Licensing and Certification Examination Process. Applicants may contact the department for additional information.

#### §296.112. Examination Schedule.

The department publishes all scheduled examination dates and locations on its website. The department may cancel or reschedule examinations when necessary. A request to take an examination on a date not listed on the schedule must be submitted to the department in writing. The department will approve or deny a request at the department's discretion. Scheduling an examination on a date not listed on the schedule may require an additional examination fee.

#### §296.113. Examination Qualifications.

(a) Individuals must complete all required training courses from a department-licensed training provider or a training provider approved by another state that administers training in accordance with the MAP (40 CFR Part 763, Subpart E, Appendix C (relating to Asbestos Model Accreditation Plan)) before applying to take an examination.

(b) Individuals who have completed all required training in another state must meet the requirements in §296.44 of this title (relating to Out-of-State Applicants).

(c) A copy of all required initial and refresher training certificates proving current accreditation must be submitted with the examination application.

#### §296.114. Examination Registration and Confirmation.

(a) To register for an examination, an applicant must submit a completed examination application, the examination fee outlined in §296.71 of this title (relating to Fees), and documentation of all required training courses at least 15 calendar days before the desired examination date.

(b) Submission of an application does not guarantee admission for a specific examination. The department will attempt to schedule the applicant for the requested date and location, but space limitations may require the department to offer an examination date and location other than the preferred selection.

(c) The department will email, fax, or mail an examination confirmation letter. The confirmation letter will include the date, location, and time of the examination.

#### §296.115. Examination Admittance and Conduct.

(a) To enter the test site, the examinee must present the examination confirmation letter from the department and government-issued photo identification.

(b) If the proctor finds an examinee's conduct to be inappropriate, the proctor may terminate the examination by collecting the examination materials and asking the examinee to leave. The examination fee will not be refunded. An examination that has been terminated as a result of an examinee's inappropriate conduct counts as an examination attempt.

(c) If an examinee's conduct involves an act of dishonesty, the department may withdraw the examination confirmation letter, impose administrative penalties, and revoke or deny a license.

#### §296.116. Grading Examinations and Reporting Scores.

(a) A grade of 70% must be achieved in order to pass the examination.

(b) Scores will be mailed to the examinee no later than 30 working days after the examination is administered.

(c) Notification of a failing grade will be accompanied by instructions regarding re-examination.

(d) If the examination is graded or reviewed by a testing service, the department will notify the examinee of the results received from the testing service no later than the 14th day after receiving the results. If notice of the examination results will be delayed for more than 90 days after the examination date, the department will notify the examinee of the reason for the delay before the 90th day. The department may require a testing service to notify an examinee of the results directly.

§296.117. Re-examination.

Individuals applying for re-examination must submit a new examination application and pay the required fee. An applicant may take a maximum of two re-examinations after failing the initial examination. Applicants who fail the state examination three times per license category must repeat the initial training course(s) for the intended license and submit a new examination application. Re-examination must occur within one year of the previous examination.

§296.118. Analysis of Examination Performance.

The department will furnish an analysis of the examinee's performance on a failed examination if requested in writing by the examinee. The request must be made within one year of the examination date.

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## SUBCHAPTER H. LICENSE AND REGISTRATION PROVISIONS RELATED TO MILITARY SERVICE MEMBERS, MILITARY VETERANS, AND MILITARY SPOUSES

### 25 TAC §296.131

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

### §296.131. Military Service Members, Military Veterans, and Military Spouses.

(a) Purpose. This subchapter establishes licensing procedures for military service members, military veterans, and military spouses in accordance with Occupations Code, Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses.

(b) An applicant shall provide documentation of the applicant's status as a military service member, military veteran, or military spouse. Acceptable documentation includes, but is not limited to, copies of official documents such as military service orders, marriage licenses, and military discharge records. The department will not process the application of a person who fails to provide appropriate documentation.

(c) Upon request, an applicant shall provide acceptable proof of current license issued by another jurisdiction and proof that the licensing requirements of that jurisdiction are substantially equivalent to the licensing requirements of Texas.

(d) A verified military service member or military veteran shall receive credit towards licensing or apprenticeship requirements, except for an examination requirement, for verified military service, training, or education that is relevant to the license, unless the service member or veteran holds a restricted license issued by another jurisdiction.

(e) An applicant who is a military spouse who holds a current license issued by another jurisdiction that has substantially equivalent licensing requirements shall complete and submit an application form and fee. The department will issue a license to a qualified applicant who holds such a license as soon as possible, and the renewal of the license will be in accordance with subsection (h) of this section.

(f) In accordance with Occupations Code, §55.004(c), the department may waive any prerequisite to obtaining a license after reviewing the applicant's credentials and determining that the applicant holds a license issued by another jurisdiction that has licensing requirements substantially equivalent to those of Texas.

(g) A military spouse who, within the five years preceding the application date, held the Texas license that expired while the applicant lived in another state for at least six months is qualified for a license based on the previously held license, if there are no unresolved complaints against the applicant and there is no other bar to licensure, such as noncompliance with a department order. The applicant must prove current accreditation.

(h) If the department issues an initial license to an applicant who is a military spouse in accordance with subsection (e) of this section, the department will assess whether the applicant has met all the licensing requirements of Texas by virtue of the current license issued by another jurisdiction. The department will provide this assessment in writing to the applicant at the time the license is issued. If the applicant has not met all licensing requirements of Texas, the applicant must provide proof of completion before applying for license renewal. A license will not be renewed if the applicant does not provide proof of completion of the requirements.

(i) Under certain circumstances, examination and licensing fees may be waived for military service members, military veterans, and military spouses.

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## SUBCHAPTER I. ACCREDITATION

### 25 TAC §296.151

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### §296.151. Asbestos Abatement in a Commercial Building.

(a) Activities. In a commercial building, a person must be appropriately accredited as an asbestos abatement worker, asbestos contractor/supervisor, asbestos project designer, or asbestos inspector, in accordance with the MAP, to engage in:

(1) work, supervision, or design to carry out any of the following activities:

(A) a response action other than an SSSD activity;

(B) a maintenance activity that disturbs friable ACBM other than an SSSD activity; or

(C) a response action for a major fiber release episode;

(2) conducting asbestos surveys; or

(3) project management to observe abatement activities performed by accredited contractors/supervisors, serving as the commercial building owner's representative to ensure that abatement work is completed according to specifications and plans and in compliance with all relevant statutes and regulations.

(b) Accreditation course. Persons receive accreditation by successfully completing the appropriate asbestos training course as described in the MAP, and:

(1) approved by the department and offered by a department-licensed asbestos training provider;

(2) approved by another state that has the authority from EPA to approve courses; or

(3) approved directly by EPA.

(c) Proof of accreditation. Persons performing an asbestos-related activity must provide proof of current accreditation at the work site by having one of the following:

(1) a government-issued photo identification (ID) with either a Texas training course certificate from a Texas-licensed asbestos training provider or an accreditation certificate from another state; or

(2) a training ID card from a Texas-licensed asbestos training provider or an accreditation photo ID card from another state.

(d) Reaccreditation. Annual refresher training is required for reaccreditation. An accredited person has a 12-month grace period in which to complete a refresher training course after the expiration date of the accreditation certificate. After that grace period, initial training must be repeated to become reaccredited.

(e) Standards. Work practices and accreditation requirements for asbestos-related activities described in this section must be at least as stringent as applicable federal laws and regulations relating to the MAP and NESHAP.

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## SUBCHAPTER J. EXEMPTIONS

### 25 TAC §§296.171 - 296.175

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### §296.171. Removal of Resilient Floor Covering.

The department exempts persons from the license and registration requirements in this chapter when they are performing resilient floor covering removal in public buildings using the work practices published in the current edition of the Resilient Floor Covering Institute's "Recommended Work Practices for Removal of Resilient Floor Coverings" (RFCI work practices) or other methods determined by the department to provide public health protection from asbestos exposure, in accordance with §1954.104 of the Act and §296.196 of this title (relating to Resilient Floor Covering Removal in Public Buildings). This includes the removal of asbestos-containing mastics adhered to non-asbestos-containing flooring material.

#### §296.172. Emergency Abatement.

In a catastrophic emergency affecting public health or safety that results from a sudden, unexpected event that is not a planned renovation or demolition, where asbestos abatement is required, the department, on receipt of notice, may waive the requirement for a license.

§296.173. *Written Certification Used as an Asbestos Survey.*

A Texas-registered architect or Texas-licensed professional engineer does not need a license from the department to provide the written certifications described in §296.191 of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities).

§296.174. *Small Projects and Repetitive Tasks in a Public Building.*

Persons who perform small projects and repetitive tasks in accordance with §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings) are exempt from the licensing and registration requirements of this chapter.

§296.175. *Regulatory Threshold for Nonfriable Material in a Public Building.*

Persons are exempt from license, registration, and notification requirements if their operations and maintenance project or installation project is not solely for the purpose of asbestos abatement and does not disturb more than three square feet or three linear feet of nonfriable ACMB per occurrence as described in §296.195 of this title (relating to Guidance for Regulatory Threshold for Nonfriable Material in a Public Building).

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## SUBCHAPTER K. OPERATIONS

### 25 TAC §§296.191 - 296.200

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; Health and Safety Code §161.402, which requires the Executive Commissioner to adopt rules designating the materials or replacement parts for which a person must obtain a material safety data sheet before installing the materials or parts in a public building; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12, 161, and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

§296.191. *Asbestos Management in Public Buildings, Commercial Buildings, and Facilities.*

(a) Public building owner responsibilities. The public building owner is responsible for compliance with this chapter for the presence, condition, disturbance, renovation, demolition, and disposal of any ACMB and ACWM encountered in the construction, operations, maintenance, or furnishing of that building. Prior to operations and maintenance, renovation, or demolition, building owners are required to have an inspection performed and have the ACMB abated in accordance with this chapter. Building owners are required to inform in writing, or document oral communication between the owner (or authorized representative) and those who perform any type of maintenance, custodial, renovation, or demolition work, of the presence and location of ACMB prior to the start of any asbestos-related activity. An authorized representative may perform the following functions; however, the building owner ultimately retains:

(1) the responsibility for hiring a licensed asbestos contractor and a licensed asbestos consultant to perform asbestos-related activities;

(2) the responsibility for ensuring compliance with this chapter during periods of vacancy;

(3) the obligation to inform those who enter the building for purposes of construction, maintenance, installation, repairs, etc., of the presence and location of ACMB that could be disturbed or dislodged by those activities, and to arrange for its proper handling;

(4) the responsibility for periods when the building is under management by others;

(5) the responsibility to ensure licensees have workers' compensation insurance issued by an insurance company authorized to do business in Texas, or licensees are exempted from the insurance requirements of this chapter, in accordance with §296.45(g) of this title (relating to Insurance Requirements), if workers' compensation insurance is required by the owner or by the specifications and plans for the asbestos-related activity; and

(6) the responsibility to ensure that the regulated area meets the clearance level of 0.01 f/cc prior to reoccupancy of that area.

(b) Commercial building owner responsibilities. The commercial building owner is responsible for compliance with this chapter for the presence, condition, disturbance, renovation, demolition, and disposal of any asbestos encountered in the construction, operations, maintenance, or furnishing of that commercial building. Prior to operations and maintenance, renovation, or demolition, commercial building owners are required to have an inspection performed and have the ACMB abated in accordance with the NESHP. The commercial building owner retains:

(1) the responsibility for ensuring compliance with this chapter during periods of vacancy; and

(2) the responsibility for periods when the building is under management by others.

(c) Facility owner responsibilities. The facility owner is responsible for compliance with this chapter for the presence, condition, disturbance, renovation, demolition, and disposal of any asbestos encountered in the construction, operations, maintenance, or furnishing of that facility. Prior to operations and maintenance, renovation, or demolition, facility owners are required to inspect for the presence of asbestos and abate ACMB in accordance with the NESHP. The facility owner retains:

(1) the responsibility for ensuring compliance with the NESHP during periods of vacancy; and

(2) the responsibility for periods when the facility is under management by others.

(d) Mandatory survey for ACBM before renovation or demolition. Before any renovation or dismantling outside of or within a public building, commercial building, or facility, including preparations for partial or complete demolition, owners must have an asbestos survey performed. The work area and all immediately surrounding areas that could foreseeably be disturbed by the actions necessary to perform the project must be thoroughly surveyed and sampled as applicable before renovation or demolition. A copy of the asbestos survey report must be produced upon request by the department within 10 working days. A building may be demolished with RACM in place if a state or local government orders the demolition because the building is structurally unsound and in danger of imminent collapse as determined by a professional engineer or a city, county, or state government official who is qualified to make that decision. If an owner is unable to obtain a survey because the building is structurally unsound and unsafe to enter, and the owner has been unable to obtain an order for demolition and has a letter from a professional engineer stating the building is structurally unsound and in danger of imminent collapse, then the owner may contact the department to request a waiver from survey. Documentation supporting the inability to obtain an order must be submitted with the request. If a survey cannot be performed before demolition starts due to the building being structurally unsound and unsafe to enter, all suspect material must be treated as RACM in accordance with NESHAP 40 CFR §§61.141, 61.145(a)(3) and (c)(4) - (9), and 61.150(a)(3). Additional information related to determining suspect ACBM is located on the department's website at <http://www.dshs.texas.gov/>.

(1) In a public building, the mandatory survey requirement may be met in one of the following two ways.

(A) A person appropriately licensed in accordance with this chapter performs a survey using the AHERA protocol specified in 40 CFR §§763.85 - 763.88 (relating to Asbestos-Containing Materials in Schools), which is the required method for schools. To demonstrate that there is no ACBM, the licensed individual must collect a minimum of three samples from each suspect homogeneous area.

(B) A Texas-registered architect or a Texas-licensed professional engineer may compile the information from MSDSs and SDSs of the materials used in the construction of the building and, finding no asbestos in any of those materials, prepare a signed written certification that he or she has reviewed the MSDSs and SDSs for all materials used in the building's construction, and that none of those materials contain ACBM. This certification, together with copies of the MSDSs, SDSs, and any previous asbestos survey reports, meets the mandatory survey requirement. This certification must also clearly identify the name of the building, the street address and specific area of the building to which the statement applies, and the specific dates on which the work was completed.

(2) In a commercial building, only an accredited inspector who has completed the MAP inspector training may perform the asbestos survey. This accredited inspector does not need to be licensed to perform the asbestos survey.

(3) In a facility that is not a public or commercial building, the survey must conform to 40 CFR §61.145 (relating to Standard for Demolition and Renovation). OSHA regulations or EPA regulations may apply.

(e) Asbestos survey reports.

(1) Limited asbestos surveys are performed to address a specific area of a building such as an area identified for renovation. A

limited asbestos survey may not be substituted for a thorough asbestos survey of the entire building.

(2) A comprehensive asbestos survey covering the entire building is required before demolition of the building.

(3) Asbestos surveys remain acceptable if the asbestos survey was done in compliance with the TAHPR in effect at the time the asbestos survey was completed, and if the asbestos survey continues to represent accurately the types of material, location, and the condition of the material that will be disturbed.

(4) An environmental assessment report may not be used as an asbestos survey report unless it contains all of the required elements of an asbestos survey report.

(f) Sampling for asbestos in a public building. A licensed asbestos inspector must perform an asbestos survey in accordance with 40 CFR §§763.85 - 763.88. To demonstrate that there is no ACBM and therefore no need for O&M activities or abatement, the licensed asbestos inspector must collect a minimum of three samples from each homogeneous area. The samples must be evaluated by a licensed asbestos laboratory. If one sample from a homogenous area is found to be greater than 1.0% asbestos, the remaining samples from that homogeneous area do not have to be analyzed. Building materials that have not been surveyed as required in this subsection and which are suspected of containing asbestos must be treated as ACBM.

(1) When conducting core sample analysis, each layer must be analyzed separately. Reporting the results as an average for a composite result is not allowed for a public building.

(2) Results of visual estimation by polarized light microscopy (PLM) analysis of 0% asbestos or no asbestos detected (NAD) do not require further analysis for the detection of asbestos in friable or nonfriable suspect materials.

(3) Results of visual estimation by PLM analysis of greater than 0% and less than 10% asbestos must be further analyzed to demonstrate the material is not ACBM using other analysis using the hierarchy and guidance in subparagraphs (A) - (C) of this paragraph.

(A) Results of point counting by PLM analysis of samples supersede and replace the initial results of visual estimation by PLM.

(B) Results of gravimetric preparation followed by point counting or transmission electron microscopy (TEM) visual estimation analysis of samples supersede and replace results of visual estimation by PLM and results of point counting by PLM.

(C) Point counting may be used to analyze both friable and nonfriable materials. Nonfriable materials such as mastics and floor tile where fibers are occluded by a binding matrix will be processed using techniques such as acid washing and ashing outlined in EPA/600/R-93/116, July 1993, "Method for the Determination of Asbestos in Bulk Building Materials."

(g) Conditions requiring mandatory abatement. Before any renovation or dismantling outside of or within a public building, commercial building, or facility, including preparations for partial or complete demolition, the building owner must have ACBM abated in accordance with this section.

(1) Demolition and/or renovation of a public building. Before performing any demolition in a public building, building owners shall ensure that all suspect ACBM is surveyed and RACM is abated in accordance with NESHAP and this chapter. Before performing any renovation in a public building, building owners shall ensure that all suspect ACBM that could foreseeably be disturbed in the area to be

renovated is surveyed, and ACBM is abated in accordance with this chapter.

(2) Demolition and/or renovation of a commercial building. Before performing any O&M, renovation, or demolition activity in a commercial building, owners or operators shall ensure that all suspect ACBM is surveyed and RACM is abated in accordance with NESHAP and the MAP.

(3) Demolition and/or renovation of a facility. Before performing any O&M, renovation, or demolition activity in a facility, owners or operators shall ensure that all suspect ACBM is surveyed and RACM is abated in accordance with NESHAP.

(4) Demolition and/or renovation of a residential building containing four or fewer dwelling units. Two or more such residential buildings that are being demolished or renovated on the same site by the same owner or operator or owner or operator under common control as part of the same project are subject to the NESHAP requirements.

(A) Residential buildings are not exempt from the NESHAP if they are on the same site, under the control of the same owner or operator as part of the same project. Residential buildings are considered to be on the same site if they are within 660 feet of each other. EPA considers demolitions planned at the same time or as part of the same planning or scheduling period to be part of the same project. In the case of municipalities, a scheduling period is often a calendar year or fiscal year or the term of a contract. Owners or operators shall ensure that all suspect ACM is surveyed and RACM is abated in accordance with NESHAP.

(B) A residential building that is being demolished together with any other type of building as part of a larger private or public project (such as an urban renewal, shopping mall, or highway construction project) is subject to the NESHAP, and owners or operators shall ensure that all suspect ACM is surveyed and RACM is abated in accordance with NESHAP. If one residential building is the only building being demolished, NESHAP regulations do not apply.

(C) Nuisance residence demolition is subject to the NESHAP if two or more single family dwellings are under control of the same owner or operator, are located on one site, are part of a larger project, or are within 660 feet of each other.

(h) Demolition with ACM left in place.

(1) Category I nonfriable ACM may be left in place if it is not in poor condition, has not become friable, and will not become RACM during demolition.

(2) Category II nonfriable ACM may be left in place if the probability is low that the material will become RACM, or crumbled, pulverized, or reduced to a powder during demolition.

(3) RACM may be left in place if the total amount of RACM is under the NESHAP threshold as described in 40 CFR §61.145. All RACM must be removed before demolition if the NESHAP threshold is met or exceeded.

(i) Mandatory abatement project design for friable ACBM. It is mandatory to have a project designed and prepared by either a licensed asbestos consultant (for a public building) or an accredited project designer (for a commercial building) for all projects that involve any of the following activities:

(1) a response action other than an SSSD activity;

(2) a maintenance activity that disturbs friable ACBM other than an SSSD activity or a small project or repetitive task described in §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings); or

(3) a response action for a major fiber release episode.

(j) Mandatory abatement project design for nonfriable ACBM. It is mandatory to have a project designed by a licensed asbestos consultant for abatement projects in public buildings that have a combined amount of nonfriable asbestos exceeding 160 square feet of surface area, or 260 linear feet of pipe length, or 35 cubic feet of material to be removed. The exception to this requirement is for floor tile removed in accordance with §296.171 of this title (relating to Removal of Resilient Floor Covering) and projects described in §296.197 of this title (relating to Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material). In a commercial building, nonfriable material does not require a project design but must be treated in accordance with NESHAP.

(k) Asbestos control and abatement. A public building owner has the following options for managing the asbestos found in the owner's building.

(1) Building owners may hire a licensed asbestos consultant or licensed asbestos management planner to perform a comprehensive asbestos survey of the entire building that may be used for O&M activities, renovation, or demolition.

(2) Building owners may hire a licensed asbestos abatement contractor to conduct:

(A) asbestos abatement in accordance with §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings); and

(B) asbestos abatement of nonfriable ACBM using the work practices described in §296.197 of this title (relating to Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material).

(3) A building owner may hire a licensed asbestos abatement contractor or a licensed asbestos O&M contractor to conduct:

(A) small projects and/or repetitive tasks involving the disturbance of friable ACBM using the work practices described in §296.198 of this title (relating to Procedures for Small Projects and Repetitive Tasks in Public Buildings); and

(B) exempted activities described in §296.199 of this title (relating to Exemptions for the Removal of Intact Asbestos-Containing Materials in a Public Building).

(4) Building owners may hire or retain a licensed asbestos abatement contractor or a licensed asbestos O&M contractor to conduct SSSD activities or cleanup affecting asbestos. When utility work is to be performed, the building owner shall either have the affected ACM removed prior to the work of a utility contractor, or require the utility contractor to be licensed to handle ACM.

(5) Building owners may conduct:

(A) asbestos abatement projects if they obtain an asbestos abatement contractor's license, in accordance with §296.48 of this title (relating to Asbestos Abatement Contractor); and

(B) asbestos O&M activities within public buildings with their own employees for their own account if they obtain an asbestos O&M contractor license, in accordance with §296.50 of this title (relating to Asbestos Operations and Maintenance Contractor), have a licensed asbestos O&M supervisor, in accordance with §296.49 of this title (relating to Asbestos Operations and Maintenance Supervisor), and have registered asbestos abatement workers, in accordance with §296.46 of this title (relating to Asbestos Abatement Worker).

(6) Building owners may hire an asbestos management planner to develop a management plan to control O&M, renovation, and demolition.

(l) Mandatory notification. Notification is required in accordance with §296.211 of this title (relating to Notifications) under the following conditions.

(1) Notification is required for any demolition of a facility or public building, whether or not asbestos has been identified.

(2) In a public building, a notification to abate any amount of asbestos must be submitted to the department by the public building owner and/or operator.

(3) In a facility, a notification to abate amounts described in NESHAP must be submitted to the department by the facility owner and/or operator.

(m) Requirement for survey and management plan. If, in the opinion of the department following a site inspection of a public building, there appears to be a danger or potential danger from ACBM in poor condition to the workers or occupants of the building or the general public, the department will, by certified letter, require the building owner or authorized representative to immediately obtain an asbestos survey and asbestos management plan completed by a licensed asbestos inspector, licensed asbestos management planner, or licensed consultant. A copy of the management plan must be submitted for review and approval to the department within 90 days of receipt of the certified letter. Copies of the plan must be on file with the owner or management agency, and in the possession of the supervisor in charge of building operations and maintenance.

(n) Installation of new materials. A person may not install building materials or replacement parts in a public building unless:

(1) the person obtains a required MSDS or SDS showing that the materials or replacement parts contain 1.0% or less of asbestos; or

(2) the materials or replacement parts, according to the MSDSs or SDSs, contain greater than 1.0% asbestos, but there is no alternative material or part as demonstrated by the building owner or contractor; or

(3) a licensed asbestos inspector may sample new materials prior to installation, and based on the laboratory results, certify that the building or renovation is free of asbestos.

(o) The department may exempt a demolition or renovation project from the Act or NESHAP rules relating to demolition and renovation activities if:

(1) the EPA has exempted the project from federal regulations; or

(2) the department determines that:

(A) the project will use methods for the abatement or removal of asbestos that provide protection for the public health and safety at least equivalent to the protection provided by the procedures required in this chapter for the abatement or removal of asbestos; and

(B) the project does not violate federal law.

(p) Survey required. A municipality that requires a person to obtain a permit before renovating or demolishing a public or commercial building may not issue the permit unless the applicant provides one of the following types of documentation:

(1) written evidence acceptable to the municipality that an asbestos survey of all parts of the building affected by the planned reno-

vation or demolition has been completed by a person licensed in accordance with the Act and this chapter (for a public building) or accredited under the MAP (for a nonpublic building) to perform a survey; or

(2) written certification from a Texas-registered architect or Texas-licensed professional engineer that, together with copies of the MSDSs, SDSs, and copies of any previous and subsequent asbestos survey reports may be used as an asbestos survey report. The certification must:

(A) identify the name of the building, the street address, and the specific area of the building to which the certification applies;

(B) certify that the Texas-registered architect or Texas-licensed professional engineer compiled and reviewed the information from MSDSs and SDSs of all products used in the construction of the building and has matched them by manufacturer to materials on-site in the construction;

(C) certify that none of the building materials are ACBM;

(D) specify whether the relevant work was new construction or renovation; and

(E) specify dates when the work was completed.

§296.192. General Requirements for Asbestos Abatement in Public Buildings.

(a) Responsibility. This section addresses general requirements for asbestos abatement projects in public buildings. It is the responsibility of owners of public buildings or their delegated agents to engage persons licensed in accordance with this chapter to perform any asbestos-related activity.

(b) Supervision.

(1) Every asbestos abatement project undertaken by a licensed contractor in a public building must be supervised by at least one licensed asbestos abatement supervisor and consultant or the consultant's designated project manager. A consultant or a project manager is not required for O&M activities described in §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings).

(2) Asbestos abatement supervisors and the consultant or the consultant's project manager shall remain on-site and in immediate proximity during all periods of asbestos abatement activity.

(3) An asbestos abatement supervisor shall supervise the asbestos abatement activity from inside the containment area during at least 25% of each day on which asbestos abatement activity occurs.

(4) The asbestos consultant or designated project manager shall enter and inspect the containment before the start of the asbestos abatement daily and throughout the day to ensure the containment is in compliance with this chapter and the specifications and plans.

(5) Every O&M activity shall be supervised by at least one asbestos O&M supervisor or abatement supervisor during all periods of asbestos abatement activity.

(c) Employees. Each employee or delegated agent of any licensee who must intentionally disturb, handle, or otherwise work with ACBM, or who engages in an asbestos abatement project, asbestos O&M activity, or other asbestos-related activity shall have an annual medical examination and respirator fit-test and be properly equipped, trained, and licensed in accordance with this chapter.

(d) Records. Project records for all asbestos-related activities in public buildings must be kept for 30 years from the date of project completion and made available for inspection and review upon re-

quest from the department. Project records include all violations issued against a licensee by the EPA, OSHA, or a state agency. The record-keeping responsibilities for licensees are explained in §296.200 of this title (relating to Recordkeeping).

(e) Compliance inspections. Each licensee, RFCI contractor, and building owner shall assist and cooperate with all properly identified representatives of the department in the conduct of asbestos inspections or investigations at all reasonable or necessary times, with or without prior notice. Such inspections may be made at proposed, actual, or former sites of asbestos-related activities, or of the premises, records, equipment, and personnel of licensees or of those who have held licenses. It is a violation of the Act and this chapter to interfere with or delay an inspection or investigation conducted by a department representative. A licensee, RFCI contractor, or building owner or owner's representative may not deny entry to a properly identified representative of the department.

(f) Respiratory protection program. Each employer with employees performing asbestos-related activities shall be responsible for establishing and following a written respiratory protection program, as required by OSHA regulations in 29 CFR §1910.134 (relating to Respiratory Protection). Each employer shall maintain a current copy of the respiratory protection program at all project locations. A copy of 29 CFR §1910.134 is not acceptable as a written respiratory protection program. Respirators must be properly worn at all times in containment during asbestos abatement activity.

(1) The employer shall perform personal air monitoring to determine airborne concentrations of asbestos exposure to its employees in accordance with 40 CFR Part 763, Subpart G (relating to Asbestos Worker Protection), or 29 CFR §1926.1101 (relating to Asbestos).

(2) The employer must maintain in safe working condition a sufficient number of respirators of the types and styles approved by NIOSH to meet all requirements for the licensee's employees. Any person whose facial characteristics, hair, mustache, or beard preclude a tight fit of a negative-pressure respirator shall not be allowed to enter the containment during any asbestos abatement activity unless equipped with a positive pressure or supplied air respirator designed for usage with facial hair.

(g) Suspect ACM found during the asbestos abatement project. Suspect building materials found during an asbestos abatement project that have not been surveyed must be treated as ACM. These materials may be proven to be non-asbestos-containing by laboratory analysis in accordance with §296.191(d) of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities).

(h) Project monitoring. The asbestos consultant shall specify in writing the duties, responsibilities, and authority of the project manager and air monitoring technician.

(1) Air sampling.

(A) Baseline.

(i) Baseline air samples must be collected before the start of any asbestos abatement project that requires a design in accordance with §296.191(i) and (j) of this title. The samples must be collected from inside the space that will become the regulated area for the project before asbestos abatement activities begin, including area preparation. A minimum of three samples must be collected on 0.8 micron mixed cellulose ester (MCE) filters loaded in cassettes with electrically conductive extension cowls. The locations selected for baseline air sample collection must provide suitable data for comparison with indoor air monitoring samples collected after asbestos abatement activ-

ities begin. Sampling and analysis must conform to the latest edition of the NIOSH 7400 method, counting rules A. The minimum sample volume will be 1,250 liters. Only one cassette may be placed on a pump at a time. If it is suspected that the clearance level cannot be achieved due to existing poor air quality in a public building, the baseline level may be used as the clearance level.

(ii) Baseline air samples must be analyzed if the clearance level of 0.01 f/cc cannot be achieved.

(iii) Baseline air samples must be kept for no fewer than 30 days after clearance is achieved.

(B) Area air monitoring.

(i) Ambient air samples must be collected continuously during asbestos abatement activity and analyzed in accordance with the latest edition of the NIOSH 7400 method, counting rules A.

(ii) Ambient air samples must be collected inside containment adjacent to the abatement activities; outside containment but inside the building (if applicable); at the negative air unit discharge, but not directly in the airstream; immediately outside the entrance to the decontamination area (representative of the air being drawn into the area); outside the bag-out area; and at any other locations required by the specifications and plans. Only one cassette may be placed on a pump at a time.

(C) Clearance.

(i) Project clearance must consist of an initial visual inspection, followed by air clearance sampling, removal of containment, and a final visual inspection.

(ii) All project activities, except O&M, must be cleared by using aggressive air sampling. Clearance samples must be collected by an asbestos air monitoring technician or an asbestos consultant. The sample pumps must be monitored during the sampling period by the person collecting the samples. For all projects, samples must be collected and analyzed using the NIOSH 7400 method, counting rules A, Phase-contrast Microscopy (PCM). Clearance samples must be collected at a flow rate between 0.5 to 16 liters per minute on 0.8 micron MCE filters in cassettes with electrically conductive extension cowls. Only one cassette may be placed on a pump at a time. Minimum sample volume will be sufficient to meet the limit of quantification of airborne fibers by adjusting the sampling volume to produce a fiber density of 100 to 1,300 fibers/mm<sup>2</sup>. Clearance is achieved if no sample is reported greater than 0.01 f/cc by the analysis report from the licensed laboratory. PCM must be used in accordance with the NIOSH 7400 method to determine the amount of fibers present. The minimum sample volume for PCM is 1,250 liters of air. Alternatively, the AHERA protocol may be used to determine volume and flow rate needed for TEM analysis in accordance with 40 CFR Part 763, Subpart E, Appendix A (relating to Interim Transmission Electron Microscopy Analytical Methods--Mandatory and Nonmandatory--and Mandatory Section to Determine Completion of Response Actions). The minimum sample volume for TEM is 1,200 liters of air.

(2) Other monitoring requirements.

(A) Initial visual inspection. The asbestos abatement contractor shall perform an initial visual inspection of the abatement area to confirm that all specified ACM has been removed, encapsulated, or enclosed. The asbestos abatement contractor shall ensure that all abatement-related items are removed from the containment excluding negative air machine(s) and equipment essential to maintain the containment and to perform the visual inspection. Once the abatement contractor has confirmed that all specified ACM has been addressed, the asbestos consultant or project manager designated by the asbestos

consultant must perform a visual inspection to verify that all specified ACM has been removed, encapsulated, or enclosed. The visual inspection must be performed in accordance with the specifications and plans and federal regulations.

(B) Final visual inspection. A final visual inspection must be performed after the removal of containment to determine if any ACM has escaped the containment or any ACWM remains. This visual inspection must be conducted by a licensed asbestos consultant or project manager designated by the asbestos consultant. The licensed asbestos abatement contractor shall abate all ACM and remove any ACWM discovered by the final visual inspection.

(3) Deviations. A licensed asbestos consultant shall design the air monitoring scheme and may deviate from this subsection only if the consultant can show that the deviation is as protective of public health. The asbestos consultant shall, upon request by the department, provide documentation and justification to support deviations and must be able to demonstrate that the design meets the requirements of 40 CFR Part 763, Subpart E (relating to Asbestos-Containing Materials in Schools) and other applicable regulations.

(i) Posting documents. Licensed asbestos abatement contractors, licensed O&M contractors, and RFCI contractors shall post the following documents visible to the public at the entrance to the regulated area:

(1) the Violation Notification Procedure poster issued by the department; and

(2) copies of any asbestos-related orders issued by the department or any other order from the federal or state asbestos-regulating authorities. These orders must be posted for 12 months from the date the order becomes effective.

(j) Prohibitions. Solvents with a flash point of 140 degrees Fahrenheit or below must not be used.

§296.193. Abatement Practices and Procedures for Full Containment in Public Buildings.

(a) General provisions. The following general work practices are minimum requirements for protection of public health, and do not constitute complete or sufficient specifications and plans for an asbestos abatement project. If an asbestos abatement project has specifications and plans that contain asbestos abatement activities that are more detailed than are found in this section or which are specific to that project, the detailed asbestos abatement activities in the specifications and plans are required for that particular project and must be met to maintain compliance with this chapter. The specifications and plans written for the asbestos abatement project must also include the required air clearance procedures.

(1) Federal work practices for asbestos abatement are referenced in 40 CFR §61.145 (relating to Standard for Demolition and Renovation) and §61.150 (relating to Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation, and Spraying Operations).

(2) An asbestos abatement project design must be prepared by a licensed asbestos consultant in accordance with §296.191 of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities).

(A) A licensed asbestos consultant who designs a project that includes dry removal or no negative air must submit the design with a written request for approval to the department. The request must include the licensed asbestos consultant's certification that the design is as protective of public health as the work practices described in this section. The request must include documentation that

a certified industrial hygienist (CIH) or a professional engineer (PE) licensed in Texas approved the design. The consultant must receive written approval from the department before beginning the project.

(B) A licensed asbestos consultant who designs a project with work practices that differ from this section must document the variance on the department's notification form. The notification form must clearly describe the work practices and demonstrate how the specific work practices are as protective of public health as the work practices in this section.

(3) If ACBM is to be removed, encapsulated, or enclosed, it must be within a regulated area.

(4) Only licensees, emergency responders as defined in §296.21(39) of this title (relating to Definitions), or appropriate governmental inspectors are allowed to enter the regulated area. The building owner or the owner's representative is allowed entry into the containment when accompanied by a licensed asbestos abatement supervisor or licensed asbestos consultant. Owners or representatives entering containment must wear at a minimum a half-face respirator and a full-body suit and may remain in the containment for no more than 30 minutes. Owners or representatives must follow the specified decontamination procedures when exiting the containment.

(5) All surfaces that are not being abated must be covered during asbestos abatement activities, except for O&M, RFCI, or projects designed by a licensed asbestos consultant in accordance with paragraph (2) of this subsection.

(b) Containment requirements.

(1) Plastic sheeting. When specified by a licensed asbestos consultant that fire retardant plastic sheeting must be used, it must be certified by the Underwriters Laboratory (UL) as being fire retardant.

(2) Objects within containment. All movable objects must be removed from the containment before the start of asbestos abatement. Contaminated non-porous items that are to be salvaged or reused must be decontaminated. Porous items that are contaminated must be disposed of as ACWM. All non-movable objects that remain in the containment must be decontaminated and covered with a minimum of 4-mil thick plastic sheeting, secured in place.

(3) Critical barriers. Regulated areas within which asbestos abatement is to be conducted must be separated from adjacent areas by a minimum of one impermeable barrier such as plastic sheeting attached securely in place. All openings between containments and adjacent areas, including but not limited to, windows, doorways, elevator openings, corridor entrances, ventilation openings, drains, ducts, grills, grates, diffusers, skylights, and lay-in suspended ceiling grid systems must be sealed. HVAC systems must be isolated from the regulated area by sealing with a double layer of 6-mil thick plastic sheeting or the equivalent. All penetrations that could permit air infiltration or air leaks through the barrier must be sealed, with exceptions of the make-up air provisions and the means of entry and exit.

(4) Floor preparation. Floors must be sealed to prevent water leakage. All floor surfaces must be completely covered by a minimum of two layers of 6-mil thick plastic sheeting with at least a dart impact of 270 grams and tear resistance of machine direction (M.D.) 512 grams and transverse direction (T.D.) of 2,067 grams or at least 6-mil thickness. Floor sheeting must extend up sidewalls at least 12 inches and be sized to minimize the number of seams. No seams may be located at wall-to-floor joints.

(5) Wall preparation. All wall surfaces must be completely covered by a minimum of two layers of 4-mil thick plastic sheeting. Wall sheeting must be installed so as to minimize seams and must ex-

tend beyond wall-to-floor joints at least 12 inches. The wall sheeting must overlap the floor sheeting. No seams may be located at wall-to-wall joints. A viewing window must be included in the wall to permit the viewing of at least 51% of the abatement work area, unless a licensed asbestos consultant specifies a viewing window is not practical. The window must be constructed of a transparent, shatter-resistant panel, also called acrylic or acrylic glass, which measures approximately 18 inches by 18 inches. The bottom of the window must be at a reasonable height for viewing.

(6) Ceiling preparation. All ceilings must be completely covered with one layer of 4-mil thick plastic sheeting that extends beyond the ceiling-to-wall joint at least 6 inches, unless a licensed asbestos consultant determines that the ceiling is impermeable and specifies the ceiling can be cleaned and does not need to be covered.

(7) Bag-out area. A licensed asbestos consultant shall specify when a bag-out area is required as part of containment. A bag-out area may not be used to decontaminate personnel.

(8) The asbestos abatement contractor and asbestos consultant shall ensure that their employees do not eat, drink, smoke, chew tobacco or gum, or apply cosmetics in the regulated area.

(c) Decontamination area. The containment must include an attached personnel decontamination area. The area must consist of a clean room, shower room, and equipment room. Each room must be at least 30 inches by 30 inches wide and 78 inches tall. Each room must be separated from the other and from the containment by airlocks so that air does not escape outside the containment and that air flows from the outside to the inside of containment through the decontamination area. The shower room must be provided with soap and hot and cold water where the temperature can be adjusted by the user. Waste water must be filtered using a 2-stage filtration system with a 50 micron and a 5 micron filter. A licensed asbestos consultant shall specify a remote decontamination area when it is not feasible to attach the decontamination area to the containment. The consultant must determine procedures for minimizing the migration of fibers from the containment to the remote decontamination area. All persons must exit the containment through the shower before entering the clean room. No asbestos-contaminated individuals or items may enter the clean room. The asbestos abatement supervisor shall ensure that the decontamination area is fully operational before and during asbestos abatement activities. All persons exiting containment shall:

- (1) remove all gross contamination and debris from their protective clothing before entering the equipment room;
- (2) remove their protective clothing in the equipment room and deposit the clothing in 6-mil thick plastic impermeable bags or containers labeled in accordance with subsection (h)(1) of this section;
- (3) not remove their respirators in the equipment room;
- (4) shower before entering the clean room; and
- (5) enter the clean room before changing into street clothes.

(d) HVAC equipment. All HVAC systems, including all supply and return openings and any seams in system components, must be sealed with at least a double layer of 6-mil thick plastic sheeting and/or tape. All old filters must be disposed of as asbestos waste.

(e) Warning signs. Danger signs, in accordance with 29 CFR §1926.1101 (relating to Asbestos), must be displayed, in both Spanish and English, at all entrances to regulated areas, and on the outside of critical barriers. Asbestos caution tape may not be substituted for warning signs.

(f) Cleaning. Cleaning procedures must include wet methods and HEPA vacuuming. A HEPA vacuum equipped with HEPA filter must remain on-site during the asbestos abatement activity.

(g) Containment-area ventilation. HEPA filtration units must be operated continuously from the time containment is established through the time acceptable final air clearance is achieved. HEPA units must be in sufficient number to provide a negative pressure of at least 0.02 inches of water column differential between the containment work space and outside, as measured by a manometer. HEPA units must provide a minimum of four containment air changes per hour. Units must be operated with unrestricted exhaust. These units must exhaust filtered air to the outside of the building wherever feasible.

(h) Requirements for removal of ACBM.

(1) All ACBM must be adequately wetted before removal or other handling using water to which a surfactant has been added (amended water). A consultant may specify the use of water without surfactant if it is at least equally protective of public health. The ACBM must then be placed in clear bags (or other suitable containers) that must be marked in accordance with the applicable OSHA and NESHAP regulations. All ACWM must be double-bagged or double-wrapped by placing into 6-mil thick plastic bags or placing in a bag and fiberboard drum. The bags must have a tear resistance of no less than M.D. 300 grams, T.D. 2,068 grams, and dart impact of no less than 216 grams.

(2) ACWM bags must be double-bagged or placed inside fiberboard drums. The bags must not be filled to a level that tears or breaks the bags. Excess air in the bags must be removed before entering the bag-out area. The top of the bag must be twisted closed, folded over, and sealed with duct tape. The bag must be rinsed off in the bag-out area to remove asbestos contamination and placed inside another bag or fiberboard drum. If an outer bag is used, excess air must be removed, and the bag must be closed and sealed in the same manner as the inner bag.

(3) If a bag leaks, the bag must be placed into a third bag and sealed as described in paragraphs (1) and (2) of this subsection. If a fiberboard drum leaks, the drum must be wrapped in a minimum of one layer of 6-mil thick plastic sheeting and sealed.

(4) The exterior bag, wrapping, or fiberboard drum must have warning and generator labels applied as specified in 40 CFR §61.150(a)(1)(iv) - (v) (relating to Standard for Waste Disposal for Manufacturing, Fabricating, Demolition, Renovation, and Spraying Operations). The generator labels must be printed in letters of sufficient size and contrast so as to be readily visible and legible. All required labeling of ACWM containers must be done before removal from the regulated area. Any container or wrapped component labeled as asbestos must be treated as ACBM.

(5) Components covered with, coated with, or containing ACM that are going to be removed from the building may either be stripped in place and cleaned (and pass a visual inspection by the asbestos consultant), or the ACBM may be adequately wetted and the entire component wrapped in two layers of 6-mil thick plastic sheeting or two layers of plastic sheeting with a tear resistance of no less than M.D. 512 grams, T.D. of 2,068 grams, and a dart impact of no less than 297 grams as measured using ASTM International methods ASTM D1709, ASTM D1922, and ASTM D882, labeled, and sealed providing that:

(A) components such as sections of metal lath that cannot be safely lowered to the floor must be stripped in place;

(B) any component that cannot be lowered or handled without presenting an excessive fiber release or safety hazard must be stripped in place; and

(C) sharp edges of components must be protected to preclude tearing the plastic wrapping and causing injury.

(6) ACBM must be removed in small sections and containerized while wet. Material must not be allowed to accumulate on the floor or become dry. Structural components and piping must be adequately wetted before wrapping in plastic sheeting for disposal.

(7) Temporary storage of ACWM must be provided (for example, a roll-off box, dumpster, or storage room lined with 6-mil thick plastic sheeting). All temporary storage must be sealed to prevent unauthorized access. Final disposal of ACWM must be within 30 days of project completion or when receiving container is full, whichever is sooner.

(8) At the conclusion of the removal, the asbestos abatement contractor shall perform a visual inspection to ensure that all ACBM required to be removed has been removed and containerized, in accordance with this section, and the containment is free of all residual dust and debris.

(i) Requirements for the encapsulation of ACBM.

(1) Encapsulations must be performed within a containment.

(2) Loose and hanging ACBM must be removed before encapsulation. Filler material applied to gaps in existing material must contain no asbestos, must adhere well to the substrate, and must provide an adequate base for the encapsulating agent.

(3) Encapsulant must be applied using only airless spray equipment with the nozzle pressure and tip size set according to the manufacturer's recommendations.

(4) Encapsulated materials must be specifically designated by signs, labels, color coding, or some other mechanism to warn individuals who may in the future be required to disturb the material.

(j) Requirements for the enclosure of ACBM.

(1) Acceptable enclosure must be airtight and of permanent construction so that the material enclosed is inaccessible.

(2) All areas of ACBM must be wetted within containment if they are to be disturbed during the installation of hangers, brackets, or other portions of the enclosure.

(3) Before building the enclosure, loose and hanging ACBM that may be disturbed must be removed.

(4) Enclosures for ACBM must be specifically designated by signs, labels, color coding, or some other mechanism to warn individuals who may in the future be required to disturb the material.

(k) Safety requirements. The following safety requirements must be in effect for an abatement project:

(1) Fire safety. A minimum of one fire extinguisher with a minimum National Fire Protection Association rating of 10BC (dry chemical) must be placed within each abatement project containment for every 3,000 square feet, or fraction thereof, of containment. One fire extinguisher must be placed at each entrance of containment. Each fire extinguisher must be maintained in a fully charged and operable condition with a current annual inspection tag approved for use by an inspector trained to determine if the extinguisher is properly functioning and maintained. Where more than one fire extinguisher is required, they must be distributed proportionately throughout the containment and their locations clearly marked.

(2) Electrical safety. All active electrical service lines within the regulated areas and containments must be connected through ground-fault circuit interrupter (GFCI) devices.

§296.194. Operations and Maintenance (O&M) Requirements for Public Buildings.

(a) Restrictions. O&M activities involving ACBM are restricted to SSSD activities. Asbestos O&M licensees shall not engage in any activity for which the primary purpose is asbestos abatement.

(b) Work practices. Work practices must include the following requirements.

(1) Employers shall be responsible for furnishing and requiring the use of respirators, protective clothing, HEPA vacuum machines, glove bags, and other necessary equipment for all employees who perform O&M activities.

(2) Access to the regulated area must be limited to authorized personnel in accordance with 29 CFR §1926.1101(e) (relating to Asbestos). At a minimum, caution tape must be used to demarcate the regulated area.

(3) Warning signs must be displayed in English and Spanish at all entrances to the regulated area in accordance with 29 CFR §1926.1101.

(4) A negative pressure mini-containment must be constructed for containment of asbestos fibers. A glove bag or negative pressure glove box may be used for removal or repair of ACM on pipes as described in 29 CFR §1926.1101(g)(5) and 40 CFR Part 763, Subpart E, Appendix C (relating to Asbestos Model Accreditation Plan).

(5) Asbestos material must be wetted with amended water and remain wet throughout the work operation.

(6) Asbestos exposed as a result of spot repairs must be suitably enclosed or encapsulated.

(7) HEPA vacuuming and/or wet cleaning must be used to decontaminate regulated areas and equipment until there is no visible debris.

(8) ACWM must be double-bagged into 6-mil thick plastic bags that meet the dart impact test, as specified in §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings), or sealed in leak-tight drums and disposed of in accordance with §296.193 of this title and NESHAP.

(9) Air clearance and visual inspections must be performed before removing any mini-containment.

(10) A single glove bag must be used only once and may not be reused by moving the bag to another area in accordance with 29 CFR §1926.1101(g)(5)(ii)(B)(3).

(c) Access. Only licensees, emergency responders as defined in §296.21(39) of this title (relating to Definitions), appropriate governmental inspectors, or the owner or owner's representative accompanied by and under the direction of the licensed asbestos O&M supervisor or asbestos abatement supervisor are allowed to enter the regulated areas.

§296.195. Guidance for Regulatory Threshold for Nonfriable Material in a Public Building.

(a) Purpose. The purpose of this section is to establish a regulatory threshold under which department licensure, registration, and notification are not required to complete an O&M project that disturbs a small amount of nonfriable ACBM.

(b) Scope and limitations.

(1) This section applies only to maintenance or installation projects and tasks that are not asbestos abatement activities and that disturb three square feet or three linear feet or less of nonfriable ACBM for each occurrence. If the materials become RACM, then:

(A) the maintenance or installation activity must cease;  
and

(B) the area must be prepared and abated in accordance with the requirements of this chapter.

(2) Projects and tasks that are below the threshold specified in paragraph (1) of this subsection are exempt from the licensing, registration, and notification requirements of this chapter. Projects and tasks involving floor tile removal below the threshold specified in paragraph (1) of this subsection are exempt from the RFCI floor tile removal requirements described in §296.196 of this title (relating to Resilient Floor Covering Removal in Public Buildings).

(3) A larger project may not be broken down into smaller projects or tasks in order to circumvent the requirements of this section or this chapter.

(4) This section does not exempt a public building from an asbestos survey required by §296.191 of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities).

(5) Failure to stop the project under the circumstances described in paragraph (1) of this subsection violates this section and §296.191 of this title, and subjects the contractor and the building owner to penalties in accordance §296.258 of this title (relating to Administrative Penalty).

(c) Work practices. Information regarding the detection of ACBM and its control can be obtained on the department's website and in §§296.192, 296.193, 296.194, 296.197, 296.198, and 296.199 of this title (relating to General Requirements for Asbestos Abatement in Public Buildings, Abatement Practices and Procedures for Full Containment in Public Buildings, Operations and Maintenance (O&M) Requirements for Public Buildings, Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material, Procedures for Small Projects and Repetitive Tasks in Public Buildings, and Exemptions for the Removal of Intact Asbestos-Containing Materials in a Public Building).

§296.196. Resilient Floor Covering Removal in Public Buildings.

(a) General provisions. The department exempts persons from licensing and registration requirements when they are performing resilient floor covering removal in public buildings in accordance with §296.171 of this title (relating to Removal of Resilient Floor Covering). The exemption applies only if the persons are using the:

(1) work practices published in the current edition of the Resilient Floor Covering Institute's "Recommended Work Practices for Removal of Resilient Floor Coverings" (RFCI work practices); or

(2) other methods approved by the department to provide public health protection from asbestos exposure, in accordance with §1954.104 of the Act.

(b) Scope and limitations.

(1) The removal activity allowed under this exemption is strictly limited to resilient floor coverings and adhesives that are non-friable; remain intact as defined in 29 CFR §1926.1101 (relating to Asbestos); and have not been sanded, ground, mechanically chipped, drilled, abraded, cut, or sawed. These actions create RACM. Shearing, slicing, or punching the flooring does not render the flooring material RACM.

(2) The removal activity must not become a response action.

(3) The PEL must not be exceeded during the removal activity.

(4) If the flooring materials become RACM, or the PEL is exceeded, either before or during the removal, then:

(A) removal under RFCI work practices must cease;  
and

(B) the area must be prepared and abated in accordance with the requirements of this chapter.

(5) Failure to stop the project under the circumstances described in paragraph (4) of this subsection violates this section and §296.191 of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities), and subjects the contractor and the building owner to penalties in accordance §296.258 of this title (relating to Administrative Penalty).

(6) Persons who perform the RFCI removal in accordance with this section must:

(A) keep a copy of the current RFCI work practices and other records applicable to the removal activity on-site for the duration of the project, in accordance with §296.200 of this title (relating to Recordkeeping);

(B) double bag and label ACWM, in accordance with §296.193(h) of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings);

(C) provide proper temporary storage of ACWM (for example, a roll-off box, dumpster, or storage room lined with plastic sheeting) and proper final disposal within 30 days of project completion or when the receiving container is full, whichever is sooner, in accordance with §296.193 of this title; and

(D) provide the department with written notification before the project starts, in accordance with §296.211 of this title (relating to Notifications).

(c) Training.

(1) All individuals engaged in removal of resilient floor coverings by the RFCI work practices must have successfully completed training in an eight-hour RFCI course and any required refresher course in accordance with 29 CFR §1926.1101(k)(9), which covers the elements described in the RFCI work practices. An additional four-hour competent person course is required to qualify as an RFCI supervisor.

(A) Individuals employed by schools who elect to use the RFCI work practices must first complete the 16-hour custodial training, required by the EPA MAP.

(B) Possession of a current, valid asbestos abatement worker registration, asbestos O&M supervisor license, or asbestos abatement supervisor license eliminates the individual's need for the 16-hour custodial training.

(2) Training or experience gained from performing resilient floor covering removal in accordance with this section does not apply toward the training or work experience requirements for registration or license to perform other asbestos-related activities.

(3) An individual licensed as an asbestos abatement supervisor is not required to complete the four-hour competent person training.

§296.197. Asbestos Abatement Practices and Procedures for Nonfriable Asbestos-Containing Building Material.

(a) Scope and limitations.

(1) This section applies to the removal of the following intact, nonfriable ACBM:

- (A) packings;
- (B) gaskets; and
- (C) cements and mastics.

(2) This section does not apply if the ACBM listed in paragraph (1) of this subsection becomes friable during the removal project. If the ACBM becomes friable or is made into RACM, all abatement activities must be stopped, and the area must be prepared and abated in accordance with §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings) or §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings).

(3) Only licensed asbestos abatement contractors, licensed asbestos abatement supervisors, and registered asbestos abatement workers may conduct asbestos abatement of nonfriable ACBM using the work practices outlined in subsection (b) of this section. All registered asbestos abatement workers must be supervised by a licensed asbestos abatement supervisor.

(b) Work practices.

(1) Access to the regulated area must be limited to authorized personnel in accordance with 29 CFR §1926.1101(e) (relating to Asbestos). At a minimum, caution tape must be used to demarcate the regulated area.

(2) Warning signs must be displayed at all entrances to the regulated area in accordance with 29 CFR §1926.1101. The warning signs must be in English and Spanish.

(3) All HVAC equipment in or passing through the regulated area must be shut down, and preventative measures taken to prevent accidental start-ups. All supply and return openings and any seams in system components must be sealed with at least 6-mil thick plastic sheeting and/or tape.

(4) All active electrical service lines within the regulated area must be connected through ground-fault circuit interrupter devices.

(5) ACBM must be wetted with amended water and remain wet throughout the abatement activity.

(6) Work practices may not include grinding, abrading, sanding, or pulverizing ACBM.

(7) HEPA vacuuming and/or wet cleaning must be used to decontaminate the regulated area and equipment until there is no visible debris.

(8) ACWM must be double-bagged into 6-mil thick plastic bags, plastic bags that meet the dart impact test as specified in §296.193 of this title, or sealed in leak-tight drums, and must be disposed of in accordance with §296.193 of this title and NESHAP.

(9) Ambient air must be monitored and analyzed on-site. Samples will be taken throughout the regulated area and adjacent to active asbestos abatement activities. All asbestos abatement activities must be stopped and cleanup conducted in accordance with §296.193 of this title if at any time the level of asbestos exposure exceeds 0.01 f/cc (fibers per cubic centimeter) for any sample when measured by phase

contrast microscopy using the NIOSH 7400 method, entitled, "Fibers," published in the NIOSH Manual of Analytical Methods, 3rd Edition, Second Supplement, August 1987.

(10) A licensed asbestos abatement supervisor shall perform a visual inspection upon completion of the project to ensure all ACBM required to be removed has been removed and containerized in accordance with this chapter, and the abatement work area is free of all residual dust and debris.

§296.198. Procedures for Small Projects and Repetitive Tasks in Public Buildings.

(a) Purpose. The purpose of this section is to simplify requirements for small projects and repetitive tasks in public buildings while limiting risk to public health.

(b) Scope and limitations.

(1) This section applies only to maintenance or installation projects and tasks that are not primarily asbestos abatement activities and that disturb less than 10 square feet of ACBM for each occurrence.

(2) A larger project may not be broken down into smaller projects or tasks in order to circumvent the requirements of this section or this chapter.

(3) Registered asbestos abatement workers or unlicensed maintenance personnel may perform small projects and repetitive tasks that disturb friable ACBM using the work practices outlined in subsection (d) of this section only when supervised by a licensed asbestos abatement supervisor or a licensed O&M supervisor.

(4) Licensed asbestos abatement supervisors or licensed O&M supervisors may perform and may supervise small projects and repetitive tasks that disturb friable ACBM using the work practices outlined in subsection (d) of this section.

(c) Exposure assessments. In order to perform a small project or repetitive task in compliance with this chapter without using a negative pressure glove bag, glove box, or mini-containment, an exposure assessment must be on-site showing that the work practices will not exceed 0.01 f/cc. Exposure assessments must be completed using the process outlined in 29 CFR §1926.1101(f) (relating to Asbestos) or ASTM D7886 or an equivalent procedure. Only appropriately licensed persons may conduct an exposure assessment. A licensed asbestos consultant must supervise the testing. A licensed asbestos supervisor or project manager must be in the containment directly monitoring the registered asbestos abatement worker performing the task.

(d) Work practices. Work practices must include the following:

(1) Access to the regulated area must be limited to authorized personnel in accordance with 29 CFR §1926.1101(e). At a minimum, caution tape must be used to demarcate the regulated area.

(2) Warning signs must be displayed in English and Spanish at all entrances to the regulated area in accordance with 29 CFR §1926.1101.

(3) All HVAC equipment in or passing through the regulated area must be shut down, and preventative measures taken to prevent accidental start-ups. All supply and return openings and any seams in system components must be sealed with at least 6-mil thick plastic sheeting and/or tape.

(4) All active electrical service lines within the regulated area must be connected through ground-fault circuit interrupter devices.

(5) ACBM must be wetted with amended water or foam agents intended to control airborne fiber release and remain wet throughout project.

(6) HEPA vacuuming and/or wet cleaning must be used to decontaminate the regulated area and equipment until there is no visible debris.

(7) ACWM must be double-bagged into 6-mil thick plastic bags, plastic bags that meet the dart impact test as specified in §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings), or sealed in leak-tight drums, and must be disposed of in accordance with §296.193 of this title and the NESHAP. Final disposal of ACWM must be within 30 days of project completion or when the receiving container is full, whichever is sooner.

(8) A licensed asbestos abatement supervisor or licensed O&M supervisor shall perform a visual inspection upon completion of the project or task to ensure all ACBM required to be removed has been removed and containerized in accordance with this chapter, and the regulated area is free of all residual dust and debris.

§296.199. Exemptions for the Removal of Intact Asbestos-Containing Materials in a Public Building.

(a) Restrictions.

(1) ACM must be in good condition and removed intact with no breakage or dust during the removal or collection.

(2) Nonfriable ACM must not become RACM.

(3) If the ACM cannot be removed intact, all abatement activities must be stopped, and the area must be prepared and abated in accordance with §296.194 of this title (relating to Operations and Maintenance (O&M) Requirements for Public Buildings) or §296.193 of this title (relating to Abatement Practices and Procedures for Full Containment in Public Buildings).

(4) Only licensed asbestos abatement contractors, licensed asbestos abatement supervisors, licensed asbestos O&M contractors, and licensed asbestos O&M supervisors may perform activities under these exemptions. Registered asbestos abatement workers may perform these activities only when supervised by a licensed asbestos abatement supervisor or a licensed asbestos O&M supervisor.

(b) Exemptions. The following activities are exempted from the requirements described in §296.193 of this title:

(1) removal of transite panels by unbolting or unscrewing and removing the panels intact;

(2) removal of transite lab-type desktops by either unbolting or unscrewing and removing the desktop intact;

(3) removal of nonfriable countertops and backsplashes by completely removing the entire unit intact;

(4) removal of window units with window glazing by removing the entire window unit intact. Window glazing must be secured with tape or similar material prior to removal;

(5) picking up loose floor tiles that have become completely disassociated from the floor and are either whole or are slightly broken but are still intact and not RACM;

(6) picking up loose miscellaneous nonfriable items such as rolls of linoleum, loose gaskets, loose shingles, etc.;

(7) removal of fire doors with asbestos-containing insulation from their hinges by removing each door intact including hardware; and

(8) removal of any other nonfriable building component by removing it intact.

(c) Work practices. Work practices must include the following:

(1) A regulated area must be established where asbestos abatement will be conducted. Access to the regulated area must be limited to authorized personnel in accordance with 29 CFR §1926.1101(e) (relating to Asbestos). At a minimum, caution tape must be used to demarcate the regulated area.

(2) Warning signs must be displayed at all entrances to the regulated area in accordance with 29 CFR §1926.1101. The warning signs must be in English and Spanish.

(3) ACWM must be:

(A) double-bagged or double-wrapped using 6-mil thick plastic bags or sheeting;

(B) double-bagged or double-wrapped in plastic bags or sheeting that meets the dart impact test as specified in §296.193 of this title; or

(C) sealed in leak-tight drums.

(4) ACWM must be disposed of in accordance with §296.193 of this title and the NESHAP.

§296.200. Recordkeeping.

(a) Recordkeeping requirements. Records and documents required by this section must be retained as defined in each subsection. Licensees ceasing to do business shall notify the department in writing within 30 days of such event. The department, on receipt of such notification, may require that licensees provide records to the department in a specified format. The licensees shall comply with the department's instructions within 60 days.

(b) Asbestos abatement contractors, asbestos O&M contractors, and RFCI contractors.

(1) Central location. The following records and documents must be maintained at a central location at the principal place of business for a period of 30 years from the date of project completion and must be made available to the department upon request:

(A) records and documents required by 29 CFR Part 1910 (relating to Occupational Safety and Health Standards) and 29 CFR §1926.1101 (relating to Asbestos);

(B) name, address, and asbestos certificate number of each employee, past and present, including dates of employment, and description of each employee's involvement in each asbestos project while employed by the contractor. Records must include the name, physical address, and duration of these projects;

(C) copies of all regulatory agency correspondence including asbestos abatement/demolition notification forms, inspection forms, letters, notices, and orders;

(D) records and documents required to be maintained in accordance with any other applicable federal, state, or local law, regulation, or ordinance;

(E) copies of all waste shipment records (manifests), including a copy of the manifest signed by the owner or operator of the designated waste disposal site, in accordance with 40 CFR §61.105(d)(5) (relating to Recordkeeping Requirements); and receipts and documentation of disposal of asbestos waste showing dates, locations, and amounts of asbestos waste disposed including the

identification of the source of the asbestos waste and the transporter (company name or driver name, if an employee of the contractor);

(F) copies of laboratory reports and sample analysis documenting workplace and personal exposure levels, including copies of consultant's reports provided to the contractor regarding employee or clearance level monitoring; and

(G) copies of all project specifications and plans and contracts for asbestos abatement projects.

(2) On-site. Records and documents must be maintained on-site at the asbestos project location for the duration of the project. Department-licensed companies and RFCI contractors are responsible for their employees' documents to be on-site. All on-site records and documents must be made available to the department upon request. The records and documents covered by this paragraph include:

(A) all valid, original, and applicable licenses and registrations for individuals and full-sized copies of current training certificates;

(B) a current copy of the asbestos contractor license;

(C) a current copy of the standard operating procedures;

(D) a copy of the asbestos project specifications and plans, or if a project specification is not required, a scope of work that outlines location and describes operations and abatement procedures;

(E) a listing of all employees working on the project, by name, asbestos license number, and certificate number;

(F) name and address of each of the contractors, project supervisors, subcontractors, consultants, project managers, waste transporters, waste disposal sites, and building owners on the asbestos project;

(G) a daily sign-in/out log for the containment and/or regulated area that identifies all persons by name and the length of time each spent in containment and/or the regulated area;

(H) air monitoring results, which must be posted within 24 hours after sampling if air samples were analyzed on-site or within 72 hours after sampling if analyzed in an asbestos laboratory off-site;

(I) a written respiratory protection program that conforms to requirements of 29 CFR §1910.134(b) (relating to Respiratory Protection);

(J) a description of personal safety practices;

(K) current copies of the department's Physician's Written Statement forms and respirator fit-tests of individuals who enter a regulated area;

(L) a copy of the current asbestos abatement/demolition notification;

(M) a copy of the TAHPR;

(N) appropriate publications as listed in §296.2 of this title (relating to Adoption by Reference of Federal and Other Standards) for the asbestos activity that is being performed;

(O) the EPA Green Book (also known as "Managing Asbestos in Place: A Building Owner's Guide to Operations and Maintenance Programs");

(P) the O&M book or manual developed for the facility, if O&M activities are being performed;

(Q) a copy of the current edition of the "Recommended Work Practices for the Removal of Resilient Floor Coverings," pub-

lished by the Resilient Floor Covering Institute, if removing floor coverings using this method;

(R) the Violation Notification Procedure poster issued by the department, which must be posted and visible to the public at the entrance to the regulated area in accordance with §296.192(i) of this title (relating to General Requirements for Asbestos Abatement in Public Buildings); and

(S) copies of any asbestos-related orders issued by the department (as evidenced by an order from the federal or state asbestos-regulating authorities), which must be posted for 12 months from the date the order becomes effective and visible to the public at the entrance to the regulated area in accordance with §296.192(i) of this title.

(c) Asbestos management planners. Licensed asbestos management planners who operate independently shall maintain asbestos survey reports, bulk sampling results, and management plans for 30 years from the date of project completion. These records and documents must be maintained at a central location and be made available to the department upon request.

(d) Asbestos management planner agencies. Licensed asbestos management planner agencies shall maintain asbestos survey reports, bulk sampling results, and management plans for 30 years from the date of project completion. These records and documents must be maintained at the management planner agency's principal place of business and be made available to the department upon request.

(e) Asbestos consultants. Licensed asbestos consultants who operate independently shall maintain asbestos survey reports, assessments, bulk sampling results, asbestos management plans, O&M plans, asbestos abatement designs and specifications, air monitoring records, the written designation of the project manager and the project manager's responsibilities and authority, and copies of asbestos abatement project documents for 30 years from the date of project completion. These records and documents must be maintained at a central location and be made available to the department upon request. All asbestos abatement project documents for current projects must be kept at the asbestos project site until final visual inspection has been completed.

(f) Asbestos consultant agencies. Licensed asbestos consultant agencies shall maintain asbestos survey reports, assessments, bulk sampling results, asbestos management plans, O&M plans, asbestos abatement designs, specifications and plans, air monitoring records, the written designation of the project manager and the project manager's responsibilities and authority, and copies of asbestos abatement project documents for 30 years from the date of project completion. These records and documents must be maintained at a central location and be made available to the department upon request. All asbestos abatement project documents for the immediate project must be kept at the asbestos project site until final visual inspection has been completed.

(g) Asbestos air monitoring technicians. Licensed air monitoring technicians (AMTs) who perform phase contrast microscopy (PCM) analysis in the field as employees of a licensed asbestos laboratory shall maintain on-site for the duration of the project:

(1) all analyzed slides each labeled with the project name, date and time of analysis, and sample location;

(2) a copy of the AMT's NIOSH 582 or NIOSH 582 Equivalent training certificate or proof of current registration with the American Industrial Hygiene Association (AIHA) Asbestos Analyst Registry (AAR); and

(3) documentation of the AMT's relative standard of deviation in conformity with the NIOSH 7400 method.

(h) Asbestos laboratories. Licensed asbestos laboratories shall maintain copies of all analyses performed and all other records and documents required by this chapter for 30 years, including the sample identification number and analytical results, and make such documents available to the department for inspection upon request.

(1) Analyzing laboratories must hold all samples from public buildings presented for analysis for 30 days following completion of analysis. Sample grids must be maintained for 1 year from the date of the analysis.

(2) Analyzing laboratories must maintain copies of individual records for each analyst to document the individual analyst's relative standard of deviation in conformity with the NIOSH 7400 method for 3 years. Records must be kept in the laboratory indicating which samples were used to meet the 10% quality-control analysis requirement.

(i) Asbestos training providers.

(1) Central location. The following records and documents must be maintained at a central location at the principal place of business for a period of three years and made available to the department upon request:

(A) Training course materials. Licensed training providers must retain copies of all instructional materials used in the delivery of the classroom training such as student manuals, instructor notebooks, and handouts.

(B) Training courses. Records must indicate the name of the course, date of the course, the instructors who taught the course, and list the students who attended the course. All records required to be maintained in accordance with this section must be available for inspection by the department upon request.

(C) Instructor qualifications. Licensed training providers must retain copies of all instructors' resumes and the documents approving each instructor issued by the department or EPA.

(D) Examinations. Licensed training providers must document that each person who receives an accreditation certificate for an initial training course has achieved a minimum passing score of 70% correct on the written examination in accordance with §296.93(b) of this title (relating to Asbestos Training Courses). These records must include a copy of the exam and clearly indicate the date on which the exam was administered, the training course and discipline for which the exam was given, the name of the person who proctored the exam, and the name, examination answer sheet, and test score of each person taking the exam. All information from the training course and examination, including the topic and dates of the training course, must correspond to the information listed on each person's accreditation certificate. All records required to be maintained in accordance with this section must be available for inspection by the department immediately upon conclusion of the course and administration of the examination.

(E) Accreditation certificates. Licensed training providers shall maintain records that document the names of all persons who have been awarded certificates, their certificate numbers, the disciplines for which accreditation was conferred, training and expiration dates, and the training location. All records required to be maintained in accordance with this section must be available for inspection by the department upon request.

(2) Records access. Licensed training providers must allow the department reasonable access to all of the records required by

the MAP, and to any other records that may be required by the department for the approval of asbestos training providers or the accreditation of asbestos training courses.

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



## SUBCHAPTER L. NOTIFICATIONS

### 25 TAC §296.211

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### §296.211. Notifications.

(a) General provisions. The department must be notified online on the department's website or on a form specified by the department of any asbestos abatement or demolition as indicated in paragraphs (1) and (2) of this subsection. Notification must be made to the department no fewer than 10 working days before commencement of the activity. Submitting the notification form online on the department's website or by hard copy will meet the notification requirements under both the NESHAP and TAHPR. The notification form must be properly completed and submitted in accordance with this section. Additional information related to this section is located on the department's website at <http://www.dshs.texas.gov/>.

(1) Public buildings. The department must be notified of any demolition of a public building whether or not asbestos has been identified. The department must be notified of any asbestos abatement within a public building except for projects described in §296.175 of this title (relating to Regulatory Threshold for Nonfriable Material in a Public Building). Notification must be submitted in accordance with this section.

(2) Facilities. For all facilities which are not otherwise subject to this title as public buildings, the department must be notified of any demolition of a facility, whether or not asbestos has been identified. The department must be notified of any renovation operation if the combined amount of RACM to be stripped, removed, dislodged, cut, drilled, or similarly disturbed meets or exceeds the NESHAP threshold,

as described in 40 CFR §61.145 (relating to Standard for Demolition and Renovation), of 160 square feet of surface area, 260 linear feet of pipe length, or 35 cubic feet off facility components where the length or area could not be measured. Notification must be submitted in accordance with NESHAP.

(b) Responsibility for proper notification.

(1) Public buildings. It is the responsibility of the public building owner and/or operator or delegated agent (such as a licensed asbestos contractor or asbestos consultant) to notify the department. When the task to notify is delegated, it must be in writing on the notification form. In a demolition where a licensed asbestos abatement contractor or asbestos consultant is not required, the task may be delegated in writing to the demolition contractor or other agent. The building owner and/or operator or the delegated agent is responsible for the accuracy and timeliness of the notification.

(2) Facilities. It is the responsibility of the facility owner and/or operator to notify the department. The facility owner and/or operator are jointly and severally responsible for the accuracy and timeliness of the notification.

(c) Completion of the notification form. The department notification form must be completed fully and properly.

(1) No form field may be left blank. Form fields that are not applicable must be marked "NA". The department does not accept the designation of NA for the identification of the work site, building description, building owner, abatement and waste transportation companies, or start or completion dates in compliance with 40 CFR §61.145.

(2) The building owner or the delegated agent or the facility owner or operator must submit an amendment to the notification for any changes. The changes may include, but are not limited to, those for start and stop dates, phased schedule form, changes greater than 20% in amounts of asbestos to be removed, and cancellations.

(3) Forms not submitted online must contain an original signature. The department will not accept a copied signature.

(d) Submission of the notification form.

(1) Notification forms must be:

(A) submitted online on the department's website;

(B) postmarked and delivered by the United States Postal Service (USPS);

(C) date-stamped and delivered by commercial delivery service; or

(D) delivered by hand during normal business hours.

(2) Printed notification forms may not be submitted by fax or email.

(e) Timeliness of notification.

(1) The initial notification of asbestos abatement or demolition must be submitted to the department at least 10 working days before the asbestos abatement or demolition start date.

(2) When a project start date or stop date or schedule or time changes from the current notified date or time, an amended notification must be submitted to the department in accordance with subsections (f) - (j) of this section.

(f) Start date change to an earlier date. When asbestos abatement or demolition will begin on a date earlier than the date contained in the notification:

(1) an amended notification must be submitted to the department at least 10 working days before the new start date in accordance with subsection (d) of this section;

(2) the appropriate regional office must be contacted by phone at least 10 working days before the new start date; and

(3) for notification not submitted online, the appropriate regional office must be provided with a fax or email copy of the amended notice at least 10 working days before the new start date.

(g) Stop date change to an earlier date. When asbestos abatement or demolition ends on a date earlier than the date contained in the notification:

(1) an amended notification of the new stop date must be submitted to the department before but no later than the new stop date. Amended notification must be submitted in accordance with subsection (d) of this section;

(2) the appropriate regional office must be contacted by phone of the new stop date before but no later than the new stop date; and

(3) for notification not submitted online, the appropriate regional office must be provided with a fax or email copy of the amended notification before but no later than the new stop date.

(h) Start date change to a later date. When asbestos abatement or demolition will begin later than the date contained in the notification:

(1) an amended notification with the new start date must be submitted to the department before the current notified date. Amended notification must be submitted in accordance with subsection (d) of this section;

(2) the appropriate regional office must be contacted by phone of the new start date before but no later than the new start date; and

(3) for notification not submitted online, the appropriate regional office must be provided with a fax or email copy of the amended notice no later than the day following the current notified start date.

(i) Stop date change to a later date. When asbestos abatement or demolition will end on a date later than the current notified stop date:

(1) an amended notification of the new stop date must be submitted to the department no later than the current notified stop date. Amended notification must be submitted in accordance with subsection (d) of this section;

(2) the appropriate regional office must be contacted by phone of the new stop date before but no later than the current notified stop date; and

(3) for notification not submitted online, the appropriate regional office must be provided with a fax or email copy of the new stop date before but no later than the current notified stop date.

(j) Cancellation.

(1) When asbestos abatement or demolition is cancelled, the building owner or the delegated agent or the facility owner or operator must:

(A) submit a notice of the cancellation to the department no later than the current notified start date. Notification of cancellation must be submitted in accordance with subsection (d) of this section;

(B) notify the appropriate regional office by phone of the cancellation no later than the current notified start date; and

(C) for notification not submitted online, provide the appropriate regional office with a fax or email copy of the notice of cancellation no later than the current notified start date.

(2) When asbestos abatement and demolition are notified on the same notification, and abatement has occurred, but the demolition will not occur, an amendment must be submitted to remove the demolition.

(k) Consolidated notification of nonscheduled asbestos O&M activities in a public building.

(1) Notification of a series of nonscheduled, separate O&M activities involving ACBM each of which does not meet or exceed a threshold of 160 square feet of surface area, or 260 linear feet of pipe length, or 35 cubic feet volume off building components may be made annually. An individual project that meets or exceeds this threshold must be notified separately and may not be combined as part of the consolidated notification. The consolidated notification must include a prediction of the cumulative amount of asbestos to be removed, enclosed, or encapsulated from January 1 through December 31. Consolidated notifications must be submitted at least 10 working days before the calendar year for which notice is being given. Consolidated notification must be submitted in accordance with subsection (d) of this section.

(2) The building owner or delegated agent must notify the appropriate regional office by phone or email before each O&M activity.

(3) The building owner shall keep records of the individual O&M activities. If by January 1 of the following year, the amount of asbestos removed, enclosed, or encapsulated exceeds the notified amount by 20% or more, then an amendment must be submitted within 10 working days.

(l) Consolidated notification of nonscheduled operations in a facility that is not a public building.

(1) A notification is required when planned renovation operations of individual nonscheduled operations, resulting from equipment failure, that when combined the RACM meets or exceeds the NE-SHAP threshold of 160 square feet of surface area, 260 linear feet of pipe length, or 35 cubic feet off facility components where the length or area could not be measured. To determine whether notification is required, the facility owner or operator predicts the combined additive amount of RACM to be removed from January 1 to December 31. These operations may be notified on a single consolidated notification per facility. Consolidated notifications must be submitted at least 10 working days before the calendar year for which notice is being given. Consolidated notification must be submitted in accordance with subsection (d) of this section.

(2) Upon request by the department, the facility owner or operator must be able to demonstrate that the amount of RACM stripped or removed did not exceed the notified amount by 20% or more. If by January 1 of the following year, the amount of RACM stripped or removed exceeds the notified amount by 20% or more, then an amendment must be submitted within 10 working days.

(3) If the facility owner or operator determines the NE-SHAP threshold amount will be exceeded, and a consolidated notification was not previously submitted, then a notification must be submitted at least 10 working days before the activity that will exceed the threshold.

(m) Notification of emergency renovation operations.

(1) An emergency notification must be submitted when an emergency renovation operation as defined in §296.21(38) of this title

(relating to Definitions) occurs. A description of the emergency must be documented on the form. Emergency notifications must be submitted as soon as possible but no later than the following working day after the occurrence of the incident. Notification must be made in accordance with subsection (d) of this section.

(2) The building owner or the delegated agent or the facility owner or operator must notify the appropriate regional office by email as soon as possible but no later than the working day following the occurrence of the incident. The email must include a description of the emergency and a copy of the notification form.

(n) Notification of demolition. The department must be notified of all demolitions 10 working days before commencement of demolition. If demolition dates are to be added to a notification for asbestos abatement, and the abatement stop date has not passed, a notification amendment must be submitted to the department to add the demolition dates no fewer than 10 working days before commencement of the demolition. Notification must be submitted in accordance with subsection (d) of this section.

(o) Notification of ordered demolitions for structurally unsound buildings.

(1) If the facility is being demolished under an order of a state or local government agency, issued because the facility is structurally unsound and in danger of imminent collapse, then the department notification must be submitted as soon as possible but no later than the working day following the commencement of demolition. The judgment that a structure is in danger of imminent collapse or that it is unsafe for anyone to enter must be made by a professional engineer or government official reasonably qualified to make the decision. A copy of the order must be attached to the notification form. Notification must be made in accordance with subsection (d) of this section. If an owner is unable to obtain a demolition order from a city, county, or state government official due to the building being structurally unsound and unsafe to enter, and has a letter from a professional engineer stating the building is structurally unsound and in danger of imminent collapse, then the owner may contact the department to request a waiver from the 10-day-notification deadline. Documentation supporting the inability to obtain an order must be submitted with the waiver request.

(2) For structurally unsound buildings that are in danger of imminent collapse, the building owner or the delegated agent or the facility owner or operator must notify the appropriate regional office by email as soon as possible but no later than the working day following the commencement of demolition. The email must include a copy of the demolition order and notification form.

(p) In public or commercial buildings or facilities, when an asbestos abatement and demolition is notified on the same notification form, and the asbestos abatement concludes early, the demolition contractor may start as early as the next calendar day after contacting the appropriate regional office by email to notify of the new demolition start date. In addition, the abatement contractor must ensure the new stop date is amended in accordance with subsection (g) of this section if applicable. The notification must be submitted in accordance with subsection (d) of this section.

(q) Notification of phased asbestos abatement and/or demolition projects in a public building.

(1) To qualify as a phased project, the project must have planned periods of inactivity, and all of the abatement and demolition work must be performed at one site. The site may contain more than one building, such as an office complex or university, under the control of one owner or operator. A phased project notification must not exceed 12 calendar months from the project start date. A completed Phased

Project Schedule form must be submitted with each notification. The notification form must be submitted at least 10 working days before the start date of the first phase. The notification form must be submitted in accordance with subsection (d) of this section.

(2) When there is a change to the phased project schedule, the building owner or the delegated agent or the facility owner or operator must:

(A) submit a notification amendment along with the revised Phased Notification Schedule form to the department as soon as possible but no later than the current scheduled date or the proposed scheduled date, whichever is earlier; and

(B) email a revised Phased Notification Schedule form to the appropriate department regional inspector as soon as possible but no later than the current scheduled date or the proposed scheduled date, whichever is earlier.

(r) Asbestos notification fees.

(1) Applicability. The building owner or the delegated agent or the facility owner or operator shall remit to the department an asbestos notification fee that is based upon the amount of asbestos removed and includes a subscription fee in an amount determined by the Texas Department of Information Resources to recover costs associated with the development and maintenance of Texas.gov services. The subscription fee is 3% of the total notification fee and applies regardless of the type of asbestos notification submitted.

(2) Payment.

(A) When a notification is submitted online, the notification fee payment must be made at the time of submission.

(B) When a notification is submitted by mail, the department will mail an invoice to the building owner or the facility owner or operator within 30 working days after the notification is submitted. Payment must be received by the department within 60 working days of the invoice date.

(3) Basis for fees. The fees will be based on the total amount of the RACM or ACBM, reported to be removed and notified, in accordance with §296.191 of this title (relating to Asbestos Management in Public Buildings, Commercial Buildings, and Facilities) and this section.

(A) Notification fees will be based on a tiered system in accordance with Figure 25 TAC §296.211(r)(3)(A) identified in this subparagraph. Fees for asbestos removal amounts in square feet, linear feet, and cubic feet will be determined separately. The sum of these separate fees is the total notification fee owed. Figure: 25 TAC §296.211(r)(3)(A)

(B) The minimum notification fee for abatement is \$50. The maximum notification fee is \$3,800, except for public or private, non-profit, elementary or secondary (kindergarten through grade 12) schools, for which the maximum notification fee is \$180. The fee will be assessed based on the amount of asbestos to be removed. If the amount of asbestos removed increases or decreases from the original notified amount, a change in fee may be assessed.

(C) The notification fee for a demolition is \$50.

(D) The notification fee for abatement with demolition is based solely on the amount of RACM and ACBM removed during the abatement. If an abatement notification is amended to add demolition, a demolition fee is not added.

(4) To be considered for reimbursement, a refund request must be received by the department within 90 days after the date the

project ends or is cancelled. The department will deduct an administrative fee of \$52 before issuing a refund.

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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Lisa Hernandez  
General Counsel

Department of State Health Services

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



## SUBCHAPTER M. INSPECTIONS AND INVESTIGATIONS

### 25 TAC §296.231

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### *§296.231. Inspections and Investigations.*

(a) The department has the right to inspect or investigate the practices of any person involved with asbestos abatement or related activity in a public building, commercial building, or facility.

(b) Advance notice of inspections or investigations by the department is not required.

(c) In order to inspect and investigate for compliance with this chapter, a department representative, upon presenting the department identification (ID) card, shall have the right to:

(1) enter at all reasonable times any area or environment, including but not limited to, any containment, facility or building, construction site, storage area, vehicle, or office area; and

(2) review records and make copies; interview any person; locate, identify, and assess the condition of ACM; take photographs; and collect bulk and/or air samples.

(d) A department representative conducting official duties is not required to notify or seek permission to conduct inspections or investigations. A person shall not interfere with, deny, or delay an inspection or investigation conducted by a department representative.

(e) Authority and responsibility for the qualifications, health status, and personal protection of department representatives resides with the department by law. A department representative may not be impeded or refused entry to conduct official duties by reason of any

regulatory or contractual specification. Attempting to bribe or threaten a department representative is a violation of this chapter and criminal law.

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 N. ENFORCEMENT

### 25 TAC §§296.251 - 296.260

#### STATUTORY AUTHORITY

The new sections are authorized by Occupations Code, §1954.056, which requires the Executive Commissioner to adopt rules to implement Chapter 1954; Health and Safety Code, §12.0111, which requires the department to collect fees for issuing or renewing a license; and Health and Safety Code, §1001.075, and Government Code, §531.0055, which authorize the Executive Commissioner to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new rules affect Health and Safety Code, Chapters 12 and 1001; Government Code, Chapter 531; and Occupations Code, Chapter 1954.

#### §296.251. Enforcement Action.

The department has the authority to enforce this chapter, the Act, and an order issued under the Act. The department may:

- (1) reprimand an accredited person;
- (2) suspend, revoke, or modify an accreditation;
- (3) suspend an accreditation on an emergency basis;
- (4) deny an application for license or registration;
- (5) suspend or revoke a license or registration;
- (6) reprimand a licensee or registrant;
- (7) modify or refuse to renew a license or registration;
- (8) suspend a license on an emergency basis;
- (9) place on probation a person whose license or registration is suspended;
- (10) impose an administrative penalty on a person regulated under the Act;
- (11) withdraw approval of a training course; or
- (12) suspend or revoke approval of a training course.

#### §296.252. Action against an Accreditation.

(a) The department may reprimand an accredited person, or may suspend or revoke an accreditation for:

(1) performing work requiring accreditation on an asbestos project without being in physical possession of current accreditation certificates;

(2) possessing a duplicate, failing to prevent duplication, or failing to prevent unauthorized use of an accreditation certificate;

(3) performing work for which accreditation has not been received;

(4) obtaining accreditation from a training provider that does not have approval to offer training for the particular discipline from EPA or from a state that has a contractor accreditation plan at least as stringent as the MAP; or

(5) failing to pay a fee required or assessed in accordance with this chapter.

(b) The department may modify an accreditation certificate or suspend an accreditation certificate on an emergency basis if the accredited person violated this chapter, the Act, or an order issued under the Act.

(c) If an accreditation has been suspended, the person named in the suspension shall not be eligible for reaccreditation for one year after the date of the order imposing the suspension.

(d) If an accreditation has been revoked, the person named in the revocation shall not be eligible for reaccreditation for three years after the date of the order imposing the revocation.

#### §296.253. Denial, Suspension, or Revocation of License or Reprimand of Licensee.

(a) The department may take enforcement action if the department finds that a person regulated under the Act:

(1) obtained or attempted to obtain a license, registration, or contract to perform an asbestos-related activity by fraud, deception, or submission of invalid documentation;

(2) falsified records required by a federal agency or by the department for asbestos-related activities;

(3) has been convicted within the past five years of a felony or misdemeanor arising from an asbestos-related activity;

(4) violated a federal or state law or rule regarding asbestos-related activities;

(5) violated this chapter, the Act, or an order issued under the Act;

(6) failed to maintain records required by a federal agency or by the department for asbestos-related activities;

(7) failed at any time to meet the qualifications for a license;

(8) failed to comply with the requirements of a probation period imposed under this subchapter; or

(9) failed to pay a fee required or assessed in accordance with this chapter or submitted a payment device that was not honored by the financial institution.

(b) The department may deny an application for license or registration or may suspend or revoke a license or registration for violations described in subsection (a)(1) - (9) of this section.

(1) A person who has had an application for license or registration denied or has had a license or registration suspended or revoked under subsection (a)(1) - (5), (8) or (9) of this section will remain ineligible for a license or registration three years after the date of the denial, suspension, or revocation order.

(2) A person who has had an application for license or registration denied or has had a license or registration suspended or revoked under subsection (a)(6) of this section may reapply for a license one year after the date of the denial, suspension, or revocation order.

(3) A person who has had an application for license or registration denied or has had a license or registration suspended or revoked under subsection (a)(7) of this section may reapply for a license or registration after the person meets all qualifications for a license.

(c) The department may reprimand a licensee or registrant, modify or refuse to renew a license or registration, or suspend a license or registration on an emergency basis for violations described in subsection (a)(1) - (6), (8), and (9) of this section.

§296.254. Emergency Suspension.

(a) The department may suspend a license, a registration, or approval of an asbestos training course on an emergency basis.

(b) Emergency suspension is effective immediately.

(c) The department will provide to the person named in the emergency suspension an opportunity to request a hearing not later than the 20th day after the date of the emergency suspension order.

§296.255. Suspension of License for Failure to Pay Child Support or Comply with a Court Order.

(a) A court or the Office of the Attorney General may issue an order suspending a license in accordance with Family Code Chapter 232 (relating to Suspension of License) for overdue child support or for failure to comply with the terms of a court order providing for the possession of or access to a child. The court or Office of the Attorney General will forward this order to appropriate licensing agencies.

(b) If the department receives an order described in subsection (a) of this section, the department will immediately determine if a license has been issued to the individual named on the order. If a license has been issued, the department will:

(1) record the suspension of the license in the department's records;

(2) report the suspension as appropriate to:

(A) the Office of the Attorney General;

(B) the licensee; and

(C) the licensee's current employer, if known; and

(3) demand surrender of the suspended license.

(c) The department will implement the terms of a final order described in subsection (a) of this section without additional review or hearing. The department will provide notice as appropriate to the licensee and may provide notice to others concerned with the license.

(d) A licensee who is the subject of a final order rendered by a court or the Office of the Attorney General suspending the license is not entitled to a refund for any fee paid to the department for the license.

(e) During the time that a license is suspended, the individual must comply with normal renewal procedures to keep the license current. Renewing a suspended license will not make the license active. A suspended license remains suspended until the final order that is described in subsection (a) of this section is vacated or stayed as described in subsection (g) of this section.

(f) An individual whose license has been suspended by a final order described in subsection (a) of this section is prohibited from engaging in activity requiring a license. An individual whose license is suspended but who continues to engage in activity requiring a license violates the Act and this chapter and is subject to enforcement action.

(g) On receipt of an order vacating or staying an order suspending a license, the department will promptly activate the individual's license if the individual is otherwise qualified for the license.

§296.256. Probation.

The department may place on probation a person whose license or registration is suspended. If a suspension is probated, the department may require the person to:

(1) report regularly to the department on matters that are the basis of the probation;

(2) limit practice to the areas prescribed by the department;  
or

(3) continue or review professional education until the person demonstrates a degree of skill satisfactory to the department in those areas that are the basis of the probation.

§296.257. Denial, Withdrawal, Suspension, or Revocation of Approval of Training Courses.

(a) The grounds for denial, withdrawal, or suspension of approval for training courses taught by department-licensed training providers and instructors include but are not limited to the following:

(1) misrepresentation of the extent of a training course's approval by a state or EPA;

(2) failure to submit required information or notifications in a timely manner;

(3) failure to maintain required records;

(4) falsification of accreditation records, instructor qualifications, or other accreditation information or submission of invalid documentation;

(5) failure to adhere to the training standards and requirements of the EPA MAP or State Accreditation Program; or

(6) violation of provisions of the Act or this chapter related to training duties and responsibilities.

(b) The department may revoke or suspend approval if a training course does not meet the requirements of the MAP or this chapter or for failing to pay a fee required or assessed in accordance with this chapter.

§296.258. Administrative Penalty.

(a) The department may impose an administrative penalty against a person who violates this chapter, the Act, or an order issued under the Act.

(b) The maximum administrative penalty is \$10,000 per day, per violation. The department may consider each day that a violation continues as a separate violation for purposes of imposing a penalty.

(c) To determine the amount of the administrative penalty, the department considers:

(1) the person's history of previous violations;

(2) the seriousness of the violation;

(3) any hazard to the health and safety of the public;

(4) demonstrated good faith efforts to correct the violation and maintain compliance; and

(5) any other matter that justice may require.

(d) For subsequent violations, the department may impose up to five times the initial administrative penalty, up to the maximum administrative penalty of \$10,000 per day, per violation.

(e) The department classifies violations according to levels of severity.

(1) Severity Level I, critical violation. Critical violations have a direct negative impact on public health and safety. Severity Level I includes fraud and misrepresentation that result in a negative impact on public health and safety. The maximum administrative penalty for a Level I violation is \$10,000 per day, per violation.

(2) Severity Level II, serious violation. Serious violations threaten public health and safety. The maximum administrative penalty for the first occurrence of a Level II violation is \$1,000 per day, per violation.

(3) Severity Level III, significant violation. Significant violations have the potential to threaten public health and safety. The maximum administrative penalty for the first occurrence of a Level III violation is \$100 per day, per violation.

§296.259. Revocation of Asbestos Abatement Supervisor's License.

(a) This section applies to an asbestos abatement supervisor against whom the department has issued final orders arising from three complaints of violations of the Act or this chapter.

(b) If this section applies to a license holder, the department will revoke the person's license in accordance with the Act.

(c) When the department revokes a license as described in this section, the department will issue to the person a registration that expires six months from the date of issuance.

(d) After the registration expires, the person may reapply for a license.

§296.260. Notice and Hearing.

(a) Before the department takes final enforcement action under §296.252 of this title (relating to Action against an Accreditation), §296.253 of this title (relating to Denial, Suspension, or Revocation of License or Reprimand of Licensee), §296.256 of this title (relating to Probation), or §296.258 of this title (relating to Administrative Penalty), the department will issue a notice of violation proposing enforcement action.

(b) The department will send the notice by certified mail to the person named in the notice at the person's current address in the department's records.

(c) The notice will describe the alleged violation, specify the action the department proposes (including any conditions for reinstatement of accreditation, license, or registration, and the amount of any administrative penalty), provide an opportunity to demonstrate compliance, and inform the person of the right to request a hearing to contest the occurrence of the violation or the department's proposed enforcement action.

(d) A person may accept the department's proposal in writing or request a hearing in writing not later than 30 days after the date the person receives the notice. If the person accepts the department's proposal, the department will issue a final order imposing the proposed enforcement action. If the person requests a hearing, the department will refer the matter to the State Office of Administrative Hearings for a contested case hearing.

(e) If the person named in a notice does not timely request a hearing, the department may determine that a violation has occurred and issue an order taking final enforcement action by default.

(f) Hearings held under this chapter will be conducted in accordance with Government Code, Chapter 2001 and §§1.21-1.27 of this title (relating to Formal Hearing Procedures).

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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Lisa Hernandez

General Counsel

Department of State Health Services

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◆ ◆ ◆  
**TITLE 28. INSURANCE**

**PART 1. TEXAS DEPARTMENT OF INSURANCE**

**CHAPTER 1. GENERAL ADMINISTRATION  
SUBCHAPTER C. ASSESSMENT OF  
MAINTENANCE TAXES AND FEES**

**28 TAC §1.414**

The Texas Department of Insurance proposes amendments to 28 Texas Administrative Code §1.414, concerning the 2017 assessment of maintenance taxes and fees imposed by the Insurance Code. The proposed amendments are necessary to adjust the rates of assessment for maintenance taxes and fees for 2017 on the basis of gross premium receipts for calendar year 2016.

EXPLANATION. Section 1.414 includes rates of assessment to be applied to life, accident, and health insurance; motor vehicle insurance; casualty insurance and fidelity, guaranty, and surety bonds; fire insurance and allied lines, including inland marine; workers' compensation insurance; workers' compensation self-insured groups; title insurance; health maintenance organizations (HMOs); third party administrators; nonprofit legal services corporations issuing prepaid legal services contracts; and workers' compensation certified self-insurers.

The department proposes an amendment to the section heading to reflect the year for which the proposed assessment of maintenance taxes and fees is applicable. The department also proposes amendments in subsections (a) - (f) and (h) to reflect the appropriate year for accurate application of the section.

The department proposes amendments in subsections (a)(1) - (8), (c)(1) - (3), (d), (e), and (f) to update rates to reflect the methodology the department developed for 2017.

The following paragraphs provide an explanation of the methodology used to determine proposed rates of assessment for maintenance taxes and fees for 2017:

In general, the department's 2017 revenue need (the amount that must be funded by maintenance taxes or fees; examination overhead assessments; the department's self-directed budget account, as established under Insurance Code §401.252; and premium finance examination assessments) is determined by calculating the department's total cost need, and subtracting from that number funds resulting from fee revenue and funds remaining from fiscal year 2016.

To determine total cost need, the department combined costs from the following: (i) appropriations set out in Chapter 1281 (HB 1), Acts of the 84th Legislature, Regular Session, 2015 (the General Appropriations Act), which come from two funds, the General Revenue Dedicated - Texas Department of Insurance Operating Account No. 0036 (Account No. 0036) and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) funds allowed by Insurance Code Chapter 401, Subchapters D and F, as approved by the commissioner for the self-directed budget account in the Treasury Safekeeping Trust Company to be used exclusively to pay examination costs associated with salary, travel, or other personnel expenses and administrative support costs; (iii) an estimate of other costs statutorily required to be paid from those two funds and the self-directed budget account, such as fringe benefits and statewide allocated costs; and (iv) an estimate of the cash amount necessary to finance both funds and the self-directed budget account from the end of the 2017 fiscal year until the next assessment collection period in 2018. From these combined costs, the department subtracted costs allocated to the Division of Workers' Compensation (DWC) and the workers' compensation research and evaluation group.

The department determined how to allocate the remaining cost need to be attributed to each funding source using the following method:

For each section within the department that provides services directly to the public or the insurance industry, the department allocated the costs for providing those direct services on a percentage basis to each funding source, such as the maintenance tax or fee line, the premium finance assessment, the self-directed budget account, the examination assessment, or another funding source. The department applied these percentages to each section's annual budget to determine the total direct cost to each funding source. The department calculated the percentage for each funding source by dividing the total directly allocated to each funding source by the total direct cost. The department used this percentage to allocate administrative support costs to each funding source. Examples of administrative support costs include services provided by human resources, accounting, budget, the commissioner's administration, and information technology. The department calculated the total direct costs and administrative support costs for each funding source.

The General Appropriations Act includes appropriations to state agencies other than the department that must be funded by Account No. 0036 and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees. The department adds these costs to the sum of the direct costs and the administrative support costs for the appropriate funding source, when possible. For instance, the department allocates an appropriation to the Texas Department of Transportation for the crash information records system to the motor vehicle maintenance tax. The department includes costs for other agencies that cannot be directly allocated to a funding source to the administrative support costs. For instance, the department includes an appropriation to the Texas Facilities Commission for building support costs in administrative support costs.

The department calculates the total revenue need after completing the allocation of costs to each funding source. To complete the calculation of revenue need, the department removes costs, revenues received, and fund balance related to the self-directed budget account. Based on remaining balances, the department

reduces the total cost need by subtracting the estimated ending fund balance for fiscal year 2016 (August 31, 2016) and estimated fee revenue collections for fiscal year 2017. The resulting balance is the estimated revenue need that must be supported during the 2017 fiscal year by the following funding sources: the maintenance taxes or fees, exam overhead assessments, and premium finance assessments.

The department determines the revenue need for each maintenance tax or fee line by dividing the total cost need for each maintenance tax line by the total of the revenue needs for all maintenance taxes. The department multiplies the calculated percentage for each line by the total revenue need for maintenance taxes. The resulting amount is the revenue need for each maintenance tax line. The department adjusts the revenue need by subtracting the estimated amount of fee and reimbursement revenue collected for each maintenance tax or fee line from the total of the revenue need for each maintenance tax or fee line. The department further adjusts the resulting revenue need as described below.

The cost allocated to the life, accident, and health maintenance tax exceeds the amount of revenue that can be collected at the maximum rate set by statute. The department allocates the difference between the amount estimated to be collected at the maximum rate and the costs allocated to the life, accident, and health maintenance tax to the other maintenance tax or fee lines. The department allocates the life, accident, and health shortfall based on each of the remaining maintenance tax or fee lines' a proportionate share of the total costs for maintenance taxes or fees. The department uses the adjusted revenue need as the basis for calculating the maintenance tax rates.

For each line of insurance, the department divides the adjusted revenue need by the estimated premium volume or assessment base to determine the rate of assessment for each maintenance tax or fee.

The following paragraphs provide an explanation of the methodology to develop the proposed rates for DWC and the Office of Injured Employee Counsel (OIEC).

To determine the revenue need, the department considered the following factors applicable to costs for DWC and OIEC: (i) the appropriations in the General Appropriations Act for fiscal year 2017 from Account No. 0036; (ii) estimated other costs statutorily required to be paid from Account No. 0036, such as fringe benefits and statewide allocated costs; and (iii) an estimated cash amount to finance Account No. 0036 costs from the end of the 2017 fiscal year until the next assessment collection period in 2018. The department adds these three factors to determine the total revenue need.

The department reduces the total revenue need by subtracting the estimated fund balance at August 31, 2016, and the DWC fee and reimbursement revenue estimate to be collected and deposited to Account No. 0036 in fiscal year 2017. The resulting balance is the estimated revenue need from maintenance taxes. The department calculated the maintenance tax rate by dividing the estimated revenue need by the combined estimated workers' compensation premium volume and the certified self-insurers' liabilities plus the amount of expense incurred for administration of self-insurance.

The following paragraphs provide an explanation of the methodology the department used to develop the proposed rates for the workers' compensation research and evaluation group.

To determine the revenue need, the department considered the following factors that are applicable to the workers' compensation and research and evaluation group: (i) the appropriations in the General Appropriations Act for fiscal year 2017 from Account No. 0036 and from the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) estimated other costs statutorily required to be paid from this funding source, such as fringe benefits and statewide allocated costs; and (iii) an estimated cash amount to finance costs from this funding source from the end of the 2017 fiscal year until the next assessment collection period in 2018. The department adds these three factors to determine the total revenue need.

The department reduced the total revenue need by subtracting the estimated fund balance at August 31, 2016. The resulting balance is the estimated revenue need from maintenance taxes. The department calculated the maintenance tax rate by dividing the estimated revenue need by the estimated assessment base.

Insurance Code §964.068 provides that a captive insurance company is subject to maintenance tax under Subtitle C, Title 3, on the correctly reported gross premiums from writing insurance on risks located in Texas as applicable to the individual lines of business written. The rates proposed in this rule will be applied to captive insurance companies based on the individual lines of business written, unless the commissioner postpones or waives the tax for a period not to exceed two years for any foreign or alien captive insurance company redomesticating to Texas under Insurance Code §964.071(c).

**FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Joe Meyer, assistant chief financial officer, has determined that for each year of the first five years the proposal will be in effect, the expected fiscal impact on state government is an estimated income of \$153,414,999 to the state's general revenue fund. There will be no fiscal implications for local government as a result of enforcing or administering the proposed section, and there will be no effect on local employment or local economy.

**PUBLIC BENEFIT AND COST NOTE.** Mr. Meyer also has determined that for each year of the first five years the amended section is in effect, the public benefit expected as a result of enforcing the section will be the collection of maintenance tax and fee assessments.

The cost in 2017 to an insurer that received premiums in 2016 will be: for motor vehicle insurance, .056 of 1 percent of those gross premiums; for casualty insurance and fidelity, guaranty, and surety bonds, .072 of 1 percent of those gross premiums; for fire insurance and allied lines, including inland marine, .364 of 1 percent of those gross premiums; for workers' compensation insurance, .064 of 1 percent of those gross premiums; and for title insurance, .103 of 1 percent of those gross premiums.

An insurer that receives premiums for workers' compensation insurance in 2016 will also pay 1.8 percent of that premium for the operation of DWC and OIEC and .016 of 1 percent of that premium to fund the Workers' Compensation Research and Evaluation Group's activities. A workers' compensation self-insurance group will pay 1.8 percent of its 2016 gross premium for the group's retention under Labor Code §407A.301 and .064 of 1 percent of its 2016 gross premium for the group's retention under Labor Code §407A.302.

The cost in 2017 for an insurer that received premiums in 2016 for life, health, and accident insurance, will be .040 of 1 percent of those gross premiums. In 2017, an HMO will pay \$.23 per en-

rollee if it is a single service HMO or a limited service HMO, and \$.69 per enrollee if it is a multiservice HMO. In 2017, a third party administrator will pay .010 of 1 percent of its correctly reported gross amount of administrative or service fees received in 2016. In 2017, for a nonprofit legal services corporation issuing prepaid legal services contracts, the cost will be .021 of 1 percent of correctly reported gross revenues for 2016.

In 2017, to fund the Workers' Compensation Research and Evaluation Group's activities, a workers' compensation certified self-insurer will pay .016 of 1 percent of the tax base calculated under Labor Code §407.103(b), and a workers' compensation self-insurance group will pay .016 of 1 percent of the tax base calculated under Labor Code §407.103(b).

Finally, in 2017, a workers' compensation certified self-insurer will pay 1.8 percent of the tax base calculated under Labor Code §407.103(b).

Except for workers' compensation certified self-insurers, there are two components of costs for entities required to comply with the proposal: the cost to gather the information, calculate the assessment, and complete the required forms; and the cost of the maintenance tax or fee. Typically, a person familiar with the accounting records of the company and accounting practices in general will perform the activities necessary to comply with the section. These persons are similarly compensated between \$25 and \$43 an hour. The actual time necessary to complete the form will vary depending on the number of lines of insurance written by the company. For a company that writes only one line of business subject to the tax, the department estimates it will take two hours to complete the form. If a company writes all the lines subject to the tax, the department estimates it will take six hours to complete the form. In the case of a certified self-insurer, DWC will calculate the maintenance tax and bill the certified self-insurer. The requirement to pay the maintenance tax or fee is the result of the legislative enactment of the statutes that impose the maintenance tax or fee and is not a result of the adoption or enforcement of this proposal.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.** As required by Government Code §2006.002(c), the department has determined the proposal may have an adverse economic effect on approximately 117 insurance companies and HMOs and approximately 541 third party administrators that are small or micro businesses required to comply with the proposed rules. Adverse economic impact may result from the costs of the maintenance taxes and fees. The cost of compliance will not vary between large businesses and small or micro businesses, and the department's cost analysis and resulting estimated costs in the public benefit and cost note portion of this proposal is equally applicable to small or micro businesses. The total cost of compliance to large businesses and small or micro businesses does not depend on the size of the business. For insurers in the following lines of insurance, the cost of compliance depends on the amount of gross premiums in 2016: motor vehicle insurance; casualty insurance and fidelity, guaranty, and surety bonds; fire insurance and allied lines, including inland marine; workers' compensation insurance; title insurance; and life, health, and accident insurance. For annuity and endowment contracts, the cost of compliance depends on the amount of gross considerations in 2016. For HMOs, the cost of compliance depends on the number of enrollees in 2016. For third party administrators, the cost of compliance depends on the amount of correctly reported gross administrative or service fees in 2016. For nonprofit legal

services corporations issuing prepaid legal services contracts, the cost of compliance depends on the correctly reported gross revenues. For workers' compensation certified self-insurers and workers' compensation certified self-insurance groups, the cost of compliance depends on the tax base calculated under Labor Code §407.103(b).

In accordance with Government Code §2006.002(c-1), the department considered other regulatory methods to accomplish the objectives of the proposal that will also minimize any adverse impact on small and micro businesses.

The primary objective of the proposal is to provide the rates of assessment for maintenance taxes and fees for 2017 to be applied to life, accident, and health insurance; motor vehicle insurance; casualty insurance and fidelity, guaranty and surety bonds; fire insurance and allied lines, including inland marine; workers' compensation insurance; workers' compensation self-insured groups; title insurance; HMOs; third party administrators; nonprofit legal services corporations issuing prepaid legal services contracts; and workers' compensation certified self-insurers.

The other regulatory methods considered by the department to accomplish the objectives of the proposal and to minimize any adverse impact on small and micro businesses include: (i) not adopting the proposed rule, (ii) adopting different tax rates for small and micro businesses, and (iii) exempting small and micro businesses from the tax requirements.

*Not adopting the proposed rule.* Under Insurance Code §251.003, if the commissioner does not advise the comptroller of the applicable maintenance tax assessment rates, the comptroller must assess taxes based on the previous year's assessment. Use of the previous year's rates and the estimated assessment bases for 2016, the department estimates revenue collections would be less than amounts needed by approximately \$13.5 million. If no rule is adopted the department would collect insufficient revenue to fund the department's costs. The department has rejected this option.

*Adopting different taxes for small and micro businesses.* The current methodology is already the most equitable methodology the department can develop. The department applies an assessment methodology that contemplates a smaller assessment for small or micro businesses because the assessment is determined based on number of enrollees, gross premiums, or gross amount of administrative or service fees. The department anticipates that a small or micro business that would be most susceptible to economic harm would be one that has fewer enrollees, lower gross premiums, or a lower gross amount of administrative or service fees. However, based on the proposed rule, a small or micro business would pay a smaller assessment, and would reduce its risk of economic harm. The department has rejected this option.

*Exemption of small and micro businesses from the tax requirements.* As noted above, the current methodology is already the most equitable methodology the department can develop. The tax methodology currently used contemplates a small business paying lower maintenance taxes because assessments are based on number of enrollees, gross premiums, or gross amount of administrative or service fees. A small or micro business that has fewer enrollees, has lower gross premiums, or receives fewer gross administrative or service fees would be assessed lower taxes. If the assessment were completely eliminated for small or micro businesses, the department would need to com-

pletely revise its calculations to shift costs to other insurers and entities, which would result in a less balanced methodology. The department has rejected this option.

The department, after considering the purpose of the authorizing statutes, does not believe it is legal or feasible to waive or modify the requirements of the proposal for small and micro businesses.

**TAKINGS IMPACT ASSESSMENT.** The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

**REQUEST FOR PUBLIC COMMENT.** Submit any written comments on the proposal no later than 5:00 p.m., Central time, on December 12, 2016, by mail to the Texas Department of Insurance, Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104; or by email to chief-clerk@tdi.texas.gov. Simultaneously submit an additional copy of the comments to the Texas Department of Insurance, Joe Meyer, Assistant Chief Financial Officer, Financial Services, Mail Code 108-3A, P.O. Box 149104, Austin, Texas 78714-9104; or by email to joe.meyer@tdi.texas.gov. Separately submit any request for a public hearing to the Texas Department of Insurance, Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If the department holds a hearing, the department will consider written and oral comments presented at the hearing.

**STATUTORY AUTHORITY.** The amendments are proposed under Insurance Code §§201.001(a)(1), (b), and (c); 201.052(a), (d), and (e); 251.001; 252.001 - 252.003; 253.001 - 253.003; 254.001 - 254.003; 255.001 - 255.003; 257.001 - 257.003; 258.002 - 258.004; 259.002 - 259.004; 260.001 - 260.003; 271.002 - 271.006; and 36.001; and Labor Code §§403.002, 403.003, 403.005, 405.003(a) - (c), 407.103, 407.104(b), 407A.301, and 407A.302.

Insurance Code §201.001(a)(1) states that the Texas Department of Insurance operating account is an account in the general revenue fund, and that the account includes taxes and fees received by the commissioner or comptroller that are required by the Insurance Code to be deposited to the credit of the account. Section 201.001(b) states that the commissioner administer money in the Texas Department of Insurance operating account and may spend money from the account in accordance with state law, rules adopted by the commissioner, and the General Appropriations Act. Section 201.001(c) states that money deposited to the credit of the Texas Department of Insurance operating account may be used for any purpose for which money in the account is authorized to be used by law.

Insurance Code §201.052(a) requires the department to reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller in administering taxes imposed under the Insurance Code or another insurance law of Texas. Section 201.052(d) provides that in setting maintenance taxes for each fiscal year, the commissioner shall ensure that the amount of taxes imposed is sufficient to fully reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller in administering taxes imposed under the Insurance Code or another insurance law of Texas. Section 201.052(e) provides that if the amount of

maintenance taxes collected is not sufficient to reimburse the appropriate portion of the general revenue fund for the amount of expenses incurred by the comptroller, other money in the Texas Department of Insurance operating account shall be used to reimburse the appropriate portion of the general revenue fund.

Insurance Code §251.001 directs the commissioner to annually determine the rate of assessment of each maintenance tax imposed under Insurance Code Title 3, Subtitle C.

Insurance Code §252.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under Insurance Code §252.003. Insurance Code §252.001 also specifies that the tax required by Insurance Code Chapter 252 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 252.

Insurance Code §252.002 provides that the rate of assessment set by the commissioner may not exceed 1.25 percent of the gross premiums subject to taxation under Insurance Code §252.003. Section 252.002(b) provides that the commissioner annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating all classes of insurance specified under: Insurance Code Chapters 1807, 2001 - 2006, 2171, 6001, 6002, and 6003; Chapter 5, Subchapter C; Chapter 544, Subchapter H; Chapter 1806, Subchapter D; and §403.002; Government Code §§417.007, 417.008, and 417.009; and Occupations Code Chapter 2154.

Insurance Code §252.003 specifies that an insurer must pay maintenance taxes under Insurance Code Chapter 252 on the correctly reported gross premiums from writing insurance in Texas against loss or damage by: bombardment; civil war or commotion; cyclone; earthquake; excess or deficiency of moisture; explosion as defined by Insurance Code §2002.006(b); fire; flood; frost and freeze; hail, including loss by hail on farm crops; insurrection; invasion; lightning; military or usurped power; an order of a civil authority made to prevent the spread of a conflagration, epidemic, or catastrophe; rain; riot; the rising of the waters of the ocean or its tributaries; smoke or smudge; strike or lockout; tornado; vandalism or malicious mischief; volcanic eruption; water or other fluid or substance resulting from the breakage or leakage of sprinklers, pumps, or other apparatus erected for extinguishing fires, water pipes, or other conduits or containers; weather or climatic conditions; windstorm; an event covered under a home warranty insurance policy; or an event covered under an inland marine insurance policy.

Insurance Code §253.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under Insurance Code §253.003. Section 253.001 also provides that the tax required by Insurance Code Chapter 253 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 253.

Insurance Code §253.002 provides that the rate of assessment set by the commissioner may not exceed 0.4 percent of the gross premiums subject to taxation under Insurance Code §253.003. Section 253.002(b) provides that the commissioner annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding

year of regulating all classes of insurance specified under Insurance Code §253.003.

Insurance Code §253.003 specifies that an insurer must pay maintenance taxes under Insurance Code Chapter 253 on the correctly reported gross premiums from writing a class of insurance specified under Insurance Code Chapters 2008, 2251, and 2252; Chapter 5, Subchapter B; Chapter 1806, Subchapter C; Chapter 2301, Subchapter A; and Title 10, Subtitle B.

Insurance Code §254.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under Insurance Code §254.003. Section 254.001 also provides that the tax required by Insurance Code Chapter 254 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 254.

Insurance Code §254.002 provides that the rate of assessment set by the commissioner may not exceed 0.2 percent of the gross premiums subject to taxation under Insurance Code §254.003. Section 254.002 also provides that the commissioner annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating motor vehicle insurance. Section 254.003 specifies that an insurer must pay maintenance taxes under Insurance Code Chapter 254 on the correctly reported gross premiums from writing motor vehicle insurance in Texas, including personal and commercial automobile insurance.

Insurance Code §255.001 imposes a maintenance tax on each authorized insurer with gross premiums subject to taxation under Insurance Code §255.003, including a stock insurance company, mutual insurance company, reciprocal or interinsurance exchange, and Lloyd's plan. Section 255.001 also provides that the tax required by Insurance Code Chapter 255 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 255.

Insurance Code §255.002 provides that the rate of assessment set by the commissioner may not exceed 0.6 percent of the gross premiums subject to taxation under Insurance Code §255.003. Section 255.002(b) provides that the commissioner shall annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating workers' compensation insurance.

Insurance Code §255.003 specifies that an insurer must pay maintenance taxes under Insurance Code Chapter 255 on the correctly reported gross premiums from writing workers' compensation insurance in Texas, including the modified annual premium of a policyholder that purchases an optional deductible plan under Insurance Code Chapter 2053, Subchapter E. The section also provides that the rate of assessment be applied to the modified annual premium before application of a deductible premium credit.

Insurance Code §257.001(a) imposes a maintenance tax on each authorized insurer, including a group hospital service corporation, managed care organization, local mutual aid association, statewide mutual assessment company, stipulated premium company, and stock or mutual insurance company, that collects from residents of this state gross premiums or gross considerations subject to taxation under Insurance Code §257.003. Section 257.001(a) also provides that the tax re-

quired by Chapter 257 is in addition to other taxes imposed that are not in conflict with Insurance Code Chapter 257.

Insurance Code §257.002 provides that the rate of assessment set by the commissioner may not exceed 0.04 percent of the gross premiums subject to taxation under Insurance Code §257.003. Section 257.002(b) provides that the commissioner annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating life, health, and accident insurers. Section 257.003 specifies that an insurer must pay maintenance taxes under Insurance Code Chapter 257 on the correctly reported gross premiums collected from writing life, health, and accident insurance in Texas, as well as gross considerations collected from writing annuity or endowment contracts in Texas. The section also provides that gross premiums on which an assessment is based under Insurance Code Chapter 257 may not include premiums received from the United States for insurance contracted for by the United States in accordance with or in furtherance of Title XVIII of the Social Security Act (42 U.S.C. §§1395c et seq.) and its subsequent amendments; or premiums paid on group health, accident, and life policies in which the group covered by the policy consists of a single nonprofit trust established to provide coverage primarily for employees of a municipality, county, or hospital district in this state; or a county or municipal hospital, without regard to whether the employees are employees of the county or municipality or of an entity operating the hospital on behalf of the county or municipality.

Insurance Code §258.002 imposes a per capita maintenance tax on each authorized HMO with gross revenues subject to taxation under Insurance Code 258.004. Section 258.002 also provides that the tax required by Insurance Code Chapter 258 is in addition to other taxes that are not in conflict with Insurance Code Chapter 258.

Insurance Code §258.003 provides that the rate of assessment set by the commissioner on HMOs may not exceed \$2 per enrollee. Section 258.003 also provides that the commissioner annually adjust the rate of assessment of the per capita maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating HMOs. Section 258.003 also provides that rate of assessment may differ between basic health care plans, limited health care service plans, and single health care service plans and must equitably reflect any differences in regulatory resources attributable to each type of plan.

Insurance Code §258.004 provides that an HMO must pay per capita maintenance taxes under Insurance Code Chapter 258 on the correctly reported gross revenues collected from issuing health maintenance certificates or contracts in Texas. Section 258.004 also provides that the amount of maintenance tax assessed may not be computed based on enrollees who, as individual certificate holders or their dependents, are covered by a master group policy paid for by revenues received from the United States for insurance contracted for by the United States in accord with or in furtherance of Title XVIII of the Social Security Act (42 U.S.C. §§1395c et seq.) and its subsequent amendments; revenues paid on group health, accident, and life certificates or contracts in which the group covered by the certificate or contract consists of a single nonprofit trust established to provide coverage primarily for employees of a municipality, county,

or hospital district in this state; or a county or municipal hospital, without regard to whether the employees are employees of the county or municipality or of an entity operating the hospital on behalf of the county or municipality.

Insurance Code §259.002 imposes a maintenance tax on each authorized third party administrator with administrative or service fees subject to taxation under Insurance Code §259.004. Section 259.002 also provides that the tax required by Insurance Code chapter 259 is in addition to other taxes imposed that are not in conflict with the chapter. Section 259.003 provides that the rate of assessment set by the commissioner may not exceed 1 percent of the administrative or service fees subject to taxation under Insurance Code §259.004. Section 259.003(b) provides that the commissioner annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses of regulating third party administrators.

Insurance Code §260.001 imposes a maintenance tax on each nonprofit legal services corporation subject to Insurance Code Chapter 961 with gross revenues subject to taxation under Insurance Code §260.003. Section 260.001 also provides that the tax required by Insurance Code Chapter 260 is in addition to other taxes imposed that are not in conflict with the chapter. Section 260.002 provides that the rate of assessment set by the commissioner may not exceed 1 percent of the corporation's gross revenues subject to taxation under Insurance Code §260.003. Section 260.002 also provides that the commissioner annually adjust the rate of assessment of the maintenance tax so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating nonprofit legal services corporations. Section 260.003 provides that a nonprofit legal services corporation must pay maintenance taxes under this chapter on the correctly reported gross revenues received from issuing prepaid legal services contracts in this state.

Insurance Code §271.002 imposes a maintenance fee on all premiums subject to assessment under Insurance Code §271.006. Section 271.002 also specifies that the maintenance fee is not a tax and must be reported and paid separately from premium and retaliatory taxes. Section 271.003 specifies that the maintenance fee is included in the division of premiums and may not be separately charged to a title insurance agent. Section 271.004 provides that the commissioner annually determine the rate of assessment of the title insurance maintenance fee. Section 271.004(b) provides that in determining the rate of assessment, the commissioner consider the requirement to reimburse the appropriate portion of the general revenue fund under Insurance Code §201.052. Section 271.005 provides that rate of assessment set by the commissioner may not exceed 1 percent of the gross premiums subject to assessment under Insurance Code §271.006. Section 271.005(b) provides that the commissioner annually adjust the rate of assessment of the maintenance fee so that the fee imposed that year, together with any unexpended funds produced by the fee, produces the amount the commissioner determines is necessary to pay the expenses during the succeeding year of regulating title insurance. Section 271.006 requires an insurer to pay maintenance fees under this chapter on the correctly reported gross premiums from writing title insurance in Texas.

Labor Code §403.002 imposes an annual maintenance tax on each insurance carrier to pay the costs of administering the Texas Workers' Compensation Act and to support the prosecution of workers' compensation insurance fraud in Texas. Labor Code §403.002 also provides that the assessment may not exceed an amount equal to 2 percent of the correctly reported gross workers' compensation insurance premiums, including the modified annual premium of a policyholder that purchases an optional deductible plan under Insurance Code Article 5.55C. Labor Code §403.002 also provides that the rate of assessment be applied to the modified annual premium before application of a deductible premium credit. Additionally, Labor Code §403.002 states that a workers' compensation insurance company is taxed at the rate established under Labor Code §403.003, and that the tax be collected in the manner provided for collection of other taxes on gross premiums from a workers' compensation insurance company as provided in Insurance Code Chapter 255. Finally, Labor Code §403.002 states that each certified self-insurer must pay a fee and maintenance taxes as provided by Labor Code Chapter 407, Subchapter F.

Labor Code §403.003 requires the commissioner of insurance to set and certify to the comptroller the rate of maintenance tax assessment, taking into account: (i) any expenditure projected as necessary for DWC and OIEC to administer the Texas Workers' Compensation Act during the fiscal year for which the rate of assessment is set and reimburse the general revenue fund as provided by Insurance Code §201.052; (ii) projected employee benefits paid from general revenues; (iii) a surplus or deficit produced by the tax in the preceding year; (iv) revenue recovered from other sources, including reappropriated receipts, grants, payments, fees, and gifts recovered under the Texas Workers' Compensation Act; and (v) expenditures projected as necessary to support the prosecution of workers' compensation insurance fraud. Labor Code §403.003 also provides that in setting the rate of assessment, the commissioner of insurance may not consider revenue or expenditures related to the State Office of Risk Management, the workers' compensation research functions of the department under Labor Code Chapter 405, or any other revenue or expenditure excluded from consideration by law.

Labor Code §403.005 provides that the commissioner of insurance must annually adjust the rate of assessment of the maintenance tax imposed under §403.003 so that the tax imposed that year, together with any unexpended funds produced by the tax, produces the amount the commissioner of insurance determines is necessary to pay the expenses of administering the Texas Workers' Compensation Act. Labor Code §405.003(a) - (c) establishes a maintenance tax on insurance carriers and self-insurance groups to fund the workers' compensation research and evaluation group, it provides for the department to set the rate of the maintenance tax based on the expenditures authorized and the receipts anticipated in legislative appropriations, and it provides that the tax is in addition to all other taxes imposed on insurance carriers for workers' compensation purposes.

Labor Code §407.103 imposes a maintenance tax on each workers' compensation certified self-insurer for the administration of the DWC and OIEC and to support the prosecution of workers' compensation insurance fraud in Texas. Labor Code §407.103 also provides that not more than 2 percent of the total tax base of all certified self-insurers, as computed under subsection (b) of the section, may be assessed for the maintenance tax established under Labor Code §407.103. Labor Code §407.103 also provides that to determine the tax base of a certified self-insurer for purposes of Labor Code Chapter 407, the department mul-

tiply the amount of the certified self-insurer's liabilities for workers' compensation claims incurred in the previous year, including claims incurred but not reported, plus the amount of expense incurred by the certified self-insurer in the previous year for administration of self-insurance, including legal costs, by 1.02. Labor Code §407.103 also provides that the tax liability of a certified self-insurer under the section is the tax base computed under subsection (b) of the section multiplied by the rate assessed workers' compensation insurance companies under Labor Code §403.002 and §403.003. Finally, Labor Code §407.103 provides that in setting the rate of maintenance tax assessment for insurance companies, the commissioner of insurance may not consider revenue or expenditures related to the operation of the self-insurer program under Labor Code Chapter 407.

Section 407.104(b) provides that the department compute the fee and taxes of a certified self-insurer and notify the certified self-insurer of the amounts due. Section 407.104(b) also provides that a certified self-insurer must remit the taxes and fees to DWC.

The Labor Code §407A.301 imposes a self-insurance group maintenance tax on each workers' compensation self-insurance group based on gross premium for the group's retention.

Labor Code §407A.301 provides that the self-insurance group maintenance tax is to pay for the administration of DWC, the prosecution of workers' compensation insurance fraud in Texas, the research functions of the department under Labor Code Chapter 405, and the administration of OIEC under Labor Code Chapter 404. Labor Code §407A.301 also provides that the tax liability of a group under subsection (a)(1) and (2) of the section is based on gross premium for the group's retention multiplied by the rate assessed insurance carriers under Labor Code §403.002 and §403.003. Labor Code §407A.301 also provides that the tax liability of a group under subsection (a)(3) of the section is based on gross premium for the group's retention multiplied by the rate assessed insurance carriers under Labor Code §405.003. Additionally, Labor Code §407A.301 provides that the tax under the section does not apply to premium collected by the group for excess insurance. Finally, Labor Code §407A.301(e) provides that the tax under the section be collected by the comptroller as provided by Insurance Code Chapter 255 and Insurance Code §201.051.

Labor Code §407A.302 requires each workers' compensation self-insurance group to pay the maintenance tax imposed under Insurance Code Chapter 255, for the administrative costs incurred by the department in implementing Labor Code Chapter 407A. Labor Code §407A.302 provides that the tax liability of a workers' compensation self-insurance group under the section is based on gross premium for the group's retention and does not include premium collected by the group for excess insurance. Labor Code §407A.302 also provides that the maintenance tax assessed under the section is subject to Insurance Code Chapter 255, and that it be collected by the comptroller in the manner provided by Insurance Code Chapter 255.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. Amendments in this proposal to Section 1.414 affect Insurance Code §§201.001(a)(1), (b), and (c); 201.052(a), (d), and (e); 251.001, 252.001 - 252.003; 253.001 - 253.003; 254.001 - 254.003; 255.001 -

255.003; 257.001 - 257.003; 258.002 - 258.004; 259.002 - 259.004; 260.001 - 260.003; and 271.002 - 271.006; and Labor Code §§403.002, 403.003, 403.005, 405.003(a) - (c), 407.103, 407.104(b), 407A.301, and 407A.302.

§1.414. *Assessment of Maintenance Taxes and Fees, 2017 [2016].*

(a) The department assesses the following rates for maintenance taxes and fees on gross premiums of insurers for calendar year 2016 [2015] for the lines of insurance specified in paragraphs (1) - (9) of this subsection:

(1) for motor vehicle insurance, under Insurance Code §254.002, the rate is .056 [-055] of 1 percent;

(2) for casualty insurance and fidelity, guaranty, and surety bonds, under Insurance Code §253.002, the rate is .072 [-077] of 1 percent;

(3) for fire insurance and allied lines, including inland marine, under Insurance Code §252.002, the rate is .364 [-344] of 1 percent;

(4) for workers' compensation insurance, under Insurance Code §255.002, the rate is .064 [-065] of 1 percent;

(5) for workers' compensation insurance, under Labor Code §403.003, the rate is 1.8 [+478] percent;

(6) for workers' compensation insurance, under Labor Code §405.003, the rate is .016 [-015] of 1 percent;

(7) for workers' compensation insurance, under Labor Code §407A.301, the rate is 1.8 [+478] percent;

(8) for workers' compensation insurance, under Labor Code §407A.302, the rate is .064 [-065] of 1 percent; and

(9) for title insurance, under Insurance Code §271.004, the rate is .103 of 1 percent.

(b) The rate for the maintenance tax to be assessed on gross premiums for calendar year 2016 [2015] for life, health, and accident insurance and the gross considerations for annuity and endowment contracts, under Insurance Code §257.002, is .040 of 1 percent.

(c) The department assesses rates for maintenance taxes for calendar year 2016 [2015] for the following entities as follows:

(1) under Insurance Code §258.003, the rate is \$.23 [-\$.28] per enrollee for single service health maintenance organizations, \$.69 [-\$.84] per enrollee for multiservice health maintenance organizations, and \$.23 [-\$.28] per enrollee for limited service health maintenance organizations;

(2) under Insurance Code §259.003, the rate is .010 [-013] of 1 percent of the correctly reported gross amount of administrative or service fees for third party administrators; and

(3) under Insurance Code §260.002, the rate is .021 [-022] of 1 percent of the correctly reported gross revenues for nonprofit legal services corporations issuing prepaid legal services contracts.

(d) Under Labor Code §405.003, each certified self-insurer must pay a maintenance tax for the workers' compensation research and evaluation group in calendar year 2017 [2016] at a rate of .016 [-015] of 1 percent of the tax base calculated under Labor Code §407.103(b) which must be billed to the certified self-insurer by the Division of Workers' Compensation.

(e) Under Labor Code §405.003 and §407A.301, each workers' compensation self-insurance group must pay a maintenance tax for the workers' compensation research and evaluation group in calendar

year 2017 [2016] at a rate of .016 [-015] of 1 percent of the tax base calculated under Labor Code §407.103(b).

(f) Under Labor Code §407.103 and §407.104, each certified self-insurer must pay a self-insurer maintenance tax in calendar year 2017 [2016] at a rate of 1.8 [+478] percent of the tax base calculated under Labor Code §407.103(b) which must be billed to the certified self-insurer by the Division of Workers' Compensation.

(g) The enactment of Senate Bill 14, 78th Legislature, Regular Session, relating to certain insurance rates, forms, and practices, did not affect the calculation of the maintenance tax rates or the assessment of the taxes.

(h) The taxes assessed under subsections (a), (b), (c), and (e) of this section will be payable and due to the Comptroller of Public Accounts on March 1, 2017 [2016].

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 October 31, 2016.

TRD-201605633

Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: December 11, 2016

For further information, please call: (512) 676-6584



## CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

### SUBCHAPTER H. CANCELLATION, DENIAL, AND NONRENEWAL OF CERTAIN PROPERTY AND CASUALTY INSURANCE COVERAGE

#### 28 TAC §5.7015

The Texas Department of Insurance proposes new 28 TAC Chapter 5, Subchapter H, §5.7015. The new rule is necessary to clarify the requirement to refund unearned premium on personal automobile or residential property policies within 15 business days of cancellation or termination of the policy as required by Insurance Code §558.002(d).

EXPLANATION. The Legislature added Insurance Code §558.002(d) in Senate Bill 698, 83rd Legislature, Regular Session (2013). Insurance Code §558.002(d) requires insurers to refund unearned premium within 15 business days of cancellation or termination of personal automobile and residential property policies as defined by Insurance Code §2301.051. Auto insurance policies are frequently canceled or terminated automatically based on policy provisions or statute, without the insurer's knowledge. Sometimes the insurer does not receive notice of the cancellation or termination before 15 business days pass. Therefore, the proposed section defines "the effective date of cancellation or termination" to mean either the date the insurer receives notice of the cancellation or termination, or the date of cancellation or termination, whichever is later. Adding this definition will clarify the deadline and give the insurer time to refund the premium in compliance with the statute.

The proposed section also allows insurers to refund unearned premium by applying it as a credit to other premium due on the same policy, unless the policyholder requests otherwise. This will reduce the transaction cost for the insurers, and give consumers the convenience of fewer monetary transactions, while retaining the option to receive the unearned premium directly if they choose.

The proposed section applies to any unearned premium, including any that results from cancellation or termination of an entire policy or an endorsement.

**FISCAL NOTE.** Marianne Baker, director of the Personal and Commercial Lines Office of the Regulatory Policy Division, has determined that for each year of the first five years the proposed section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. Ms. Baker does not anticipate any measurable effect on local employment or the local economy as a result of the proposal.

**PUBLIC BENEFIT/COST NOTE.** Ms. Baker expects that for each year of the first five years the proposed section is in effect, the public benefit is that insurers will have time to refund the premium after receiving notice of termination or cancellation, and consumers will receive timely refunds of unearned premium.

Ms. Baker does not expect the proposed rule to increase the cost of compliance with Insurance Code §558.002(d) because the rule does not impose requirements beyond those in the statute.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.** As required by Government Code §2006.002(c), TDI has determined the proposal will not have an adverse economic effect or a disproportionate impact on small or micro businesses. Insurance Code §558.002(d) applies equally to all insurance companies writing personal automobile and residential property policies. The refund timeline is mandated by statute, and the rule does not specify any additional requirements. As a result, and in compliance with Government Code §2006.002(c), TDI is not required to prepare a regulatory flexibility analysis.

**TAKINGS IMPACT ASSESSMENT.** TDI has determined that no private real property interests are affected by this proposal, and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

**REQUEST FOR PUBLIC COMMENT.** TDI invites the public to comment on this proposal. Submit written comments on the proposal no later than 5 p.m., Central time on December 12, 2016. TDI requires two copies of your comments. Send one copy to the chief clerk by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov), or by mail to the Texas Department of Insurance, Office of the Chief Clerk, MC 113-2A, P.O. Box 149104, Austin, Texas 78714-9104. Send the other copy to Marianne Baker by email to [marianne.baker@tdi.texas.gov](mailto:marianne.baker@tdi.texas.gov), or by mail to the Texas Department of Insurance, Property and Casualty Lines Office, MC 104-PC, P.O. Box 149104, Austin, Texas 78714-9104. If you wish to request a public hearing, submit a request separately to the chief clerk by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov), or by mail to the Texas Department of Insurance, Office of the Chief Clerk, MC 113-2A, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If TDI holds a hearing, the commissioner will consider written comments and testimony presented at the hearing.

**STATUTORY AUTHORITY.** The new section is proposed under Insurance Code §§558.003 and 36.001.

Section 558.003 requires the commissioner to adopt rules necessary to implement Chapter 558. Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

**CROSS REFERENCE TO STATUTE.** Section 5.7015 implements Insurance Code §558.002(d), enacted by Senate Bill 698, 83rd Legislature, Regular Session (2013).

§5.7015. Refund of Unearned Premium.

(a) Insurers must refund the appropriate portion of any unearned premium to the policyholder not later than the 15th business day after the effective date of cancellation or termination of a personal automobile or residential property insurance policy, as required by Insurance Code §558.002(d).

(b) For purposes of this section and Insurance Code §558.002(d), the "effective date of cancellation or termination" means the date the insurer receives notice of the cancellation or termination, or the date of the cancellation or termination, whichever is later.

(c) Insurers may refund unearned premium by applying it as a credit to other premium due on the same policy, unless the policyholder requests otherwise.

(d) This section applies to any unearned premium, including any that results from cancellation or termination of an entire policy or an endorsement.

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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Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



## CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

### SUBCHAPTER J. EXAMINATION EXPENSES AND ASSESSMENTS

#### 28 TAC §7.1001

The Texas Department of Insurance proposes amendments to 28 Texas Administrative Code §7.1001, concerning assessments to cover the expenses of examining domestic and foreign insurance companies and self-insurance groups providing workers' compensation insurance. Under Insurance Code §843.156, the term "insurance company" as used in this proposal includes a health maintenance organization (HMO) as defined in Insurance Code §843.002.

**EXPLANATION.** The proposed amendments are necessary to establish the examination expenses to be levied against and collected from each domestic and foreign insurance company and

each self-insurance group providing workers' compensation insurance examined during the 2017 calendar year. The proposed amendments are also necessary to establish the rates of assessment to be levied against and collected from each domestic insurer, based on admitted assets and gross premium receipts for the 2016 calendar year, and from each foreign insurer examined during the 2016 calendar year using the same methodology.

The department proposes an amendment to the section heading to reflect the year for which the proposed assessment will be applicable. The department also proposes amendments in subsections (b)(1) and (2), (c)(1), (c)(2)(A) and (B), (c)(3), and (d) to reflect the appropriate year for accurate application of the section.

The department proposes an amendment in subsection (b)(2) to clarify that a foreign insurance company pay an annual assessment based on an examination completed entirely in 2016, or beginning in 2016 and completed in 2017. The change makes clear that a foreign insurance company assessed previously for an examination that began in 2015 will not be assessed for an examination finishing in 2016.

The department proposes amendments in subsection (c)(2)(A) and (B) to update assessments to reflect the methodology the department has developed for 2017.

Finally, the department proposes amendments that are nonsubstantive in nature to conform to the department's writing style guides.

The following paragraphs provide an explanation of the methodology used to determine examination overhead assessments for 2017.

In general, the department's 2017 revenue need (the amount that must be funded by maintenance taxes or fees; examination overhead assessments; premium finance exam assessments; and funds in the self-directed budget account, as established under Insurance Code §401.252) is determined by calculating the department's total cost need, and subtracting from that number funds resulting from fee revenue and funds remaining from fiscal year 2016.

To determine total cost need, the department combined costs from the following: (i) appropriations set out in Chapter 1281 (HB 1), Acts of the 84th Legislature, Regular Session, 2015 (the General Appropriations Act), which come from two funds, the General Revenue Dedicated - Texas Department of Insurance Operating Account No. 0036 (Account No. 0036) and the General Revenue Fund - Insurance Companies Maintenance Tax and Insurance Department Fees; (ii) funds allowed by Insurance Code Subchapters D and F of Chapter 401 as approved by the commissioner of insurance for the self-directed budget account in the Treasury Safekeeping Trust Company to be used exclusively to pay examination costs associated with salary, travel, or other personnel expenses and administrative support costs; (iii) an estimate of other costs statutorily required to be paid from those two funds and the self-directed budget account, such as fringe benefits and statewide allocated costs; and (iv) an estimate of the cash amount necessary to finance both funds and the self-directed budget account from the end of the 2017 fiscal year until the next assessment collection period in 2018. From these combined costs, the department subtracted costs allocated to the Division of Workers' Compensation and the workers' compensation research and evaluation group.

The department determined how to allocate the revenue need to be attributed to each funding source using the following method:

Each section within the department that provides services directly to the public or the insurance industry allocated the costs for providing those direct services on a percentage basis to each funding source, such as the maintenance tax or fee line, the premium finance assessment, the examination assessment, the self-directed budget account as limited by Insurance Code §401.252, or another funding source. The department applied these percentages to each section's annual budget to determine the total direct cost to each funding source. The department calculated a percentage for each funding source by dividing the total directly allocated to each funding source by the total of the direct cost. The department used this percentage to allocate administrative support costs to each funding source. Examples of administrative support costs include services provided by human resources, accounting, budget, the commissioner's administration, and information technology. The department calculated the total of direct costs and administrative support costs for each funding source.

To complete the calculation of the revenue need, the department combined the costs allocated to the examination overhead assessment source and the self-directed budget account source. The department then subtracted the fiscal year 2017 estimated amount of examination direct billing revenue from the amount of the combined costs of the examination overhead assessment source and the self-directed budget account source. The resulting balance is the amount of the examination revenue need for the purpose of calculating the examination overhead assessment rates.

To calculate the assessment rates, the department allocated 50 percent of the revenue need to admitted assets and 50 percent to gross premium receipts. The department divided the revenue need for gross premium receipts by the total estimated gross premium receipts for calendar year 2016 to determine the proposed rate of assessment for gross premium receipts. The department divided the revenue need for admitted assets by the total estimated admitted assets for calendar year 2016 to determine the proposed rate of assessment for admitted assets.

**FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Joe Meyer, assistant chief financial officer, has determined that for each year of the first five years the proposed amendments will be in effect, the expected fiscal impact on state government is estimated income of \$12,333,235 to the Texas Department of Insurance Examination Self-Directed Account in the Texas Treasury Safekeeping Trust Company. There will be no fiscal implications for local government as a result of enforcing or administering the section, and there will be no effect on local employment or the local economy.

**PUBLIC BENEFIT AND COST NOTE.** Mr. Meyer also has determined that for each year of the first five years the proposed amendments are in effect, the public benefit expected as a result of enforcing the section will be adequate and reasonable assessment rates to defray the state's expenses of domestic and foreign insurer examinations and administration of the laws related to these examinations during the 2017 calendar year. Mr. Meyer has determined that the direct economic cost to entities required to comply with the proposed amendments will vary.

The examination expense will consist of the actual salary of the examiner directly attributable to the examination and the actual expenses of the examiner directly attributable to the examina-

tion, including transportation, lodging, meals, subsistence expenses, and parking fees. The actual salary of an examiner is to be determined by dividing the annual salary of the examiner by the total number of working days in a year, and a company or group is to be assessed the part of the annual salary attributable to each working day the examiner examines the company or group.

The amount of the assessment in 2017 for every domestic insurer and those foreign insurers examined in 2016 will be .00086 of 1 percent of the company's admitted assets as of December 31, 2016, excluding pension assets specified in subsection (c)(2)(A), and .00311 of 1 percent of the company's gross premium receipts for 2016, excluding pension related premiums specified in subsection (c)(2)(B), and premiums related to welfare benefits described in subsection (c)(6).

There are two components of costs for entities required to comply with the assessment requirements in the proposal: the cost to gather the information, calculate the assessment, and complete the required forms; and the cost of the assessment. Typically, a person familiar with the accounting records of the company and accounting practices in general will perform the activities necessary to comply with the section. The compensation is generally between \$25 and \$43 an hour. The department estimates that the required form can be completed in two hours. The requirement to pay the assessment necessary to cover the expenses of company examination is the result of legislative enactment and is not a result of the adoption or enforcement of this proposal. For those domestic and foreign companies with an overhead assessment of less than \$25 as computed under §7.1001(c)(2)(A) and (B), a minimum overhead assessment of \$25 will be assessed.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.** As required by Government Code §2006.002(c), the department has determined that the proposal may have an adverse economic effect on approximately 18 domestic insurance companies that are small or micro businesses required to comply with the proposed rules. It is not possible to anticipate the number or size of foreign insurance companies that may be required to comply with the proposed rule, because of the limited number of examinations the department conducts on foreign insurance companies. The department has determined that none of the workers' compensation self-insurance groups that must comply with the proposed rule would qualify as a small or micro business.

Adverse economic impact may result from costs associated with examination fees and the amount of the required assessment resulting from this proposal. The cost of compliance will not vary between large businesses and small or micro businesses, and the department's cost analysis and resulting estimated costs in the public benefit or cost note portion of this proposal is equally applicable to small or micro businesses. The total cost of compliance to large businesses and small or micro businesses is not dependent on the size of the business, but rather is dependent on: for workers' compensation self-insurance groups, the length of time it takes to conduct an examination, the annual salary of the examiner, and expenses associated with the examination; and for domestic and foreign insurers, the length of time it takes to conduct an examination, expenses associated with the examination, and the admitted assets and gross premium receipts of the company.

In accordance with Government Code §2006.002(c-1), the department has considered other regulatory methods to accom-

plish the objectives of the proposal that will also minimize any adverse impact on small and micro businesses.

The primary objective of the proposal is to propose a rule addressing examination fees and assessments for domestic and foreign insurance companies and workers' compensation self-insurance groups.

The other regulatory methods considered by the department to accomplish the objectives of the proposal and to minimize any adverse impact on small and micro businesses include: (i) not adopting the proposed rule, (ii) adopting a different assessment requirement for small and micro businesses, and (iii) exempting small or micro businesses from the assessment requirements.

*Not adopting the proposed rule.* Without adopting the proposed rule the department would be unable to collect the necessary funds to cover the examination functions of the department. The purpose of conducting examinations is to monitor the activities and solvency of insurance companies. Failure of the department to perform its examination functions could result in public harm if a company does not comply with the Insurance Code or becomes insolvent and this is not detected because of the lack of regular examinations. Not adopting the rule would also result in the department being out of compliance with Insurance Code §401.151(c) and §401.152(a-1), which direct the department to impose an annual assessment on domestic and foreign insurers in an amount sufficient to meet all other expenses and disbursements necessary to comply with the insurer examination laws of Texas. This option has been rejected.

*Adopting a different assessment requirement for small and micro businesses.* The proposed assessment is already based on the most equitable methodology the department can develop. The department applies an assessment methodology that results in a smaller assessment, down to a minimum assessment of \$25, for domestic and foreign insurer small or micro businesses because the assessment is determined based on premium levels and admitted assets. The department anticipates that a domestic or foreign insurer that is a small or micro business most susceptible to economic harm would be one that writes fewer premiums and has fewer admitted assets. However, based on the proposed assessment requirements of the rule, that small or micro business would pay a smaller assessment, reducing its risk of economic harm. This option has been rejected.

*Exempting small or micro businesses from the assessment requirements.* As previously noted, the current methodology used to develop the proposed rule is already the most equitable that the department can develop. The department applies a methodology that contemplates a domestic or foreign insurer that is a small or micro business paying less of an assessment if it writes fewer premiums or has less admitted assets. However, if the assessment were completely eliminated for small or micro businesses, the department would need to completely revise its calculations to shift costs to other insurers and entities, which would result in a less balanced methodology. This option has been rejected.

The department, after considering the purpose of the authorizing statutes, does not believe it is legal or feasible to waive or modify the requirements of the proposal for small and micro businesses.

**TAKINGS IMPACT ASSESSMENT.** The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and so does not constitute a tak-

ing or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. Submit any written comments on the proposal no later than 5:00 p.m., Central time, on December 12, 2016, by mail to the Texas Department of Insurance, Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104; or by email to [chiefclerk@tdi.texas.gov](mailto:chiefclerk@tdi.texas.gov). Simultaneously submit an additional copy of the comments to Texas Department of Insurance, Joe Meyer, Assistant Chief Financial Officer, Financial Services, Mail Code 108-3A, P.O. Box 149104, Austin, Texas 78714-9104; or by email to [joe.meyer@tdi.texas.gov](mailto:joe.meyer@tdi.texas.gov). Separately submit any request for a public hearing to the Texas Department of Insurance, Office of the Chief Clerk, Mail Code 113-2A, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If the department holds a hearing, the department will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. The amendment is proposed under Insurance Code §§201.001(a)(1), (b), and (c); 401.151; 401.152; 401.155, 401.156; 843.156(h); and 36.001; and Labor Code §407A.252(b).

Insurance Code §201.001(a)(1) states that the Texas Department of Insurance operating account is an account in the general revenue fund, and that the account includes taxes and fees received by the commissioner or comptroller that are required by the Insurance Code to be deposited to the credit of the account. Section 201.001(b) states that the commissioner administers money in the Texas Department of Insurance operating account and may spend money from the account in accordance with state law, rules adopted by the commissioner, and the General Appropriations Act. Section 201.001(c) states that money deposited to the credit of the Texas Department of Insurance operating account may be used for any purpose for which money in the account is authorized to be used by law.

Insurance Code §401.151 provides that a domestic insurer examined by the department or under the department's authority must pay the expenses of the examination in an amount the commissioner certifies as just and reasonable. Insurance Code §401.151 also provides that the department collect an assessment at the time of the examination to cover all expenses attributable directly to that examination, including the salaries and expenses of department employees and expenses described by Insurance Code §803.007. Section 401.151 also requires that the department impose an annual assessment on domestic insurers in an amount sufficient to meet all other expenses and disbursements necessary to comply with the laws of Texas relating to the examination of insurers. Additionally, §401.151 states that in determining the amount of assessment, the department consider the insurer's annual premium receipts or admitted assets, or both, that are not attributable to 90 percent of pension plan contracts as defined by §818(a), Internal Revenue Code of 1986; or the total amount of the insurer's insurance in force.

Insurance Code §401.152 provides that an insurer not organized under the laws of Texas must reimburse the department for the salary and expenses of each examiner participating in an examination of the insurer and for other department expenses that are properly allocable to the department's participation in the examination. Section 401.152(a-1) requires that the department also impose an annual assessment on insurers not organized under the laws of this state subject to examination as described by the

section in an amount sufficient to meet all other expenses and disbursements necessary to comply with the laws of this state relating to the examination of insurers, and the amount imposed must be computed in the same manner as the amount imposed under §401.151(c) for domestic insurers. Section 401.152 also requires an insurer to pay the expenses under the section directly to the department on presentation of an itemized written statement from the commissioner. Additionally, §401.152 provides that the commissioner determine the salary of an examiner participating in an examination of an insurer's books or records located in another state based on the salary rate recommended by the National Association of Insurance Commissioners or the examiner's regular salary rate.

Insurance Code §401.155 requires the department to impose additional assessments against insurers on a pro rata basis as necessary to cover all expenses and disbursements required by law and to comply with Insurance Code Chapter 401, Subchapter D, and §§401.103, 401.104, 401.105, and 401.106.

Insurance Code §401.156 requires the department to deposit any assessments or fees collected under Insurance Code Chapter 401, Subchapter D, relating to the examination of insurers and other regulated entities by the financial examinations division or actuarial division, as those terms are defined by Insurance Code §401.251, to the credit of an account with the Texas Treasury Safekeeping Trust Company to be used exclusively to pay examination costs as defined by Insurance Code §401.251, to reimburse the Texas Department of Insurance operating account for administrative support costs, and for premium tax credits for examination costs and examination overhead assessments. Additionally, §401.156 provides that revenue not related to the examination of insurers or other regulated entities by the financial examinations division or actuarial division be deposited to the credit of the Texas Department of Insurance operating account.

Insurance Code §843.156(h) provides that Insurance Code Chapter 401, Subchapter D, applies to an HMO, except to the extent that the commissioner determines that the nature of the examination of an HMO renders the applicability of those provisions clearly inappropriate.

Labor Code §407A.252(b) provides that the commissioner of insurance may recover the expenses of an examination of a workers' compensation self-insurance group under Insurance Code Article 1.16, which was recodified as Insurance Code §§401.151, 401.152, 401.155, and 401.156 by House Bill 2017, 79th Legislature, Regular Session (2005), to the extent the maintenance tax under Labor Code §407A.302 does not cover those expenses.

Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of Texas.

CROSS REFERENCE TO STATUTE. Amendments in this proposal to §7.1001 affect Insurance Code §§201.001(a)(1), (b), and (c); 401.151; 401.152; 401.155; 401.156; and 843.156(h); and Labor Code §407A.252(b).

*§7.1001. Examination Assessments for Domestic and Foreign Insurance Companies and Self-Insurance Groups Providing Workers' Compensation Insurance, 2017 [2016].*

(a) Under Insurance Code §843.156 and for purposes of this section, the term "insurance company" includes a health maintenance organization as defined in Insurance Code §843.002.

(b) An insurer not organized under the laws of Texas (foreign insurance company) must pay the costs of an examination as specified in this subsection.

(1) Under Insurance Code §401.152, a foreign insurance company must reimburse the department for the salary and examination expenses of each examiner participating in an examination of the insurance company allocable to an examination of the company. To determine the allocable salary for each examiner, the department divides the annual salary of each examiner by the total number of working days in a year. The department assesses the company the part of the annual salary attributable to each working day the examiner examines the company during 2017 [2016]. The expenses the department assesses are those actually incurred by the examiner to the extent permitted by law.

(2) Under Insurance Code §401.152(a-1), a foreign insurance company examined in 2016 entirely, [2015] or an exam beginning in 2016 [2015] and completed in 2017 [2016], must pay an annual assessment in an amount sufficient to meet all other expenses and disbursements necessary to comply with the laws of this state relating to the examination of insurers. The amount imposed must be computed in the same manner as the amount imposed for domestic insurers as applicable under subsection (c) of this section.

(3) A foreign insurance company must pay the reimbursements and payments required by this subsection to the department as specified in each itemized bill the department provides to the foreign insurance company.

(c) Under Insurance Code §401.151, §401.155, and Chapter 803, a domestic insurance company must pay examination expenses and rates of overhead assessment in accordance [ææææææ] with this subsection.

(1) A domestic insurance company must pay the actual salaries and expenses of the examiners allocable to an examination of the company. The annual salary of each examiner is to be divided by the total number of working days in a year, and the company is to be assessed the part of the annual salary attributable to each working day the examiner examines the company during 2017 [2016]. The expenses assessed must be those actually incurred by the examiner to the extent permitted by law.

(2) Except as provided in paragraphs (3) and (4) of this subsection, the overhead assessment to cover administrative departmental expenses attributable to examination of companies is:

(A) .00086 [-.00133] of 1 percent of the admitted assets of the company as of December 31, 2016 [2015], taking into consideration the annual admitted assets that are not attributable to 90 percent of pension plan contracts as defined in §818(a) of the Internal Revenue Code of 1986 (26 U.S.C. §818(a)); and

(B) .00311 [-.00415] of 1 percent of the gross premium receipts of the company for the year 2016 [2015], taking into consideration the annual premium receipts that are not attributable to 90 percent of pension plan contracts as defined in §818(a) of the Internal Revenue Code of 1986 (26 U.S.C. §818(a)).

(3) Except as provided in paragraph (4) of this subsection, if a company was a domestic insurance company for less than a full year during calendar year 2016 [2015] because of a redomestication, the overhead assessment for the company is the overhead assessment required under paragraph (2)(A) and (B) of this subsection divided by 365 and multiplied by the number of days the company was a domestic insurance company during calendar year 2016 [2015].

(4) If the overhead assessment required under paragraph (2)(A) and (B) of this subsection or paragraph (3) of this subsection produces an overhead assessment of less than \$25, a domestic insurance company must pay a minimum overhead assessment of \$25.

(5) The department will base the overhead assessments on the assets and premium receipts reported in the annual statements.

(6) For the purpose of applying paragraph (2)(B) of this subsection, the term "gross premium receipts" does not include insurance premiums for insurance contracted for by a state or federal government entity to provide welfare benefits to designated welfare recipients or contracted for in accordance [ææææææ] with or in furtherance of the Human Resources Code, Title 2, or the federal Social Security Act (42 U.S.C. §§301 et seq.).

(d) Under Labor Code §407A.252, a workers' compensation self-insurance group must pay the actual salaries and expenses of the examiners allocable to an examination of the group. To determine the allocable salary for each examiner, the department divides the annual salary of each examiner by the total number of working days in a year. The department assesses the group the part of the annual salary attributable to each working day the examiner examines the company during 2017 [2016]. The expenses the department assesses are those actually incurred by the examiner to the extent permitted by law.

(e) A domestic insurance company must pay the overhead assessment required under subsection (c) of this section to the Texas Department of Insurance at the address provided on the invoice not later than 30 days from the invoice date.

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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Norma Garcia  
General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



## CHAPTER 21. TRADE PRACTICES

### SUBCHAPTER AA. CONSUMER CHOICE

#### HEALTH BENEFIT PLANS

The Texas Department of Insurance proposes changes to 28 TAC Chapter 21, Subchapter AA, relating to consumer choice health benefit plans. Proposed changes are in Division 1, §§21.3501 - 21.3504; Division 3, §21.3530; and Division 4, §21.3542. The proposal also includes proposed new 28 TAC §21.3506 and the proposed repeal of Division 2, §§21.3510 - 21.3518.

The department proposes nonsubstantive changes to §§21.3501 - 21.3504 to conform to agency style and usage guidelines and proposes new §21.3506, relating to State-Mandated Health Benefits in Blanket Indemnity Policies. The new section will replace §21.3514, State-Mandated Health Benefits in Blanket Indemnity Policies, which is proposed for repeal along with the other sections in Division 2. No changes are proposed to the text of §21.3514 as it moves to §21.3506.

The department proposes the repeal of Division 2, §§21.3510 - 21.3518, concerning state-mandated health benefits. The repeal is necessary to remove the list of mandates that may be excluded from consumer choice health benefit plans.

The department proposes amendments to §21.3530, relating to Health Carrier Disclosure; and §21.3542, relating to Offer of State-Mandated Plan. These amendments are necessary to require health carriers to use additional language in the consumer choice health benefit plan written disclosure statement. The disclosure statement assists consumers in making informed decisions, and the proposed amendments ensure that a health carrier provides the disclosure to consumers no later than three business days from the date the health carrier receives the consumer's application from the federal health benefit exchange.

The proposed amendments to §21.3530 and §21.3542 are also necessary to update the information that must be included in a required consumer choice health benefit plan written disclosure statement form. The existing rule does not contemplate marketing a consumer choice health benefit plan through the electronic medium of the federal health benefit exchange. Because of this, the existing rule only addresses delivery of the required consumer choice health benefit plan written disclosure statement either from a health carrier directly to an applicant or through an agent.

The proposed amendments to §21.3542 update the existing rule to clarify that a health carrier that offers consumers the opportunity to apply for one or more consumer choice health benefit plans must also offer the opportunity to apply for an accident and sickness insurance policy or evidence of coverage in the same category that reasonably approximates the consumer choice health benefit plan offered, including state-mandated health benefits and other benefits authorized by the Insurance Code. This change is not a new requirement, but merely a clarification of requirements already in existence.

EXPLANATION. Insurance Code §1507.006 and §1507.056 require health carriers to provide a proposed policy or contract holder, or current policy or contract holder, with a written disclosure statement that the "health benefit plan being purchased does not provide some or all the state-mandated health benefits," and to list the state-mandated health benefits not included in the plan. The disclosure statement enables a consumer to make an informed decision about whether the consumer choice health benefit plan provides sufficient coverage for the consumer's needs. If the health carrier issues a consumer choice health benefit plan to an individual policy or contract holder, the written disclosure statement must include a notice that purchasing the plan may limit their future coverage options in the event the covered person's health changes and needed benefits are not available under the consumer choice health plan.

The proposed amendments will add a new section to 28 TAC Chapter 21, Subchapter AA, Division 1. The new section will be §21.3506, relating to State-Mandated Health Benefits in Blanket Indemnity Policies, and will contain the unmodified text of §21.3514, which is proposed for repeal.

The department also proposes the repeal of 28 TAC §§21.3510 - 21.3518, relating to state-mandated health benefits. The current text of the rule has caused some confusion, as it only lists mandates that may be excluded from consumer choice health benefit plans and does not list what mandates are required in the plans. Insurance Code §1507.002(2) and §1507.053 sufficiently

define what constitutes the state-mandated health benefits that may be excluded from consumer choice health benefit plans, and these sections also provide a list of specific state-mandated health benefits that may not be excluded.

Under the proposed amendments, §21.3530 will be revised to require a health carrier to provide each prospective or current policyholder or contract holder a clearly written disclosure statement that provides a sufficient description of the reduced benefits or state-mandated health benefits not included in the consumer choice health benefit plan. This will enable a consumer to make an informed decision about whether the consumer choice health benefit plan under consideration provides sufficient coverage for the consumer's needs. "Health carrier" is defined in §21.3502(7) to include a health insurance carrier, a group hospital corporation under Insurance Code Chapter 842, a health maintenance organization (HMO), and a stipulated premium company.

The proposed amendments to §21.3530 establish an exception for carriers that offer and provide consumer choice health benefit plans through the federal health benefit exchange to provide the required consumer choice health benefit plan written disclosure statement. The amendments to this section would require a health carrier to provide the written disclosure statement to the consumer at the time of application, if the federal health benefit exchange provides a mechanism for it. If the federal exchange does not provide a mechanism, the amendments would require a health carrier to provide the disclosure statement to the consumer no later than three business days from the date the health carrier receives the consumer's application from the federal exchange.

If the health carrier does not provide the written disclosure statement at the time of application under this exception, the health carrier must provide either a link to the written disclosure statement directly on the healthcare.gov website, or a reference and link to the written disclosure statement in either the summary of benefits and coverage or the plan brochure provided on the healthcare.gov website. When the health carrier provides the written disclosure statement under this exception, the proposed amendments require that the health carrier request that the prospective or current policyholder or contract holder sign and return the written disclosure statement, and that the health carrier provide a no-cost method for the prospective or current policyholder or contract holder to return the signed written disclosure statement.

Under the proposed amendments to §21.3530, changes will be made to Form CCP 1 to make it more consumer friendly and easier to understand. The department currently has multiple versions of the form for individual or group coverage. Under this proposal, there will be one consolidated form with variable brackets to enable the health carriers to select "individual" or "group" disclosures. This consolidated form will retain the Form CCP 1 form number, but with the new title of *Texas Department of Insurance, Required Disclosure Statement for all Consumer Choice Health Benefit Plans Issued in Texas*. These form changes will eliminate confusion, ensure that consumers receive adequate information about the reduced benefits or the state-mandated health benefits not included in the plan and enable them to make informed decisions about whether the consumer choice plan offered or purchased will provide sufficient coverage for their needs. Health carriers are currently required to file Form CCP 1 with the department for approval under §21.3543. Health carriers will be required to update and file for approval their written disclosure forms, to conform with the consolidated Form CCP 1 proposed

under the amendments to §21.3530 and §21.3542, no later than one year after the effective date of this rule.

The proposal also makes nonsubstantive changes to §21.3530 to update mailing and website addresses.

Section 21.3542(a) is amended by adding language to clarify that a health carrier that offers the opportunity to apply for one or more consumer choice health benefit plans must also offer the opportunity to apply for an accident and sickness insurance policy or evidence of coverage in the same category that reasonably approximates the consumer choice health benefit plan offered, including state-mandated health benefits and other benefits authorized by the Insurance Code.

The proposed amendments will also revise §21.3542 to clarify that the requirement in subsection (b)(1) to market a state-mandated plan with any consumer choice plan applies to health carriers who market consumer choice health benefit plans through the electronic medium of the federal health benefit exchange or other online marketplaces. Subsection (b)(1) requires health carriers to use the same sources and methods of distribution to market both the consumer choice health benefit plans and the health benefit plans required by the subsection.

Section 21.3542(b) is also updated by deleting subsection (b)(3)(C), because it is redundant and unnecessary. Subsection (b)(3)(C) requires a health carrier, on request, to provide the person or entity an explanation of each of the policies or evidences of coverage and the differences between the health plan offered under subsection (a) of the section and the consumer choice health benefit plans. Health carriers are required to provide this information to a prospective or current policyholder or contract holder under §21.3530. The information is provided under §21.3530 regardless of whether the prospective or current policyholder or contract holder requests it.

The proposal also makes nonsubstantive changes to §§21.3501 - 21.3504, §21.3530, §21.3542 to conform to agency style and usage guidelines.

**FISCAL NOTE AND LOCAL EMPLOYMENT IMPACT STATEMENT.** Judy Wooten, project manager, Life and Health Regulatory Initiatives Team, Regulatory Policy Division, has determined that during each year of the first five years that the proposed repeal, amended, and new sections are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

**PUBLIC BENEFIT AND COST NOTE.** Ms. Wooten has determined that for each year of the first five years the repeal of §§21.3510 - 21.3518 is in effect, the public benefit anticipated as a result of administration and enforcement of the repeal is that it will add clarity to the rules by removing the list of mandates that may be excluded from consumer choice health benefit plans, since they do not affirmatively impose requirements. There is no anticipated economic cost to persons who are required to comply with the proposed repeal. There is no anticipated difference in cost of compliance between small and large businesses.

Ms. Wooten has also determined that certain public benefits will result for each year of the first five years the proposed amendments are in effect. The proposed amendments to §21.3530 will ensure that consumers who purchase their health coverage through the federal health benefit exchange receive a required consumer choice health benefit plan written disclosure

statement that includes a sufficient description of the health benefit plan being purchased, a list of the reduced benefits, or state-mandated health benefits not included in the plan being purchased. The disclosure is intended to enable a consumer to make an informed decision about whether the consumer choice health benefit plan provides sufficient coverage for the consumer's needs.

The proposed amendments to §21.3530 and §21.3542 may result in additional costs to health carriers offering or providing health coverages through the federal health benefit exchange. Under the proposed amendments, a health carrier offering or providing health coverage through the federal health benefit exchange, as that exchange currently structures its enrollment process, is required to provide a method for a prospective or current policyholder or contract holder to return a signed written disclosure statement to the health carrier at no cost to the prospective or current policyholder or contract holder. The proposed amendments would allow the health carrier to determine the best method for consumers to return the signed written disclosure statement. A health carrier can designate a method that is the most cost efficient for the health carrier to facilitate the return of the signed written disclosure statement.

The department anticipates that a health carrier offering or providing health coverage through the federal health benefit exchange will incur the following costs to comply with the proposed amendments to §21.3530, if the return method used by the health carrier is to send a printed form and provide return postage for it: (i) printing costs to print the written disclosure statement; (ii) the costs for filing the written disclosure statement for approval; (iii) return postage costs for the prospective or current policyholder or contract holder to mail the written disclosure statement to the health carrier; and (iv) the compensation costs for the additional staff time needed to print and mail the written disclosure statement to the prospective or current policyholder or contract holder.

(i) **Printing costs.** The department's analysis of standard printing and paper costs relies on the following factors. The department estimates that the cost of printing could range from approximately six to eight cents per page for printing and paper. The department anticipates that the health carriers required to comply with the proposed amendments to §21.3530 will have the information necessary to determine their costs, including the number of pages that will need to be printed and whether in-house printing costs or contract printing costs will be incurred. The printing costs may vary, be slightly higher if in-house printing is not used, or both.

(ii) **Filing costs.** Health carriers must update previously approved written CCP 1 disclosure forms for plans offered, issued, or renewed. Health carriers must file with the department their updated CCP 1 disclosure forms for the department's approval. Health carriers will incur costs for filing the updated written disclosure statement with the department for approval. Filings submitted to the department for approval incur a \$100.00 filing fee per filing, plus any additional fee for filing through the SERFF system. The department is unable to provide the SERFF costs with specificity since it is dependent on the number of filings a health carrier may submit through SERFF and whether the carrier elects to pay a fee per filing or purchase a filing block. A health carrier's cost is also dependent on the number of CCP 1 disclosure forms the health carrier may have filed with the department. A health carrier could mitigate the filing fee costs if the written disclosure statement is included as a supplemental

form with other policy forms or plan documents and submitted to the department in one filing. A health carrier marketing multiple consumer choice plans could also submit one filing containing multiple variations of the written disclosure statement along with a statement identifying the previously approved policy forms or plan documents with which the written disclosure statements will be used. To help mitigate a health carrier's filing costs, the department is allowing health carriers one year from the effective date of the rule to update and file for approval their written disclosure forms that conform with the proposed consolidated Form CCP 1. In the interim, health carriers may continue to use their existing stock of previously approved written disclosure forms.

(iii) Mailing costs. The department's analysis of standard mailing costs is based on the following factors. According to the U.S. Postal Service business price calculator, available at [dbcalc.usps.com](http://dbcalc.usps.com), the cost to bulk mail machinable letters in the automated area distribution center category, in a standard business mail envelope with a weight limit of 3.3 ounces and sent to a standard five-digit ZIP code in the United States, is 29 cents. With the weight limit of 3.3 ounces, a health carrier can mail approximately 18 pages per envelope for the 29-cent cost (this estimate is based on six pages of standard 20-lb printing paper, which weighs one ounce). The department determined that the cost of a standard business envelope is two cents. Accordingly, for each additional mailing that does not exceed 18 pages, the department estimates that the total mailing cost would be no more than 31 cents. The department anticipates that it will cost approximately 31 cents for health carriers to comply with the written disclosure requirement in the proposed amendments to §21.3530. For first-class mailings, the current cost of a first class stamp is 47 cents, and the metered cost for a first-class letter is 46.5 cents for the first ounce, and 21 cents for each additional ounce. The department anticipates that the health carriers required to comply with the postage requirements in the proposed amendments will have the information necessary to determine their individual postage cost, including the number of mailings and the number of pages to be mailed. In addition, the health carrier could eliminate mailing costs entirely if the health carrier uses the e-signature process under Insurance Code Chapter 35. Using the e-signature process will result in cost reduction as the health carriers will not incur printing and copying costs. To the extent there are any other additional mailing costs, those costs should be attributed to the statutory requirements for disclosure under Insurance Code Chapter 1507.

(iv) Staff wages. The number of hours that will be required to comply with the proposed amendments to §21.3530 will be minimal. The department's analysis of the costs for staff wages to perform required compliance tasks is based on information from the Labor Market and Career Information Development Department of the Texas Workforce Commission at the web addresses below.

(I) A general operations manager working in Texas earns a median hourly wage of approximately \$61.99, according to: [www.texaswages.com/socDetails.aspx?soc=11-1021](http://www.texaswages.com/socDetails.aspx?soc=11-1021).

(II) An administrative assistant working in Texas earns a median hourly wage of approximately \$15.76, according to: [www.texaswages.com/socDetails.aspx?soc=43-6014](http://www.texaswages.com/socDetails.aspx?soc=43-6014).

(III) A computer programmer working in Texas earns a median hourly wage of approximately \$41.66, according to: [www.texaswages.com/socDetails.aspx?soc=15-1131](http://www.texaswages.com/socDetails.aspx?soc=15-1131).

(IV) An attorney working in Texas earns a median hourly wage of approximately \$68.98, according to: [www.texaswages.com/socDetails.aspx?soc=23-1011](http://www.texaswages.com/socDetails.aspx?soc=23-1011).

(V) A medical director working in Texas earns a median hourly wage of approximately \$94.91, according to: [www.texaswages.com/socDetails.aspx?soc=29-1069](http://www.texaswages.com/socDetails.aspx?soc=29-1069).

(VI) A registered nurse working in Texas earns a median hourly wage of approximately \$33.60, according to: [www.texaswages.com/socDetails.aspx?soc=29-1141](http://www.texaswages.com/socDetails.aspx?soc=29-1141).

(VII) A desktop publisher working in Texas earns a median hourly wage of approximately \$17.25, according to: [www.texaswages.com/socDetails.aspx?soc=43-9031](http://www.texaswages.com/socDetails.aspx?soc=43-9031).

(VIII) A paralegal working in Texas earns a median hourly wage of approximately \$25.57, according to: [www.texaswages.com/socDetails.aspx?soc=23-2011](http://www.texaswages.com/socDetails.aspx?soc=23-2011).

The department anticipates that the number of hours that will be required to comply with the proposed amendments to §21.3530 will be negligible. Health carriers may be able to reduce or eliminate additional staff hours to comply with the written disclosure requirement if they use the e-signature process under Insurance Code Chapter 35.

The anticipated compliance cost is the cost of printing and return postage for a single page, which the department estimates as approximately 31 - 49 cents per form. Health carriers can mitigate or eliminate the cost of compliance with this requirement by using a cost-efficient method. For example, if a health carrier uses the e-signature process under Insurance Code Chapter 35, the health carrier may be able to reduce the cost for compliance.

The department does not anticipate any cost for compliance with §21.3542 since the amendments to that section are a clarification of existing requirements in the current rule. The department anticipates that any cost a health carrier may incur from the amendments to §21.3542 would be a result of the health carrier's failure to comply with §21.3542 adopted in 2004. In any event, the cost to provide a state-mandated health plan through the federal health benefit exchange would vary from health carrier to health carrier; thus a health carrier would be in the best position to determine those actual costs.

The cost of compliance with the proposal will not vary between large businesses and small or micro businesses based on the size of the business, and the department's cost analysis is equally applicable to both large and small or micro businesses. There is no anticipated difference in cost of compliance between small or micro businesses and large businesses.

**ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES.** In accordance with Government Code §2006.002(c), the department has determined that the proposed repeal of §§21.3510 - 21.3518 will not have an adverse economic effect on small or micro business health carriers because it is a repeal of sections that list mandates that may be excluded from consumer choice health benefit plans that do not affirmatively impose any requirements. Therefore, in accordance with Government Code §2006.002(c), the department is not required to prepare a regulatory flexibility analysis with respect to the repealed sections in the proposed rule.

*Adverse Economic Impact on Small and Micro Businesses from Proposed Amendments.*

In accordance with Government Code §2006.002(c), the department has determined that the proposed amendments to §21.3530 and §21.3542 may have an adverse economic effect on one to 38 small or micro business health carriers that must comply with the proposed rules.

The proposed amendments to §21.3530 require health carriers to have a prospective or current policyholder or contract holder sign and return a written disclosure statement. The proposed rule requires health carriers to provide a method for the prospective or current policyholder or contract holder to return the signed written disclosure statement to the health carriers at no cost to the prospective or current policyholder or contract holder.

The department anticipates the economic impact to be the cost of printing and return postage for a single page, which the department estimates as approximately 31 - 49 cents per form. The cost of compliance with this amendment will not vary between large businesses and small or micro businesses. The department's cost analysis of this requirement, which can be found in the *Public Benefit/Cost Note* section of this proposal applies equally to small or micro businesses.

Under Government Code §2006.002(c), before adopting a rule that may have an adverse economic effect on small or micro businesses, an agency must prepare a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the proposed rule. For each of the proposed amendments, the department considered other regulatory methods that accomplish the objectives of the proposal, minimize any adverse economic impact on health carriers that qualify as small or micro businesses under Government Code §2006.001(1) and (2), but still protect the health, safety, and environmental and economic welfare of the state.

#### *Regulatory Alternatives Considered - Written Disclosure Requirement under §21.3530.*

The department considered the following regulatory alternatives for the written disclosure requirement in proposed §21.3530 that are not statutory requirements: (i) not proposing the amendment to §21.3530; (ii) proposing a different disclosure requirement that would apply only to small and micro businesses; and (iii) excluding small and micro businesses from the applicability of the written disclosure requirement under the proposed amendment to §21.3530. However, the department determined that these options would not accomplish the objectives of §21.3530 and would not be consistent with protecting the health, safety, and environmental and economic welfare of the state.

*(i) Not proposing the written disclosure amendment to §21.3530.* The proposed amendments to §21.3530 establish a process for health carriers that market consumer choice health benefit plans through the federal health benefit exchange to provide the required consumer choice health benefit plan written disclosure statement. The proposed amendments require that the health carrier request that the prospective or current policyholder or contract holder sign and return the written disclosure statement, and that the health carrier provide a no-cost method for the prospective or current policyholder or contract holder to return the signed written disclosure statement to the health carrier. The proposed amendments to §21.3530 are necessary to address a gap in the existing rule because it does not contemplate offering or providing a consumer choice health benefit plan through an electronic medium, such as the federal health benefit exchange. Absent the proposed amendments to §21.3530, the existing rule would remain in place, and the section would not address

a method for health carriers to provide the notice required by Insurance Code §1507.006 and §1507.056 when the health carrier offers or provides a consumer choice plan through the federal health benefit exchange. For these reasons this alternative was rejected.

*(ii) Allowing health carriers flexibility in determining how consumers must return the signed disclosure statement forms.* Under Insurance Code §1507.006 and §1507.056, and 28 TAC §21.3530, a health carrier must retain a signed copy of the written disclosure statement required by the respective sections. However, if the consumer does not return the signed copy of the written disclosure statement, the health carrier will not have it to retain. The department believes that a consumer is more likely to return the signed disclosure form if there is no cost to the consumer to return it. So the proposed amendment requires the health carriers to provide a method of returning the signed form at no cost to the consumer.

Initially, the department considered specifying that health carriers comply with the written disclosure requirement by providing return postage for a consumer to use in returning the disclosure form. However, the proposed rule does not specify a method for returning a signed disclosure form as proposed, and health carriers will instead be given flexibility under the rule.

A health carrier is in the best position to determine the most cost-effective way for a consumer to return a signed disclosure form as required by the proposed rule. Permitting each health carrier to determine the method of returning the form creates a flexible approach that could help defray the cost of return postage. For some health carriers, providing return postage may be the most cost-effective method to comply with the proposed amendment. Other health carriers may choose to use an e-signature process under Insurance Code Chapter 35. The department cannot determine a more cost-effective alternative to apply to small or micro businesses to ensure compliance with the disclosure requirements. The flexible approach proposed in the written disclosure amendment to §21.3530 would help alleviate additional cost impact to any health carrier, including small or micro business health carriers, in complying with the requirement to provide a way for consumers return the signed disclosure statement forms. For this reason, the department has incorporated this option in the proposed text.

*(iii) Excluding small and micro businesses from the applicability of the written disclosure requirement under the proposed amendments to §21.3530.* Exempting small and micro business health carriers from the written disclosure requirement of the proposed amendments could result in consumers of these small and micro businesses failing to receive adequate information about state-mandated health benefits not included in the consumer choice health benefit plan they are purchasing. Differing standards could also result in diminished methods of providing the elaborate notice contemplated under the statute and the rule. Applying the written disclosure requirement to all health carriers, regardless of size, will result in consistent application of the disclosure criteria and oversight review procedures in the statute and the rule. This consistent application will, in turn, ensure that all consumers, including those that use small and micro business health carriers, have the requisite information to obtain necessary services. Requiring all health carriers, regardless of size, to follow the same disclosure requirements eliminates the possibility that the department would have to create a dual tracking system for overseeing compliance with

the disclosure process based on a health carrier's business size.

**TAKINGS IMPACT ASSESSMENT.** The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

**REQUEST FOR PUBLIC COMMENT.** If you wish to comment on this proposal you must do so in writing no later than 5 p.m. on December 12, 2016. Send your comments either by mail to Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to ChiefClerk@tdi.texas.gov. You must simultaneously submit an additional copy of the comment either by mail to Judy Wooten, project manager, Life and Health Regulatory Initiatives Team, Regulatory Policy Division, Mail Code 106-1D, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, or by email to LHLComments@tdi.texas.gov. You must submit any request for a public hearing separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

## DIVISION 1. GENERAL PROVISIONS

### 28 TAC §§21.3501 - 21.3504, 21.3506

**STATUTORY AUTHORITY.** The amendments to §§21.3501 - 21.3504 and the addition of new §21.3506 to Subchapter AA, Consumer Choice Health Benefit Plans, Division 1, General Provisions, is proposed under Insurance Code §§1507.006, 1507.007, 1507.009, 1507.056, 1507.057, 1507.059, and 36.001.

Section 1507.006 requires a health carrier selling a standard health benefit plan to a proposed policyholder or a current policyholder to provide a written disclosure statement that acknowledges that the standard health benefit plan being purchased does not provide some or all state-mandated health benefits; lists those state-mandated health benefits not included in the standard health benefit plan; and, if the standard health benefit plan is issued to an individual policyholder, provides a notice that purchase of the plan may limit the policyholder's future coverage options in the event the policyholder's health changes and needed benefits are not available under the standard health benefit plan. The section also requires a health carrier to retain the signed written disclosure statement in the health carrier's records and provide it to department on request by the commissioner.

Section 1507.007 requires a health carrier offering one or more consumer choice health benefit plans to also offer at least one accident or sickness plan that provides the state-mandated health benefits.

Section 1507.009 requires that the commissioner adopt rules necessary to implement Insurance Code Chapter 1507, Subchapter A.

Section 1507.056 requires an HMO providing a standard health benefit plan to a proposed contract holder or a contract holder to provide a written disclosure statement that acknowledges that the standard health benefit plan being purchased does not provide some or all state-mandated health benefits; lists those state-mandated health benefits not included in the standard health

benefit plan; and, if the standard health benefit plan is issued to an individual certificate holder, provides a notice that purchase of the plan may limit the certificate holder's future coverage options in the event the certificate holder's health changes and needed benefits are not available under the standard health benefit plan. The section also requires an HMO to retain the signed disclosure statement in the HMO's records and provide it to the department on request by the commissioner.

Section 1507.057 requires an HMO offering one or more standard health benefit plans to also offer at least one evidence of coverage that provides the state-mandated health benefits.

Section 1507.059 requires that the commissioner adopt rules necessary to implement Insurance Code Chapter 1507, Subchapter B.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

**CROSS REFERENCE TO STATUTE.** The proposed new §21.3506 implements Insurance Code §§1507.006, 1507.007, 1507.009, 1507.056, 1507.057, 1507.059, and 36.001.

#### *§21.3501. Statement of Purpose.*

This subchapter implements [is intended to implement] the provisions of the Texas Consumer Choice of Benefits Health Insurance Plan Act to achieve [- The general purpose of the Act and this subchapter is to implement] the legislative goal of providing individuals, employers, and other purchasers of health care coverage in this state the opportunity to choose health benefit plans that are more affordable and flexible than plans available in the existing market. To that end, the Legislature [legislature] has authorized health carriers to issue policies or evidences of coverage that, in whole or in part, do not offer or provide certain state-mandated health benefits.

#### *§21.3502. Definitions.*

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

(1) Basic health care services--Health care services that the commissioner determines an enrolled population might reasonably need to maintain [be maintained in] good health.

(2) Commissioner--The commissioner of insurance.

(3) Consumer choice health benefit plan--A group or individual accident or sickness insurance policy[.] or evidence of coverage that, in whole or in part, does not offer or provide state-mandated health benefits, but that provides creditable coverage as defined by [the] Insurance Code §1205.004(a) or §1501.102(a).

(4) Consumer choice of benefits health insurance plan--A consumer choice health benefit plan.

(5) Department--The Texas Department of Insurance.

(6) HMO--a person defined in Insurance Code §843.002(14).

(7) Health carrier--Any entity authorized under the Insurance Code or another insurance law of this state that provides health benefits in this state, including an insurance company, a group hospital service corporation under the Insurance Code Chapter 842, an HMO [a health maintenance organization] under the Insurance Code Chapter 843, and a stipulated premium company under the Insurance Code Chapter 884.

(8) Health insurer--Any entity authorized under the Insurance Code [this code] or another insurance law or regulation of this state that provides health insurance or health benefits in this state, including an insurance company, a group hospital service corporation under Chapter 842 of the Insurance Code, and a stipulated premium company under Chapter 884 of the Insurance Code.

(9) Standard health benefit plan--A consumer choice health benefit plan.

(10) State-mandated health benefits--

(A) Coverage required under the Insurance Code, the Administrative Code [this code], or other law of this state to be provided in an individual, blanket, or group policy for accident and health insurance, a contract for coverage of a health-related condition, or an evidence of coverage that:

(i) includes coverage for specific health care services or benefits;

(ii) places limitations or restrictions on deductibles, coinsurance, copayments, or any annual or lifetime maximum benefit amounts, including limitations provided in [the] Insurance Code §1271.151; or

(iii) includes a specific category of licensed health care practitioner from whom an insured or enrollee is entitled to receive care.

(B) Do not include benefits or coverage mandated by federal law, or standard provisions or rights required under the Insurance Code, the Administrative Code [this code], or other law of this state, to be provided in an individual, blanket, or group policy for accident and health insurance, a contract for coverage of a health-related condition, or an evidence of coverage unrelated to specific health illnesses, injuries, or conditions of an insured or enrollee, including those benefits or coverages enumerated in [the] Insurance Code §1507.003(b) and §1507.053(b).

§21.3503. *Authority to Offer.*

A health carrier may offer[;] one or more consumer choice health benefit plans; however, if the [and a] health carrier [that] is [also] a small employer carrier, it must [shall] offer[;] one or more consumer choice health benefit plans in accordance with this subchapter and other applicable law.

§21.3504. *Severability.*

A holding that any provision of this subchapter or the application thereof to any person or circumstances is for any reason invalid may [shall] not affect the remainder of the subchapter and the application of its provisions to any persons under other circumstances.

§21.3506. *State-Mandated Health Benefits in Blanket Indemnity Policies.*

The category of group to which the health carrier is issuing coverage determines which benefits are state-mandated health benefits for blanket indemnity insurance policies.

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 October 31, 2016.

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Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: December 11, 2016

For further information, please call: (512) 676-6584



## DIVISION 2. STATE-MANDATED HEALTH BENEFITS

### 28 TAC §§21.3510 - 21.3518

STATUTORY AUTHORITY. The repeal of 28 TAC Division 2, §§21.3510 - 21.3518 is proposed under Insurance Code §§1507.006, 1507.007, 1507.009, 1507.056, 1507.057, 1507.059, and 36.001.

Section 1507.006 requires a health carrier selling a standard health benefit plan to a proposed policyholder or a current policyholder to provide a written disclosure statement that acknowledges that the standard health benefit plan being purchased does not provide some or all state-mandated health benefits; lists those state-mandated health benefits not included in the standard health benefit plan; and, if the standard health benefit plan is issued to an individual policyholder, provides a notice that purchase of the plan may limit the policyholder's future coverage options in the event the policyholder's health changes and needed benefits are not available under the standard health benefit plan. The section also requires a health carrier to retain the signed written disclosure statement in the health carrier's records and to provide it to the department on request by the commissioner.

Section 1507.007 requires a health carrier offering one or more consumer choice health benefit plans to also offer at least one accident or sickness plan that provides the state-mandated health benefits.

Section 1507.009 requires that the commissioner adopt rules necessary to implement Insurance Code Chapter 1507, Subchapter A.

Section 1507.056 requires an HMO providing a standard health benefit plan to a proposed contract holder or a contract holder to provide a written disclosure statement that acknowledges that the standard health benefit plan being purchased does not provide some or all state-mandated health benefits; lists those state-mandated health benefits not included in the standard health benefit plan; and, if the standard health benefit plan is issued to an individual certificate holder, provides a notice that purchase of the plan may limit the certificate holder's future coverage options in the event the certificate holder's health changes and needed benefits are not available under the standard health benefit plan. The section also requires an HMO to retain the signed disclosure statement in the HMO's records and provide it to the department on request by the commissioner.

Section 1507.057 requires an HMO offering one or more standard health benefit plans to also offer at least one evidence of coverage that provides the state-mandated health benefits.

Section 1507.059 requires that the commissioner adopt rules necessary to implement Insurance Code Chapter 1507, Subchapter B.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and

duties of the department under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed repeal of Division 2, §§21.3510 - 21.3518 implements Insurance Code §§1507.006, 1507.007, 1507.009, 1507.056, 1507.057, 1507.059, and 36.001.

§21.3510. *State-mandated Health Benefits in Individual Indemnity Policies.*

§21.3511. *State-mandated Health Benefits in Group Association Indemnity Policies.*

§21.3512. *State-mandated Health Benefits in Small Employer Indemnity Policies.*

§21.3513. *State-mandated Health Benefits in Large Employer Indemnity Policies.*

§21.3514. *State-mandated Health Benefits in Blanket Indemnity Policies.*

§21.3515. *State-mandated Health Benefits in Individual HMO Plans.*

§21.3516. *State-mandated Health Benefits in Group HMO Plans.*

§21.3517. *State-mandated Health Benefits in Small Employer HMO Plans.*

§21.3518. *State-mandated Health Benefits in Large Employer HMO Plans.*

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 October 31, 2016.

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Norma Garcia

General Counsel

Texas Department of Insurance

Earliest possible date of adoption: December 11, 2016

For further information, please call: (512) 676-6584



### DIVISION 3. REQUIRED NOTICES

#### 28 TAC §21.3530

STATUTORY AUTHORITY. The amendments to §21.3530 are proposed under Insurance Code §§1507.006, 1507.007, 1507.009, 1507.056, 1507.057, 1507.059, and 36.001.

Section 1507.006 requires a health carrier selling a standard health benefit plan to a proposed policyholder or a current policyholder to provide a written disclosure statement that acknowledges that the standard health benefit plan being purchased does not provide some or all state-mandated health benefits; lists those state-mandated health benefits not included in the standard health benefit plan; and, if the standard health benefit plan is issued to an individual policyholder, provides a notice that purchase of the plan may limit the policyholder's future coverage options in the event the policyholder's health changes and needed benefits are not available under the standard health benefit plan. The section also requires a health carrier to retain the signed written disclosure statement in the health carrier's records and provide it to the department on request by the commissioner.

Section 1507.007 requires a health carrier offering one or more consumer choice health benefit plans to also offer at least one accident or sickness plan that provides the state-mandated health benefits.

Section 1507.009 requires that the commissioner adopt rules necessary to implement Insurance Code Chapter 1507, Subchapter A.

Section 1507.056 requires an HMO providing a standard health benefit plan to a proposed contract holder or a contract holder to provide a written disclosure statement that acknowledges that the standard health benefit plan being purchased does not provide some or all state-mandated health benefits; lists those state-mandated health benefits not included in the standard health benefit plan; and, if the standard health benefit plan is issued to an individual certificate holder, provides a notice that purchase of the plan may limit the certificate holder's future coverage options in the event the certificate holder's health changes and needed benefits are not available under the standard health benefit plan. The section also requires an HMO to retain the signed disclosure statement in the HMO's records and provide it to the department on request by the commissioner.

Section 1507.057 requires an HMO offering one or more standard health benefit plan to also offer at least one evidence of coverage that provides the state-mandated health benefits.

Section 1507.059 requires that the commissioner adopt rules necessary to implement Insurance Code Chapter 1507, Subchapter B.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed amendments to §21.3530 implement Insurance Code §§1507.006, 1507.007, 1507.009, 1507.056, 1507.057, 1507.059, and 36.001.

§21.3530. *Health Carrier Disclosure.*

(a) A health carrier offering or providing a consumer choice health benefit plan must provide each prospective or current policyholder or contract holder with a written disclosure statement in the manner prescribed in Form CCP 1 provided by the department for that purpose. The information provided in Form CCP 1 must provide a sufficient description of the reduced benefit or the state-mandated health benefits not included in the plan to enable the consumer to make an informed decision about whether the consumer choice plan being offered or purchased provides sufficient coverage for the consumer's needs. Form CCP 1:

(1) acknowledges that the consumer choice health benefit plan being offered or purchased does not provide some or all state-mandated health benefits;

(2) lists those state-mandated health benefits not included under the consumer choice health benefit plan;

(3) provides a notice that purchase of the plan may limit future coverage options in the event the policyholder's, contract holder's, or certificate holder's health changes and needed benefits are not covered under the consumer choice health benefit plan;

(4) requires the prospective or current policyholder or contract holder to sign an acknowledgment that the prospective or current policyholder or contract holder has [he] received the written disclosure statement; [.] and

(5) informs the prospective or current policyholder or contract holder that the prospective or current policyholder or contract holder [he] has the right to a copy of the written disclosure statement free of charge.

(b) A health carrier may obtain Form CCP 1 by making a request to the Life and Health Lines Office Intake [~~Life and Health/Filings and Operations Division~~], Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 or 333 Guadalupe, Austin, Texas 78701, or by accessing the department's [department] website at [www.tdi.texas.gov](http://www.tdi.texas.gov) [[www.tdi.state.tx.us](http://www.tdi.state.tx.us)].

(c) A health carrier must provide [tender] the written disclosure statement described in subsection (a) of this section:

(1) to a prospective policyholder or contract holder, not later than the time of [with] the offer of a consumer choice health benefit plan, except as provided by subsection (e) of this section;

(2) to a [an] current [existing] policyholder or contract holder, along with any offer to renew the contract or policy.

(d) A health carrier must provide the written disclosure statement described in subsection (a) of this section to a prospective or current policyholder or contract holder applying for coverage through the federal health benefit exchange as follows:

(1) The health carrier must provide a written disclosure statement:

(A) at the time of application, if the federal health benefit exchange provides a mechanism for a health carrier to provide the written disclosure statement at the time of application; or

(B) no later than three business days from the date the health carrier receives the application from the federal health benefit exchange.

(2) If the health carrier does not provide the written disclosure statement at the time of application, the health carrier must provide either a link to the written disclosure statement directly on the [healthcare.gov](http://healthcare.gov) website; or a reference and link to the written disclosure statement in either the summary of benefits and coverage or the plan brochure provided on the [healthcare.gov](http://healthcare.gov) website.

(e) ~~[(d)]~~ Except as provided by subsection (g) of this section, when [Where] a health carrier provides [tenders] the written disclosure statement referenced in subsection (a) of this section to a prospective or current policyholder or contract holder:

(1) through an agent, the agent may not transmit the application to the health carrier for consideration until the agent has secured the signed written disclosure statement from the applicant; and[-]

(2) directly to the applicant, the health carrier may not process the application until the health carrier has secured the signed written disclosure statement from the applicant.

(f) When a health carrier provides the written disclosure statement described in subsection (a) of this section in the manner described by subsection (e) of this section, the health carrier must:

(1) request that the prospective or current policyholder or contract holder sign and return the written disclosure statement described in subsection (a) of this section; and

(2) provide a method for the prospective or current policyholder or contract holder to return the signed written disclosure statement to the health carrier at no cost to the prospective or current policyholder or contract holder.

(g) ~~[(e)]~~ The health carrier must, on [upon] request, provide the prospective or current policyholder or contract holder with a copy of the written disclosure statement.

(h) ~~[(f)]~~ When [Where] a health carrier is offering or issuing a consumer choice health benefit plan to an association, the health carrier

must satisfy the requirements of subsection (d) ~~[(e)]~~ of this section by providing ~~[tendering]~~ the written disclosure statement to prospective or existing certificate holders.

(i) A health carrier offering or issuing a consumer choice health benefit plan to a prospective or current policy holder, contract holder, or an association must update and file with the commissioner, for approval, its written disclosure statement that conforms with Form CCP 1 no later than one year from the effective date of this rule.

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 October 31, 2016.

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Norma Garcia

General Counsel

Texas Department of Insurance

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For further information, please call: (512) 676-6584



## DIVISION 4. ADDITIONAL REQUIREMENTS

### 28 TAC §21.3542

STATUTORY AUTHORITY. The amendment to §21.3542 is proposed under Insurance Code §§1507.006, 1507.007, 1507.009, 1507.056, 1507.057, 1507.059, and 36.001.

Section 1507.006 requires a health carrier selling a standard health benefit plan to a proposed policyholder or a current policyholder to provide a written disclosure statement that acknowledges that the standard health benefit plan being purchased does not provide some or all state-mandated health benefits; lists those state-mandated health benefits reduced or not included in the standard health benefit plan; and, if the standard health benefit plan is issued to an individual policyholder, provides a notice that purchase of the plan may limit the policyholder's future coverage options in the event the policyholder's health changes and needed benefits are not available under the standard health benefit plan. The section also requires a health carrier to retain the signed written disclosure statement in the health carrier's records and provide it to the department on request by the commissioner.

Section 1507.007 requires a health carrier offering one or more consumer choice health benefit plans to also offer at least one accident or sickness plan that provides the state-mandated health benefits.

Section 1507.009 requires that the commissioner adopt rules necessary to implement Insurance Code Chapter 1507, Subchapter A.

Section 1507.056 requires an HMO providing a standard health benefit plan to a proposed contract holder or a contract holder to provide a written disclosure statement that acknowledges that the standard health benefit plan being purchased does not provide some or all state-mandated health benefits; lists those state-mandated health benefits reduced or not included in the standard health benefit plan; and, if the standard health benefit plan is issued to an individual certificate holder, provides a notice that purchase of the plan may limit the certificate holder's future cov-

erage options in the event the certificate holder's health changes and needed benefits are not available under the standard health benefit plan. The section also requires an HMO to retain the signed disclosure statement in the HMO's records and provide it to the department on request by the commissioner.

Section 1507.057 requires an HMO offering one or more standard health benefit plans to also offer at least one evidence of coverage that provides the state-mandated health benefits.

Section 1507.059 requires that the commissioner adopt rules necessary to implement Insurance Code Chapter 1507, Subchapter B.

Section 36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed amendments to §21.3542 implement Insurance Code §§1507.006, 1507.007, 1507.009, 1507.056, 1507.057, 1507.059, and 36.001.

§21.3542. *Offer of State-Mandated Plan.*

(a) A health carrier that offers the opportunity to apply for one or more consumer choice health benefit plans under this section to a person or entity must also, no later than at the time of application, offer the opportunity to apply for an accident and sickness insurance policy or evidence of coverage in the same category that reasonably [most closely] approximates the consumer choice health benefit plan offered, that includes state-mandated health benefits, and that is otherwise authorized by the Insurance Code.

(b) With regard to health plans required by subsection (a) of this section, a health carrier must [shall]:

(1) use the same sources and methods of distribution to market both consumer choice health benefit plans and health benefit plans required by this subsection, [;] and a health carrier that markets consumer choice health benefit plans through the federal health benefit exchange or other online marketplaces must use the same sources and methods of distribution to market both consumer choice health benefit plans and state-mandated health benefit plans required by this subsection;

(2) make the offer of the [such] health plans, the premium cost of the [such] plans, as well as any additional details regarding them, contemporaneously with and in the same manner as the offer and premium cost of, and other details regarding, the consumer choice health benefit plan policy or evidence of coverage; and

(3) provide at least the following information:

(A) a description of how the person or entity may apply for or enroll in each offered policy or evidence of coverage; and

(B) the benefits [and/] or services available, or both, and the premium cost under each offered policy or evidence of coverage. [; and ]

~~(C) upon request, an explanation of each of the policies or evidences of coverage and the differences between the health plan offered pursuant to subsection (a) of this section and the consumer choice health benefit plans.]~~

(c) A health carrier may [shall] not apply more stringent or detailed requirements related to the application process for a consumer choice health benefit plan, or for a policy or evidence of coverage offered in accordance [compliance] with subsection (a) of this section,

than it applies for other health benefit plans offered by the health carrier.

(d) A health carrier offering a consumer choice health benefit plan must obtain from each prospective policyholder or contract holder, at or before the time of application, a written affirmation that the health carrier also offered a policy or evidence of coverage in compliance with subsection (a) of this section. A health carrier may combine on a single form this written affirmation and the acknowledgement of the written disclosure statement required by §21.3530(a)(4) of this subchapter (relating to Health Carrier Disclosure).

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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Norma Garcia

General Counsel

Texas Department of Insurance

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## TITLE 43. TRANSPORTATION

### PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

#### CHAPTER 9. CONTRACT AND GRANT MANAGEMENT

##### SUBCHAPTER C. CONTRACTING FOR ARCHITECTURAL, ENGINEERING, AND SURVEYING SERVICES

###### 43 TAC §§9.31, 9.33, 9.34

The Texas Department of Transportation (department) proposes amendments to §9.31, Definitions, §9.33, Precertification, and §9.34, Comprehensive Process, concerning Contracting for Architectural, Engineering, and Surveying Services.

#### EXPLANATION OF PROPOSED AMENDMENTS

Updates to the rules related to administrative qualifications are necessary to clarify when a resubmittal is allowed and to align requirements of the state-funded procurement process with the federal procurement process. The amendments also streamline the process by modifying standard work categories used for pre-certification.

Amendments to §9.31, Definitions, provide a definition for "engineering and design related services" that corresponds with the federal definition of the term. This definition works in conjunction with changes to §9.34(b), Administrative Qualifications, to align the federal and state procurement processes with respect to which types of providers must be administratively qualified.

Amendments to §9.33, Precertification, change the level of authority necessary to add, revise, or delete a standard work category from the Texas Transportation Commission (commission) to the department. This change streamlines the process by allow-

ing the department to better define and maintain work categories, and the minimum qualifications of an individual to perform work under those categories, without the need to bring the changes before the commission.

Amendments to Section §9.34, Comprehensive Process, provide several substantive changes.

Amendments to §9.34(b)(1) narrow the applicability of the administrative qualification process requirement to only those providers performing engineering and design related services. This change aligns the federal and state procurement processes with respect to whether or not a provider must be administratively qualified and allows subproviders to perform ancillary services that are not engineering and design related without being administratively qualified. This change increases the efficiency of the engineer and design related procurement process, eliminates confusion between the federal and state processes, and eliminates multiple forms while maintaining compliance with both federal and state law.

Amendments to §9.34(b)(2)(C) expand the scope of compensation analysis that must be submitted by a provider to include employees as well as executives or to be a cognizant letter of concurrence issued by a state transportation agency. This change will bring this section into conformity with the American Association of State Highway and Transportation Officials' Uniform Audit and Accounting Guide.

Section 9.34(b)(3)(B) allows the department, after reviewing a provider's administrative qualifications submittal, to request additional information or a corrected submittal. Currently, if a provider fails to return the requested information or corrected submittal within a 30-day window comprised of two separate 15-day periods, the department will reject the original submittal. This provision has been interpreted as imposing a 1-year bar against resubmittal of administrative qualification information if a provider fails to return the requested information or corrected submittal within the 30-day window. Amendments to §9.34(b)(3) change the two 15-day periods to one 30-day period and clarify that if the department rejects a provider's submittal, the provider may resubmit its administrative qualification information no earlier than 90 days after rejection.

Amendments to §9.34(b)(3) add a good faith effort provision in new subparagraph (D) which provides that the department will make a good faith effort to process administrative qualification submittals within 60 days following submittal. By providing a target window for the department's processing of administrative qualification submittals, this provision addresses the issue of providers submitting administrative qualification information on or very near to the date the provider must be administratively qualified to compete for a particular contract.

Section 9.34(f) requires the department to disqualify a provider if a named task leader leaves the provider's employment prior to selection. This requirement can result in a provider being disqualified when a minor task leader leaves the provider through no fault of the provider. Amendments to §9.34(f) allow a prime provider, in those cases, to propose a replacement task leader who meets the requirements of the solicitation and is a current employee of the provider or a subprovider. If the proposed replacement is acceptable to the department, the prime provider may continue in the procurement process. However, if the proposed replacement is not acceptable to the department, the department may still disqualify the prime provider. Amendments to §9.34(f) also clarify for solicitations under the streamline process

for which the department determines that interviews are not required, the prime provider may propose to replace the prime provider project manager at any time before the provider is selected for the contract.

#### FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

Martin Rodin, Director, Professional Engineering Procurement Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

#### PUBLIC BENEFIT AND COST

Mr. Rodin has also determined that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be improvements to the department's administrative qualification and provider selection processes. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses. There are no anticipated economic costs for persons required to comply with the sections as proposed. There will be no adverse economic effect on small businesses.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§9.31, 9.33, and 9.34 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "PEPS Rules." The deadline for receipt of comments is 5:00 p.m. on December 12, 2016. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

#### STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department.

#### CROSS REFERENCE TO STATUTE

Government Code, Chapter 2254, Subchapter A and Transportation Code, §223.041.

#### §9.31. Definitions.

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

(1) Consultant Certification Information System (CCIS)--A computer system used to collect and store information related to the department's certification of providers.

(2) Consultant selection team (CST)--The department's team that evaluates statements of qualification, proposals, and interviews and selects the provider based on demonstrated qualifications.

(3) Department--The Texas Department of Transportation.

(4) Department project manager--A department employee who manages a project from project initiation and contracting through

project close-out, including the oversight and management of deliverables and provider performance.

(5) Engineering and design related services--Program management, construction management, feasibility studies, preliminary engineering, design engineering, surveying, mapping, or architectural related services; or professional services of an architectural or engineering nature that are required to or may logically or justifiably be performed or approved by a person licensed, registered, or certified to provide the services.

(6) Executive director--The executive director of the department.

(7) [(6)] Indefinite deliverable contract--A contract containing a general scope of services that identifies the types of work that will later be issued under work authorizations, but does not identify deliverables, locations, or timing in sufficient detail to define the provider's responsibilities under the contract.

(8) [(7)] Interview and Contract Guide (ICG)--A document provided by the department to short-listed providers that includes instructions to prepare for the interview.

(9) [(8)] Multiphase contract--A project specific contract where the solicited services are divided into phases whereby the specific scope of work and associated costs may be negotiated and authorized by phase as the project progresses.

(10) [(9)] Non-listed category (NLC)--A formal classification used to define a specific sub-discipline of work and provide the minimum technical qualifications for performing the work. NLCs address project-specific work categories not covered by the standard work categories.

(11) [(10)] Precertification--A department process conducted to verify that a provider meets the minimum technical requirements to perform work under a standard work category.

(12) [(11)] Prime provider--A firm that provides or proposes to provide architectural, engineering, or surveying services under contract with the state.

(13) [(12)] Prime provider project manager--An employee of a prime provider who serves as the point of contact for the provider to coordinate project deliverables and project performance with the department.

(14) [(13)] Professional Engineering Procurement Services (PEPS) Division--The department's division responsible for overseeing procurement planning, provider selection, leading the contract negotiations, administering the contract, and processing invoices.

(15) [(14)] Professional Engineering Procurement Services (PEPS) Division Director--The head of the PEPS Division.

(16) [(15)] Proposal--A response to a request for proposal that provides details on a provider's specific technical approach and qualifications.

(17) [(16)] Provider--A prime provider or subprovider.

(18) [(17)] Relative importance factor (RIF)--The numerical weight assigned to an evaluation criterion, used by the consultant selection team to score statements of qualification, proposals, and interviews.

(19) [(18)] Request for proposal (RFP)--A document provided by the department to short-listed providers that provides instructions for submitting a proposal and may include instructions to prepare for the interview.

(20) [(19)] Request for qualification (RFQ)--A public announcement that advertises the department's intent to enter into an architectural, engineering, or surveying contract and provides instructions for the preparation and submittal of a statement of qualification generally referred to as a solicitation.

(21) [(20)] Short list--The list of prime providers most qualified to perform the services specified in an RFQ, as demonstrated by the statement of qualification scores.

(22) [(21)] Solicitation--A request for qualification.

(23) [(22)] Specific deliverable contract--A contract containing a specific scope of services that identifies deliverables, locations, and timing in sufficient detail to define the provider's responsibilities under the contract, although additional requirements may later be specified in work authorizations.

(24) [(23)] Standard work category--A formal classification, developed by the department, used to define a specific sub-group of work and provide the minimum technical qualifications for performing the work.

(25) [(24)] Statement of qualification (SOQ)--A document prepared by a prime provider, submitted in response to a request for qualification.

(26) [(25)] Subprovider--A firm that provides or supports, or proposes to provide or support, architectural, engineering, or surveying services under contract with a prime provider.

### §9.33. Precertification.

(a) Standard work categories. Precertification establishes the minimum technical qualifications to perform work under a standard work category. The department [~~Texas Transportation Commission, by minute order,~~] may add, revise, or delete a standard work category.

(b) Contract eligibility.

(1) To be eligible to perform work under a standard work category, a firm providing a task leader must have active precertification status in that work category by the closing date of the solicitation.

(2) The department will not delay the selection process or the contract execution to accommodate a provider that is not in active precertification status.

(c) Precertification status of firms and employees.

(1) A firm is precertified in a standard work category only if it employs an individual precertified in that category.

(2) A firm that employs an individual who is precertified in multiple standard work categories is, by extension, precertified in each of those categories.

(3) A firm's precertification status is only applicable to the incorporated business entity that employs the individual upon whom the firm's precertification status is based and does not extend to a subsidiary, affiliate, or parent of the incorporated entity.

(4) An employee's precertification status is based solely on the individual's qualifications. A firm's qualifications may not serve as a basis for precertifying an employee.

(5) Precertification status shall transfer with the employee, should the employee leave the firm.

(d) Precertification website. The department will maintain a precertification website that will include:

(1) the definitions of the standard work categories;

(2) the minimum technical qualifications to perform work under the standard work categories; and

(3) the precertification application form, with instructions.

(e) Application and review process.

(1) To apply for precertification in a standard work category, a firm must employ an individual qualified to become precertified in that category and present the individual's qualifications in a precertification application.

(2) The department will consider the following factors in reviewing an application:

(A) the minimum technical qualifications as applicable;

(B) the individual's professional license or registration;

(C) the individual's experience and training; and

(D) any record that shows that the individual or the firm is the subject of a final administrative or judicial determination that the employee or firm has violated a statute or rule of a state licensing entity related to occupational or professional conduct.

(3) If a submitted application is incomplete or inaccurate, the firm will be given an opportunity to correct the application and provide additional information. The firm must provide the information within 30 days after the day that it receives the department's notice that the application is incomplete or inaccurate.

(4) If the information is not provided under paragraph (3) of this subsection within the 30-day period prescribed by that paragraph, the application will be processed at the end of that 30-day period with the information available.

(5) The department will make a good faith effort to make a precertification determination within 60 days after the day that the department receives a complete and accurate application or if paragraph (4) of this subsection applies, within 60 days after the day that the 30-day period prescribed by that paragraph ends.

(f) Appeal. A firm may appeal a precertification denial to the department by submitting additional information within 30 days after the day that it receives written notification of the denial. The information must justify why precertification should be granted. The department will review the information and make a second precertification determination. A firm may file a written complaint regarding a second precertification denial to the executive director or the executive director's designee.

(g) Updates. A firm must report any change in its application information no later than 45 days after the day that the change occurs.

(h) Data management. A firm's application information will be maintained in the Consultant Certification Information System (CCIS).

(i) Annual renewal. To maintain contract eligibility, a firm must renew its precertification status no later than March 31 of each year. The firm must submit its annual renewal through the CCIS.

(1) A firm that has renewed its precertification status by the annual deadline will maintain an active precertification status in the standard work categories in which it is precertified.

(2) A firm that has not renewed its precertification by the annual deadline will be placed in inactive status.

#### §9.34. Comprehensive Process.

(a) Applicability. The comprehensive process described under this section must be used for any specific deliverable contract that is \$1

million or more in value and is not subject to §9.35 of this subchapter (relating to Federal Process).

(b) Administrative qualification.

(1) Administrative qualification is a process used by the department to verify that a provider performing engineering and design related services has an indirect cost rate that meets department requirements. Except as provided by paragraph (8) of this subsection, to compete for a contract under this section a provider performing engineering and design related services either must be administratively qualified or must accept an indirect cost rate under paragraph (7) of this subsection.

(2) Factors in determining administrative qualification.

(A) A provider may demonstrate administrative qualification by an audit or by self-certification.

(i) An audit may be performed by an independent certified public accountant (CPA), an agency of the federal government, another state transportation agency, or a local transit agency. An audit performed by an independent CPA must be conducted in accordance with the current versions of 48 C.F.R. Part 31, the Generally Accepted Government Auditing Standards (GAGAS), and the American Association of State Highway and Transportation Officials (AASHTO) Uniform Audit and Accounting Guide. The provider must provide the department with unrestricted access to the audit work papers, records, and other information as requested by the department.

(ii) Self-certification may be conducted by the provider and must include a cost report and an internal controls report. The self-certified cost report must comply with the current versions of 48 C.F.R. Part 31, the GAGAS, and the AASHTO Uniform Audit and Accounting Guide. The self-certified internal control report must certify the provider has internal controls in place within its organization. Both the cost report and the internal control report must be signed by a company officer and notarized.

(B) The audit or self-certification shall be based on the provider's fiscal year. The indirect cost rate, as approved by the department, shall become effective six months after the end of the provider's fiscal year, or immediately if filed more than six months after the end of the provider's fiscal year. It shall be effective no more than twelve months and shall expire eighteen months after the end of the fiscal year upon which it is based.

(C) A provider must submit on an annual basis:

(i) a cognizant letter of concurrence issued by a state transportation agency in accordance with the AASHTO Uniform Audit and Accounting Guide; or

(ii) a compensation analysis for all executives and employees in accordance with the AASHTO Uniform Audit and Accounting Guide for which the provider may use either the National Compensation Matrix or surveys as prescribed in the AASHTO Uniform Audit and Accounting Guide.

(D) The department may audit the indirect cost rate of a provider under contract with, or seeking to do business with, the department. These audits will be conducted in accordance with the criteria outlined in this subsection.

(E) A provider must submit a signed Certification of Final Indirect Costs with the audit report or self-certification. The certification must follow the requirements of the Federal Highway Administration.

(3) Submittal and review process for administrative qualification.

(A) A provider must submit its administrative qualification information to the department in accordance with the instructions on the department's website.

(B) Upon review of an audit report or self-certification received from a provider, the department may request additional information from the provider. If the submittal is not complete and accurate, the department will return it to the provider for correction. The [Upon request for additional information by the department, the] provider shall submit the additional information or the corrected administrative qualification submittal within 30 [15] days after the day that it receives the department's request. [If the information is not provided within the 15-day period, the submittal will be placed on pending status for an additional 15 days.] If the information is not received within the 30-day [additional 15-day] period, the department will reject and not process the [submittal will not be processed for] administrative qualification submittal.

(C) If an administrative qualification submittal is rejected under subparagraph (B) of this paragraph, the provider may refile a corrected audit report or self-certification and shall include any previously requested information. The provider may not refile earlier than 90 days after the day that the department sends the notice rejecting the submittal.

(D) The department will make a good faith effort to complete the administrative qualification review process within 60 days after the day that it receives a complete and accurate audit report or self-certification.

(4) Administrative qualification is applicable only to the incorporated business entity upon which the indirect cost rate is based and does not extend to a subsidiary, affiliate, or parent of the incorporated entity, except as provided by this paragraph. A corporation may administratively qualify a business segment of the corporation if the business segment is not limited to a geographical area that is less than the entire state of Texas and if the corporation is able to demonstrate and justify the allocation of costs between the business segment and other corporate operations. If a corporate business segment is administratively qualified, the resulting indirect cost rate is not applicable to staff not employed by the business segment.

(5) The department will use a selected firm's indirect cost rate information in negotiations under §9.40 of this subchapter (relating to Negotiations).

(6) The department will not provide a firm's administrative qualification information to the department's staff conducting negotiations or the consultant selection team before the selection of that firm.

(7) Providers not administratively qualified. The department may contract with a prime provider or allow the use of a sub-provider that is not administratively qualified if:

(A) the provider has been in operation, as currently organized, for less than one fiscal year and the provider accepts an indirect cost rate developed by the department; or

(B) on request by the department during the selection process, the prime provider provides written certification that the prime provider or subprovider, as applicable, does not have an indirect cost rate audit and will accept an indirect cost rate developed by the department.

(8) Exemptions to administrative qualification.

(A) A non-engineering firm is exempt from the administrative qualification requirement of this section.

(B) A provider performing a service under standard work category 18.2.1, subsurface utilities engineering, or any of the following work groups, as listed on the department's precertification website, is exempted from administrative qualification, to the extent of the service being performed:

- (i) Group 6, bridge inspection;
- (ii) Group 12, materials inspection and testing;
- (iii) Group 14, geotechnical services;
- (iv) Group 15, surveying and mapping; and
- (v) Group 16, architecture.

(C) The department may exempt services other than those indicated in subparagraph (B) of this paragraph on a case-by-case basis. Any request for an exemption must be received by the department by the closing date of the solicitation.

(c) Consultant selection team (CST).

(1) The department shall use a CST in selecting providers under this section.

(2) The CST shall be composed of at least three department employees.

(3) At least one CST member must be a professional engineer, for engineering contracts; a registered architect, for architectural contracts; and either a professional engineer or registered professional land surveyor, for surveying contracts.

(4) If a CST member leaves the CST during the selection process, the process may continue with the remaining members, subject to paragraph (3) of this subsection.

(d) Request for qualifications (RFQ). Not fewer than 14 calendar days before the solicitation closing date, the department will post on a web-based bulletin board an RFQ providing the contract information and specifying the requirements for preparing and submitting a statement of qualification.

(e) Statement of qualification (SOQ). To be considered, an SOQ must comply with the requirements specified in the RFQ.

(f) Replacements.

(1) An individual may be proposed as a replacement for the prime provider project manager ~~or a task leader~~ prior to the department's notification of firms short-listed for an interview or, if an interview is not required, prior to selection.

(2) An individual may be proposed as a replacement for a task leader prior to contract execution.

(3) A proposed replacement for the prime provider project manager must be an employee of the prime provider. A proposed replacement for a task leader must be an employee of the prime provider or its subprovider. A proposed replacement for either position [designated in the SOQ and] must satisfy the applicable precertification and non-listed category requirements.

(g) SOQ screening and evaluation.

(1) The department may disqualify an SOQ if the department has knowledge that a firm on the project team or an employee of a firm on the project team is the subject of a final administrative or judicial determination that the firm or employee has violated a statute or rule of a state licensing entity related to occupational or professional conduct.

(2) If an SOQ is not disqualified under paragraph (1) of this subsection, the CST will screen the SOQ to determine whether it complies with the requirements specified in the RFQ. Each SOQ that meets these requirements will be considered responsive to the RFQ and evaluated.

(3) The CST will evaluate the responsive SOQ according to the evaluation criteria detailed in the RFQ based on factors the department has identified as most likely to result in the selection of the most qualified provider.

(h) Short list. The short list will consist of the most qualified providers, as indicated by the SOQ scores.

(1) For single contract selections, the minimum number of short-listed prime providers is three, unless fewer than three prime providers submitted a responsive SOQ.

(2) For multiple contract selections, the minimum number of short-listed prime providers is the number of desired contracts plus three, unless fewer than the desired number of prime providers submitted a responsive SOQ.

(3) Notification.

(A) The department will notify each prime provider that submitted an SOQ whether it was short-listed.

(B) The department will notify each short-listed prime provider whether a short list meeting will be held.

(i) Short list evaluation.

(1) Interviews. The department will evaluate the short-listed providers through interviews. The department will issue an Interview and Contract Guide (ICG) to each short-listed prime provider. The ICG will provide contract information and specify the requirements for the interview.

(2) Short list evaluation criteria. The CST will evaluate the interviews according to the criteria specified in the ICG, including the prime provider's past performance scores in the Consultant Certification Information System database reflecting less than satisfactory performance.

(j) Selection.

(1) Basis of final selection. The CST will select the best qualified provider, as indicated by the short list scores.

(2) Tie scores. The PEPS Division Director will break a tie using the following method.

(A) The first tie breaker will be the scores for the interview criterion with the highest RIF.

(B) The remaining interview criteria shall be compared in the order of decreasing RIF until the tie is broken.

(C) If the providers have identical scores on all of the interview criteria, the provider will be chosen by random selection.

(3) Notification. The department will:

(A) provide written notification to the prime provider selected for contract negotiation and arrange a meeting to begin contract negotiations;

(B) provide written notification to each short-listed prime provider that was not selected, notifying the provider of the non-selection; and

(C) publish the short list and the selected provider on a web-based bulletin board.

(4) Appeal. A provider may file a written appeal concerning the selection process with the executive director or the executive director's designee as provided under §9.7 of this chapter (relating to Protest of Contract Practices or Procedures).

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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