

**Department of State Health Services
Agenda Item for State Health Services Council
August 6, 2007**

Agenda Item Title: New 25 TAC §§229.470-229.474, Rules Relating to Inspection Fees for Retail Food Establishments

Agenda Number: 3-d

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background: The program regulates food service establishments in areas of Texas without a local health department. Due to an implementation date of September 1, 2007, the department is expediting the rulemaking process for these new rules. HHSC approved publication of the proposed rules on June 18, 2007, and the proposed rules were published in the July 6, 2007, issue of the *Texas Register*. A public hearing is scheduled for July 13, 2007.

Summary: These new rules concern inspection fees for Retail Food Establishments that are exempt from the food establishment permitting rules, but need an inspection for various reasons including other agency licensing requirements, federal mandates, and requirements to receive federal grants or subsidies. The new rules establish definitions, inspection fees, application procedures, hearing guidelines, and the ability to assess administrative penalties.

Summary of Stakeholder Input to Date (including advisory committees): This is an inspection process needed and requested by the stakeholders in order to comply with other state agency and federal requirements. The public comment period for stakeholders to comment is open from July 7, 2007, through August 6, 2007. Stakeholders will have an opportunity to comment before presenting the rule package and comments to the State Health Services Council.

Proposed Motion: Motion to recommend HHSC approval to adopt rules contained in agenda item # 3-d.

Agenda Item Approved by: Kathryn C. Perkins, R.N., M.B.A.

Presented by: Deborah Marlow **Title:** Group Manager, Food Establishments Group

Program/Division: Policy/Standards/Quality Assurance Unit, Environmental and Consumer Safety Section, Division for Regulatory Services

Contact Name/Phone: Deborah Marlow, 834-6753

Date Submitted
7/9/07

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 229. Food and Drug
Subchapter Z. Inspection Fees for Retail Food Establishments
New §§229.470 - 229.474

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes new §§229.470 - 229.474, concerning inspection fees for retail food establishments.

BACKGROUND AND PURPOSE

The purpose of these new rules is to implement Texas Health and Safety Code, §437.0125(c), which authorizes the department to collect fees for inspecting a facility. Facilities that are exempt from obtaining a Food Establishment Permit under 25 Texas Administrative Code (TAC), §229.371, but must comply with 25 TAC, §§229.161 - 229.171, and §§229.173 - 229.175, require inspections for various reasons such as other agency licensing requirements, federal mandates, governmental entities that do not have inspection staff, and requirements to receive federal grants or subsidies. As the department is unable to recover the costs for these inspections, these new rules provide a process for such entities to request an inspection and pay an inspection fee prior to the state conducting the inspection.

SECTION-BY-SECTION SUMMARY

New §229.470 defines the purpose of these rules. New §229.471 provides definitions to clarify terminology. New §229.472 outlines the fees, applications procedures for requesting an inspection, and clarifies facilities subject to this rule. New §229.473 describes the minimum standards that facilities must follow when engaging in food service activities. New §229.474 explains the department's ability to refuse an inspection request, conduct hearings, and assess administrative penalties.

FISCAL NOTE

Susan E. Tennyson, Section Director, Environmental and Consumer Safety Section, has determined that for each calendar 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 \$652,100 the first calendar year and \$652,100 each year for calendar years two through five due to the implementation of new inspection fees. Implementation of the proposed sections will not result in any fiscal implications for local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Tennyson has also determined that there are anticipated economic costs to small businesses or micro-businesses required to comply with the sections as proposed. There will be a new inspection fee for businesses or persons who are not required to obtain a Food Establishment Permit under 25 TAC, §229.371, but that require an inspection for various reasons such as other agency licensing requirements, federal mandates, and/or requirements to receive federal grants or subsidies. The probable economic cost to persons requesting these inspections is \$150 per inspection requested. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Tennyson 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 generate funding to operate the program to provide food service inspections to entities that perform food service and require the inspections to continue the operation for various reasons. As these facilities are exempt from permitting under the Texas Food Establishment Rules, these new rules would provide a mechanism for these facilities to obtain inspection services to ensure their facilities are operated in a manner to protect health.

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Deborah Marlow, Food Establishments Group, Environmental and Consumer Safety Section, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, 512/834-6753 or by email to Deborah.Marlow@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

A public hearing will be held on Friday July 13th from 8:30 am – 12:00 noon at the Texas Department of State Health Services, Room K-100, 1100 West 49th Street, Austin, Texas 78756. Further information may be obtained from Deborah Marlow, Food Establishments Group, Division for Regulatory Services, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756, 512/834-6753.

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, Chapter 437, which authorizes the department to collect fees for inspecting facilities, Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The new sections affect the Health and Safety Code, Chapters 437 and 1001.

Legend: (Proposed New Rules)
Regular Print = Proposed new language

§229.470. Purpose. The purpose of these sections is to implement Texas Health and Safety Code, Chapter 437, which requires the department to collect fees to conduct inspections requested or required by certain food establishments when exempted from permitting by the department.

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

(1) Child care center -- Any facility licensed by the regulatory authority to receive 13 or more children for child care which prepares food for on-site consumption. A child care center is classified as a food establishment.

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

(3) Food -- A raw, cooked, or processed edible substance, ice, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(4) Food employee -- An individual working with unpackaged food, food equipment or utensils, or food-contact surfaces.

(5) Food establishment --

(A) Food establishment means an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption:

(i) such as a restaurant; retail food store; satellite or catered feeding location; catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people; market; vending location; conveyance used to transport people; institution; or food bank; and

(ii) that relinquishes possession of food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

(B) Food establishment includes:

(i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or feeding location is permitted by the regulatory authority; and

(ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location; where consumption is on or off the premises; and regardless of whether there is a charge for the food.

(C) Food establishment does not include:

- (i) an establishment that offers only prepackaged foods that are not potentially hazardous;
- (ii) a produce stand that only offers whole, uncut fresh fruits and vegetables;
- (iii) a food processing plant;
- (iv) a kitchen in a private home if only food that is not potentially hazardous is prepared for sale or service at a function such as a religious or charitable organization's bake sale if allowed by law;
- (v) an area where food that is prepared as specified in clause (iv) of this subparagraph is sold or offered for human consumption;
- (vi) a Bed and Breakfast Limited facility as defined in §229.162 of this title (relating to Definitions); or
- (vii) a private home that receives catered or home-delivered food.

(D) All definitions found in §229.162 of this title under the Texas Food Establishment Rules are applicable to these sections except that, for purposes of inspection or payment of inspection fees only, the term “food establishment” does not include:

- (i) food establishments permitted and inspected under authority granted to Home-Rule or Type A General-Law Municipalities;
- (ii) federally inspected food establishments on federal property;
- (iii) food establishments at correction facilities under the inspection of the Texas Department of Criminal Justice;
- (iv) food establishments on state campuses inspected by state college or university personnel in accordance with the requirements of §229.373 of this title (relating to Minimum Standards for Permitting and Operation);
- (v) food establishments licensed under the Health and Safety Code, Chapter 431, as manufacturers of food;
- (vi) mobile food units permitted and inspected under the authority granted to Home-Rule or Type A General-Law Municipalities and which operate only within their respective jurisdictions.

(6) Food service establishment -- A food establishment as defined in these rules.

(7) Group residence -- A private or public housing corporation or institutional facility that provides living quarters and meals. The term includes a domicile for unrelated persons such as a retirement home, correctional facility, or a long-term care facility.

(8) Mobile food establishment -- A vehicle mounted food establishment that is readily moveable.

(9) Nonprofit organization -- A civic or fraternal organization, charity, lodge, association, proprietorship or corporation possessing a 501(C) exemption under the Internal Revenue Code; or religious organizations meeting the definition of “church” under the Internal Revenue Code, §170(b)(1)(A)(I). Nonprofit organizations are exempted from obtaining a permit as specified in §229.372(e) of this title (relating to Permitting Fees and Procedures). Nonprofit organizations are not exempted from the payment of an inspection fee as required under §229.472 of this title.

(10) Person -- An association, corporation, individual, partnership, other legal entity, government, or governmental subdivision or agency.

(11) Potentially hazardous food --

(A) Potentially hazardous food (PHF) means a food that requires time and temperature control for safety (TCS) to limit pathogen growth or toxin production.

(B) Potentially hazardous food includes:

(i) an animal food (a food of animal origin), including fresh shell eggs, that is raw or heat-treated; a food of plant origin that is heat-treated or consists of raw seed sprouts; cut melons; and garlic-in-oil mixtures that are not modified in a way that results in mixtures that do not support growth as specified under subparagraph (A) of this paragraph; and

(ii) a food whose pH/a_w interaction is designated as PHF/TCS in one of the tables listed in subparagraph (D) of this paragraph, unless a product assessment or vendor documentation acceptable to the regulatory authority is provided.

(C) Potentially hazardous food does not include:

(i) an air-cooled hard-boiled egg with shell intact, or a shell egg that is not hard-boiled, but has been treated to destroy all viable *Salmonellae*;

(ii) a food whose pH/a_w interaction is designated as non-PHF/non-TCS in one of the tables in subparagraph (D) of this paragraph;

(iii) a food, in an unopened hermetically sealed container, that is commercially processed to achieve and maintain commercial sterility under conditions of non-refrigerated storage and distribution;

(iv) a food for which a product assessment, including laboratory evidence, demonstrates that time and temperature control for safety is not required and that may contain a preservative, other barrier to the growth of microorganisms, or a combination of barriers that inhibit the growth of microorganisms; or

(v) a food that does not support the growth of microorganisms as specified under subparagraph (A) of this paragraph even though the food may contain an infectious or toxigenic microorganism or chemical or physical contaminant at a level sufficient to cause illness.

(D) Potentially hazardous food does not include food that, because of pH, water activity (a_w) or the interaction of pH and a_w , is considered non-PHF/non-TCS in Table A or B below. Guidance for using the tables is provided in the document entitled “Using pH, a_w , or the Interaction of pH and a_w to Determine If a Food Requires Time/Temperature Control for Safety (TCS)”. Copies of the guidance document may be downloaded from the following website: <http://www.dshs.state.tx.us>, or may be obtained from the department, 1100 West 49th Street, Austin, Texas 78756-3182.

(i) Table A.

Figure: 25 TAC §229.471(5)(D)(i)

Table A. Control of spores: Product heat-treated to control vegetative cells and subsequently packaged.			
Critical a_w values	Critical pH values		
	4.6 or less	>4.6 – 5.6	>5.6
0.92 or less	non-PHF/non-TCS	non-PHF/non-TCS	non-PHF/non-TCS
>0.92-0.95	non-PHF/non-TCS	non-PHF/non-TCS	PHF/TCS
>0.95	non-PHF/non-TCS	PHF/TCS	PHF/TCS

(ii) Table B.

Figure: 25 TAC §229.471(5)(D)(ii)

Table B. Control of vegetative cells and spores: Product not heat-treated or heat-treated but not packaged.				
Critical a_w Values	Critical pH values			
	<4.2	4.2 – 4.6	4.6 – 5.0	>5.0
<0.88	non-PHF/non-TCS	non-PHF/non-TCS	non-PHF/non-TCS	non-PHF/non-TCS
0.88-0.90	non-PHF/non-TCS	non-PHF/non-TCS	non-PHF/non-TCS	PHF/TCS
>0.90-0.92	non-PHF/non-TCS	non-PHF/non-TCS	PHF/TCS	PHF/TCS
>0.92	non-PHF/non-TCS	PHF/TCS	PHF/TCS	PHF/TCS

(12) Pushcart -- A non self-propelled mobile food unit limited to serving nonpotentially hazardous food or potentially hazardous foods requiring a limited amount of preparation as authorized by the regulatory authority. A pushcart is classified as a mobile food unit. A pushcart does not include non self-propelled units owned and operated within a retail food store.

(13) Roadside food vendor -- A person who operates a mobile retail food store from a temporary location adjacent to a public roadway or highway. Foods shall not be prepared or processed by a roadside food vendor. A roadside vendor is classified as a mobile food establishment.

(14) School food establishment -- A food service establishment where food is prepared or served and intended for service primarily to students in institutions of learning including, but not limited to, public and private schools, including kindergarten, preschool and elementary schools, junior high schools, high schools, colleges, and universities. A school food establishment is classified as a food establishment.

(15) Temporary food establishment -- A food establishment that operates for a period of no more than 14 consecutive days in conjunction with a single event or celebration.

§229.472. Inspection Fees and Procedures.

(a) Inspection fees. A person who operates a non-permitted food establishment, that requests an inspection be conducted by the department, shall pay an inspection fee for each inspection of the establishment. All inspection fees are nonrefundable.

(1) A school food establishment that requests two inspections per year shall pay for both inspections before the first inspection is conducted by the department.

(A) The school food establishment fee is \$300 for two inspections.

(B) An application and inspection fee must be submitted between September 15 and October 31 annually.

(2) A person who operates a non-permitted food establishment that is not a school food establishment shall pay an inspection fee for each inspection of the establishment.

(A) The inspection fee is \$150 per inspection.

(B) An application and inspection fee must be submitted to the department at least 6 weeks prior to the earliest desired inspection date.

(b) Non-permitted food establishments, other than schools, inspection fee requirement. Non-permitted food establishments, that are nonprofit organizations as defined in §229.471(9) of this title (relating to Definitions), are not exempted from the payment of an inspection fee as required under subsection (a) of this section. Nonprofit organizations are exempted from obtaining a permit as specified in §229.372(e) of this title (relating to Permitting Fees and Procedures). Nonprofit organizations shall comply with the requirements of §229.473 of this title (relating to Minimum Standards for Permitting and Operation). Any civic or fraternal organization, charity, lodge, association, proprietorship, corporation or church not meeting the definition of “nonprofit organization” must obtain a permit, pay the required fee, and comply with the requirements for permitted food establishments. Internal Revenue Service documentation of nonprofit status shall be provided if requested by the department.

(c) The department shall not inspect or collect an inspection fee from food establishments permitted or inspected by a county or public health district under the Texas Health and Safety Code, Chapter 437, or food establishments permitted or inspected under authority granted to Home-Rule or Type A General-Law Municipalities.

(d) Application for inspection request. The inspection request application shall be completed on a form furnished by the department and shall contain the following information:

- (1) the name under which the business is operated;
- (2) the mailing address and street address of the establishment; and
- (3) the signature of the owner, operator, or other authorized person.

(e) Two or more establishments. If a person owns or operates two or more establishments, each establishment shall request inspections separately by listing the name and address of each establishment on separate application forms. A school district may submit a single application and attach a listing of each school food establishment to be inspected.

(f) Application form. Copies of the application for inspection request form may be obtained from the department, 1100 West 49th Street, Austin, Texas 78756-3182, or online at

www.dshs.state.tx.us/fdlicense.shtm.

(g) Texas Online. Applicants may submit an application for inspection request under these sections electronically by the Internet through Texas Online at www.texasonline.state.tx.us, when available. The department is authorized to collect fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

§229.473. Minimum Standards for Permitting and Operation. All food establishments shall be operated in accordance with the requirements specified in §§229.161 - 229.171 and §§229.173 - 229.175 of this title (relating to Texas Food Establishments). Copies may be obtained from the department, 1100 West 49th Street, Austin, Texas 78756-3182, or may be downloaded from the following website: www.dshs.state.tx.us/foodestablishments.shtm.

§229.474. Refusal of Inspection Request; Administrative Penalties.

(a) Basis. The department may refuse an application for an inspection for violations of the requirements of §229.472 of this title (relating to Inspection Fees and Procedures) or §229.473 of this title (relating to Minimum Standards for Permitting and Operation), or for interference with a department representative in the performance of their duties under these sections.

(b) Hearings. Any hearings for the refusal of an inspection are governed by §§1.21, 1.23, 1.25, and 1.27 of this title (relating to Formal Hearing Procedures) or under the provisions of the Government Code, Chapter 2001, the Administrative Procedures Act.

(c) Administrative penalties. Administrative penalties, as provided in the Health and Safety Code, §437.018, and in §229.261 of this title (relating to Assessment of Administrative Penalties), may be assessed for violation of these sections or requirements specified in §§229.161 - 229.171, and §§229.173 - 229.175 of this title (relating to Texas Food Establishments).