

**Department of State Health Services
Agenda Item for State Health Services Council
January 31, 2007**

Agenda Item Title: Amend 25 TAC, §141.2, new §141.4, and the repeal of §141.54, relating to the regulation and licensing of massage therapists.

Agenda Number: 5d

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background: Texas Occupations Code, (TOC), §455.155, requires the Executive Commissioner of the Health and Human Services to adopt rules to provide for a fair and reasonable procedure to grant exemptions from the licensing requirements of the chapter. The rules must provide that a person is exempt if the person shows that the advertising or provision of massage therapy services is incidental to the person's primary enterprise.

Summary: The amendments establish the procedure, which involves the completion of an application for exemption and submission of supporting documentation, payment of the exemption fee, application review by the Massage Therapy Program administrator, and an appeal process in case an exemption is denied. The new section also sets out certain circumstances under which an exemption shall not be granted. Additionally, the proposal provides for limited exemptions from the massage therapy licensing requirements for the offices of licensed health care professionals, government establishments, individual massage therapists, public and charity events, establishments holding credentials issued under another state law, and massage therapy educational programs.

The provisions of §141.54 are proposed for repeal, as that section will no longer be necessary when the exemption procedure in proposed new §141.4 is effective. With the exceptions described above, individuals and businesses will be required to use the new exemption procedure in order to obtain an exemption. This includes hotels, motels, nonprofit organizations, beauty shops, barber shops, health spas, non-profit organizations and businesses devoted to the sale of food and food products that are also providing massage therapy services.

Summary of Stakeholder Input to Date (including advisory committees):

Stakeholder input has been solicited through verbal and written communication with stakeholders. Draft proposed rules were submitted to the Honorable Representative Rafael Anchia; Chris Bowers, Dallas City Attorney; American Organization for Bodywork Therapies of Asia; United States *Trager* Association; Federation of Therapeutic Massage, Bodywork and Somatic Practices; Texas Association of Massage Therapists; and the Texas Coalition of Massage School Instructors for review and input before the proposed rules were finalized.

Proposed Motion: Motion to recommend HHSC approval for publication of the rule contained in agenda item 5d.

Agenda Item Approved by: _____

Presented by: Debbie Peterson

Title: Unit Manager

Program/Division: PLC **Contact Name/Phone:** Debbie Peterson 834-2725

Date Submitted
11/17/06

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 141. Massage Therapy
Subchapter A. The Department
Amendment §141.2
New §141.4
Subchapter F. Massage Establishments
Repeal §141.54

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §141.2, new §141.4, and the repeal of §141.54 concerning the regulation and licensing of massage therapists.

BACKGROUND AND PURPOSE

Texas Occupations Code (TOC), §455.155, requires the Executive Commissioner to adopt rules to provide for a fair and reasonable procedure to grant exemptions from the licensing requirements of the chapter. The rules must provide that a person is exempt if the person shows that the advertising or provision of massage therapy services is incidental to the person's primary enterprise. This rule proposal creates a procedure for establishing the right to an exemption.

SECTION-BY-SECTION SUMMARY

The amendment to §141.2 sets a \$25 exemption fee for persons or entities requesting an exemption under the new procedure. New §141.4 establishes the procedure for granting exemptions from the licensing requirements of TOC, Chapter 455. The procedure involves completion of an application for exemption and submission of supporting documentation; payment of the exemption fee; application review by the Massage Therapy Program administrator; and an appeal process in case an exemption is denied. The new section sets out certain circumstances under which an exemption shall not be granted. The new section also provides for limited exemptions from the massage therapy establishment licensing requirements for the offices of licensed health care professionals, government establishments, individual massage therapists, public and charity events, establishments holding credentials issued under another state law, and massage therapy educational programs.

The provisions of §141.54 are proposed for repeal, as that section will no longer be necessary when the exemption procedure in proposed new §141.4 is effective. With the exceptions described above, the specific list of exemptions found within §141.54 are proposed for repeal and those individuals and businesses will be required to use the new exemption procedure in order to obtain an exemption. This includes hotels, motels, nonprofit organizations, beauty shops, barber shops, health spas, non-profit organizations and businesses devoted to the sale of food and food products that are also providing massage therapy services.

FISCAL NOTE

Kathryn Perkins, Director, Health Care Quality Section, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications to the state as a result of enforcing or administering the sections as proposed. The effect on state government will be an increase in revenue to the state of \$18,750 the first fiscal year, \$33,750 the second fiscal year, \$11,250 the third fiscal year, \$7,500 the fourth fiscal year, and \$3,750 the fifth fiscal year. Implementation of the proposed sections will not result in any fiscal implications for local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Perkins has also determined that there are anticipated economic costs to small businesses or micro-businesses required to comply with the sections as proposed, if those businesses engage in activities in which the advertising or provision of massage therapy services is incidental to the primary enterprise of the business. The cost of the exemption fee for each business will be \$25. The anticipated cost for small businesses will be the same as those of larger businesses.

There will be economic cost to individuals who are required to comply with the sections as proposed, if the individuals engage in activities in which the advertising or provision of massage therapy services is incidental to the person's primary enterprise. The cost of the exemption fee for each individual will be \$25. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Perkins has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to protect and promote public health, safety, and welfare, by ensuring that exemptions to massage therapy licensing requirements are appropriate and granted in accordance with the statute.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Heather Muehr, Professional Licensing and Certification Unit, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, (512) 834-4565 or by email to massage@dshs.state.tx.us. When e-mailing comments, please indicate “Comments on Proposed Rules” in the subject line. 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, Cathy Campbell, 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 proposed sections are authorized by Occupations Code, §455.155(c), which requires the Executive Commissioner of the Health and Human Services Commission to adopt rules providing for a fair and reasonable procedure for granting exemptions and by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed rules affect Occupations Code, Chapter 455, Health and Safety Code, Chapter 1001; and Government Code, Chapter 531.

Section for Repeal.

§141.54. Exemptions.

Legend: (Proposed Amendment)

Single Underline = Proposed new language

Regular Print = Current language

(No change.) = No changes are being considered for the designated subdivision

§141.2. Fees.

(a) - (j) (No change.)

(k) Exemption fee--\$25.

Legend: (Proposed New Rule)

Regular Print = Proposed new language

§141.4. Exemption from Licensing Requirements.

(a) The following rules govern the granting or disapproval of exemption from the licensing requirements of the Act. In accordance with the Act, an exemption may be granted when the advertising or provision of massage therapy services is incidental to the applicant's primary enterprise.

(1) All applications for an exemption shall be on a form prescribed by the department and shall be accompanied by the exemption fee set out in §141.2(k) of this title (relating to Fees) and all required documentation to support the exemption request. Incomplete applications for exemption will not be processed.

(2) The administrator of the Massage Therapy Licensing Program, or the administrator's designee, will review the application and grant or disapprove the exemption.

(3) If the exemption is not approved, the applicant shall be informed of the reason.

(4) An applicant whose exemption is not approved may request a review of the decision by the director of the Professional Licensing and Certification Unit. The director's decision shall be final.

(5) If an exemption is disapproved, the person must either comply with the requirements and procedures of this title for obtaining a license or cease and desist from providing massage therapy or other massage services.

(6) Unless exempted by the Act, a person who offers or provides massage therapy for compensation shall not be granted an exemption from the massage therapist licensing requirements of the Act.

(b) Exemptions shall not be granted to:

(1) a person or an entity against whom the department has taken disciplinary action;

(2) a person or entity who has failed to renew, or been denied renewal of a license;

(3) a person or entity whose application for licensure has been denied; or

(4) a sexually oriented business.

(c) A person licensed in this state as a physician, chiropractor, occupational therapist, physical therapist, nurse, cosmetologist, podiatrist, osteopath, midwife, physician's assistant, surgical assistant, acupuncturist, perfusionist, respiratory care practitioner, or athletic trainer that is practicing within the scope of their license is specifically exempt from the massage therapy licensing requirement.

(d) The following entities are specifically exempt from the massage therapy establishment licensing requirements of the Act:

(1) a licensed massage therapist who practices as a solo practitioner under that therapist's legal name, or uses an assumed name, if the person's legal name or massage therapy license number is used in any advertisement or presentation of the assumed name;

(2) the office of a person licensed in this state as a physician, chiropractor, occupational therapist, physical therapist, nurse, cosmetologist, podiatrist, osteopath, midwife, physician's assistant, surgical assistant, acupuncturist, perfusionist, respiratory care practitioner, or athletic trainer who is practicing within the scope of their license. This exemption applies to a professional who employs or uses massage therapists to practice massage therapy in the professional's office or where the professional has authority to delegate tasks under the statutory authority for that professional;

(3) an establishment owned or operated by the federal government, the state, a political subdivision of the state, or a municipality;

(4) an establishment that holds a license, permit, certificate, or other credential issued by the state under another law, and that offers or performs massage therapy within the scope of that credential;

(5) a public or charity event which is operational for a period of time of no more than 72 hours in a six-month period and in which the provision of massage therapy services is incidental to the primary athletic, fund raising, or other purpose of the event; and

(6) a massage therapy educational program in compliance with the Act.

Section for Repeal.

~~§141.54 Exemptions.~~

~~(a) The following establishments are specifically exempt from the provisions of the Texas Occupations Code, Chapter 455 (the Act), regulating massage establishments:~~

~~(1) an establishment that holds a license, permit, certificate, or other credential issued by the state under another law, and that offers or performs massage therapy under the scope of that credential;~~

~~(2) a registered massage therapist who practices as a solo practitioner in that therapist's legal name or uses an assumed name if the person's legal name or massage therapy registration number is used in any advertisement or presentation of the assumed name;~~

~~(3) a nonprofit organization which is tax exempt under 26 United States Codes Annotated, §501(c) (Internal Revenue Code);~~

~~(4) a hotel, motel, or similar commercial establishment which:~~

~~(A) offers a sleeping room for rent for a period of time that is more than 10 hours; and~~

~~(B) does not allow a tenant or occupant of a sleeping room to sublease the room for a period of time that is less than 10 hours;~~

~~(5) a business whose primary business is devoted to the sale of food and food products;~~

~~(6) a health spa in compliance with the Health Spa Act, Texas Occupations Code, Chapter 702;~~

~~(7) the office of a physician, chiropractor, physical therapist, or member of another similarly licensed or regulated profession as determined by the department if the professional is practicing within the scope of his or her license. This exemption applies to a professional who uses a registered massage therapist to practice massage therapy in the professional's office or where the professional has authority to delegate tasks under the statutory authority for that professional;~~

~~(8) an establishment owned or operated by the federal government, the state, a political subdivision of the state, or a municipality;~~

~~(9) an establishment which is operational for a period of time of no more than 24 hours in a calendar year and in which the provision of massage therapy services is~~

incidental to the primary athletic, fund raising, or other purpose of the event sponsored by the establishment:

~~(10) a massage therapy educational program in compliance with the Act;~~

~~(11) a beauty shop in compliance with the Texas Occupations Code, Chapter 1602; or~~

~~(12) a barber shop in compliance with the Texas Occupations Code, Chapter 1601.~~

~~(b) An establishment may request an exemption from the registration requirements of this section where it can show that the advertising or provision of massage therapy services is incidental to the person's primary enterprise.~~

~~(c) Requests for exemptions must be in writing and must state the reasons why the exemption should be granted.]~~