

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

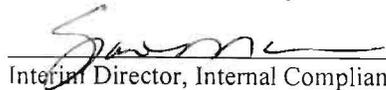
The Texas Transportation Commission (commission) finds it necessary to adopt new §1.8 and §1.9 and amendments to §15.92 and §27.53, all relating to the internal compliance program to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted new sections and amendments, attached to this minute order as Exhibits A - F, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

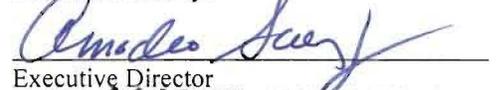
IT IS THEREFORE ORDERED by the commission that new §1.8 and §1.9 and amendments to §15.92 and §27.53 are adopted and are authorized for filing with the Office of the Secretary of State.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:


Interim Director, Internal Compliance Program

Recommended by:


Executive Director

111666 JAN 29 09

Minute Number Date Passed

Adoption Preamble

The Texas Department of Transportation (department) adopts new §1.8 and §1.9, concerning internal ethics and compliance programs. New §1.8 and §1.9 are adopted without changes to the proposed text as published in the December 5, 2008 issue of the *Texas Register* (33 TexReg 9952) and will not be republished.

EXPLANATION OF ADOPTED NEW SECTIONS

The department has a long standing reputation for integrity and ethical behavior. To maintain and build on the department's commitment to integrity and ethical behavior, the Texas Transportation Commission (commission) in November 2007 ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. The commission strengthened the requirement in May 2008 by ordering the department to develop and implement for the commission and commission staff, the department's executive director, deputy executive director, and assistant executive directors a training program that is to include training on ethics law and policies and the department's ICP.

The next step is for the commission to take action to discourage fraudulent and illegal activity by persons who receive financial

1 assistance from or contract with the department. A purpose of
2 the rule changes is to require that an entity that receives
3 financial assistance from the department have and enforce an
4 ethics and compliance program that is recognized by the
5 department. The rule changes also provide that a contractor's
6 adoption and enforcement of an ethics and compliance program is
7 a potential mitigating factor for the imposition of sanctions on
8 the contractor.

9
10 New §1.8, Internal Ethics and Compliance Program, establishes a
11 framework for the internal ethics and compliance program of an
12 entity that receives financial assistance from the department
13 and that is required under another rule of the commission to
14 establish such a program. The section establishes the minimum
15 requirements of the internal ethics and compliance program and
16 requires the entity to certify that it has adopted and enforces
17 compliance with the program.

18
19 New §1.9, Effect of Contractor's Internal Ethics and Compliance
20 Program, provides that a contractor's adoption and enforcement
21 of compliance with an internal ethics and compliance program
22 that meets the requirements of §1.8 may be considered in
23 determining a sanction that may be imposed on the contractor as
24 the result of a violation of federal or state law, including
25 regulations.

1

2 COMMENTS

3 No comments on the proposed new sections were received.

4

5 STATUTORY AUTHORITY

6 The new sections are adopted under Transportation Code,
7 §201.101, which provides the commission with the authority to
8 establish rules for the conduct of the work of the department.

9

10 CROSS REFERENCE TO STATUTE

11 None.

1 SUBCHAPTER C. OTHER ENTITIES' INTERNAL ETHICS AND COMPLIANCE
2 PROCEDURES

3 §1.8. Internal Ethics and Compliance Program.

4 (a) Various sections of this title require an entity to
5 adopt and enforce an internal ethics and compliance program. To
6 comply with that requirement, the entity must provide the
7 department with written evidence of the internal ethics and
8 compliance program and must certify to the department that the
9 entity:

10 (1) has adopted an internal ethics and compliance program
11 that:

12 (A) is designed to detect and prevent violations of the
13 law, including regulations, and ethical standards applicable to
14 the entity or its officers or employees; and

15 (B) satisfies the requirements of this section; and

16 (2) enforces compliance with its internal ethics and
17 compliance program.

18 (b) An entity's internal ethics and compliance program must
19 be in writing and must provide compliance standards and
20 procedures that the entity's employees and agents are expected
21 to follow. The program must be recognized by the department as
22 a qualifying compliance program. At a minimum, the program must
23 provide that:

1 (1) high-level personnel are responsible for oversight of
2 compliance with the standards and procedures;

3 (2) appropriate care is being taken to avoid the
4 delegation of substantial discretionary authority to individuals
5 whom the organization knows, or should know, have a propensity
6 to engage in illegal activities;

7 (3) compliance standards and procedures are effectively
8 communicated to all of the organization's employees by requiring
9 them to participate in training and disseminating to them
10 information that explains, in understandable language, the
11 requirements of the program;

12 (4) the governing body or individuals of the organization
13 have periodic training in ethics and in the compliance program;

14 (5) compliance standards and procedures are effectively
15 communicated to all of the organization's agents;

16 (6) reasonable steps are being taken to achieve
17 compliance with the compliance standards and procedures by:

18 (A) using monitoring and auditing systems that are
19 designed to reasonably detect noncompliance; and

20 (B) providing and publicizing a system for the
21 organization's employees and agents to report suspected
22 noncompliance without fear of retaliation;

23 (7) consistent enforcement of compliance standards and

1 procedures is administered through appropriate disciplinary
2 mechanisms;

3 (8) reasonable steps are being taken to respond
4 appropriately to detected offenses and to prevent future similar
5 offenses; and

6 (9) the organization has a written employee code of
7 conduct that, at a minimum, addresses:

8 (A) record retention;

9 (B) fraud;

10 (C) equal opportunity employment;

11 (D) sexual harassment and sexual misconduct;

12 (E) conflicts of interest;

13 (F) personal use of the organization's property; and

14 (G) gifts and honoraria.

15

16 §1.9. Effect of Contractor's Internal Ethics and Compliance
17 Program. The adoption by a contractor, as defined by §9.101 of
18 this title, of an internal ethics and compliance program that
19 satisfies the requirements of §1.8 of this subchapter applicable
20 to an internal ethics and compliance program and the
21 contractor's enforcement of compliance with that program may
22 mitigate the imposition of a sanction on the contractor or the
23 level of a sanction that is imposed.

Adoption Preamble

The Texas Department of Transportation (department) adopts amendments to §15.92, concerning transportation corporations. The amendments to §15.92 are adopted without changes to the proposed text as published in the December 5, 2008 issue of the *Texas Register* (33 TexReg 9957) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

To maintain and build on the department's commitment to integrity and ethical behavior, the Texas Transportation Commission (commission) ordered the department to develop an internal compliance program (ICP) designed to promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law and departmental policies. The rule changes expand the use of that concept to require transportation corporations to have and enforce compliance with an internal ethics and compliance program. The purpose of the changes is to discourage fraudulent and illegal activity by persons who receive financial assistance from or contract with the department.

Amendments to §15.92, Miscellaneous Powers and Duties of Corporations, add new subsection (c) to require a transportation corporation formed under the Texas Transportation Corporation Act (Transportation Code, Chapter 431) for the promotion and

1 development of public transportation facilities and systems to
2 adopt an ethics and compliance program that satisfies new 43 TAC
3 §1.8, Internal Ethics and Compliance Program. The amendments
4 give a transportation corporation approximately one year to
5 satisfy the requirement. The amendments also add new subsection
6 (d), which requires the transportation corporation to enforce
7 compliance with the program.

8

9 COMMENTS

10 No comments on the proposed amendments were received.

11

12 STATUTORY AUTHORITY

13 The amendments are adopted under Transportation Code, §201.101,
14 which provides the commission with the authority to establish
15 rules for the conduct of the work of the department.

16

17 CROSS REFERENCE TO STATUTE

18 Transportation Code, Chapter 431.

1 SUBCHAPTER H. TRANSPORTATION CORPORATIONS

2 §15.92. Miscellaneous Powers and Duties of Corporations.

3 (a) Open Meetings and Public Information.

4 (1) A corporation is subject to the Open Meetings Act,
5 Government Code, Chapter 551.

6 (A) Except as provided in subparagraph (B) of this
7 section, the Board shall file notice of each meeting of the
8 board in the same manner and in the same location as is required
9 of a state governmental body under Chapter 551, Government Code.

10 (B) If the commission designates an area of the state
11 in which a corporation may act on behalf of the commission, the
12 board shall file notice of each meeting of the board in the same
13 manner and the same location as is required of a governmental
14 body under Government Code, §551.053.

15 (2) The Board is subject to the Public Information Act,
16 Government Code, Chapter 552.

17 (b) Texas Non-Profit Corporation Act. The Texas Non-Profit
18 Corporation Act applies to a transportation corporation to the
19 extent that the provisions of that Act are not inconsistent with
20 provisions of the Transportation Corporation Act, Transportation
21 Code, Chapter 431, and this subchapter.

22 (c) Internal ethics and compliance program. A corporation
23 shall adopt an internal compliance and ethics program that

1 satisfies the requirements of §1.8 of this title (relating to
2 Internal Ethics and Compliance Program) before the later of:

3 (1) January 1, 2010; or

4 (2) the first anniversary of the date on which the
5 corporation is created.

6 (d) Enforcement of compliance program. A corporation shall
7 enforce compliance with the internal compliance and ethics
8 program adopted under subsection (c) of this section.

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts
3 amendments to §27.53, concerning financial assistance for toll
4 facilities. The amendments to §27.53 are adopted **with** changes
5 to the proposed text as published in the December 5, 2008 issue
6 of the *Texas Register* (33 TexReg 9966).

7

8 EXPLANATION OF ADOPTED AMENDMENTS

9 To maintain and build on the department's commitment to
10 integrity and ethical behavior, the Texas Transportation
11 Commission (commission) ordered the department to develop an
12 internal compliance program (ICP) designed to promote an
13 organizational culture that encourages ethical conduct and a
14 commitment to compliance with the law and departmental policies.
15 The rule changes expand the use of that concept to require that
16 to be eligible to receive funds from the department for the
17 financing of a toll facility that is not under the jurisdiction
18 of the department, an entity must have an internal ethics and
19 compliance program and enforce compliance with that program.
20 The purpose of the changes is to discourage fraudulent and
21 illegal activity by persons who receive financial assistance
22 from the department.

23

24 Amendments to §27.53, Request, add new subsection (a)(3) to
25 provide that, to be eligible for financing by the department of

1 a toll facility that is not under the jurisdiction of the
2 department, an entity must have adopted, and must enforce
3 compliance with, an ethics and compliance program that satisfies
4 new 43 TAC §1.8, Internal Ethics and Compliance Program. While
5 most entities that apply for financial assistance for toll
6 facilities currently have ethics and compliance programs in
7 place, the commission recognizes that some potential applicants
8 may not have those programs. It is the intent of the commission
9 that the requirements of this new paragraph will apply only for
10 applications for financial assistance submitted to the
11 department after January 1, 2010, and the application forms for
12 the assistance will contain such a provision.

13

14 COMMENTS

15 No comments on the proposed amendments were received. The
16 wording of §27.53(a)(3) has been modified to emphasize that the
17 requirements of that new provision apply only to applications
18 for financial assistance submitted to the department after
19 January 1, 2010.

20

21 STATUTORY AUTHORITY

22 The amendments are adopted under Transportation Code, §201.101,
23 which provides the commission with the authority to establish
24 rules for the conduct of the work of the department, and more
25 specifically, Transportation Code, §222.103, which provides the

1 commission with the authority to establish rules to finance the
2 cost of a toll facility of a public or private entity.

3

4 CROSS REFERENCE TO STATUTE

5 Transportation Code, Chapter 222, Subchapter E.

1 SUBCHAPTER E. FINANCIAL ASSISTANCE FOR TOLL FACILITIES

2 §27.53. Request.

3 (a) Eligibility.

4 (1) A public or private entity that is authorized by
5 state law to construct or maintain a toll facility is eligible
6 to submit a request for financing under this subchapter.

7 (2) A private entity is not eligible to submit a request
8 for a grant.

9 (3) For requests submitted after January 1, 2010, to be
10 eligible to receive funds under this subchapter, an entity must
11 have adopted an internal ethics and compliance program that
12 satisfies the requirements of §1.8 of this title (relating to
13 Internal Ethics and Compliance Program) and must enforce
14 compliance with that program.

15 (b) Basic request. Except as otherwise noted below with
16 respect to a request for funding of development costs only, a
17 request must be accompanied by:

18 (1) an overview of the project, which shall include a
19 description of the project, the estimated total cost of the
20 project or the preliminary cost estimate of development costs if
21 the request is to fund only development costs, and the proposed
22 use of the requested financial assistance;

23 (2) a list of all proposed funding sources, including,

1 but not limited to, bond revenue, any equity contribution from
2 the requestor, and grants or loans requested under this
3 subchapter, and the proposed use of the funding;

4 (3) the requested financing terms if loan financing is
5 requested;

6 (4) a description of the need, or potential need in the
7 case of a request for financing of development costs, for the
8 project and potential impact on traffic congestion and mobility;

9 (5) a statement of the amount of unencumbered (or
10 unreserved) cash on hand or the requestor's latest audited
11 financial statement;

12 (6) the latest bond rating obtained by the requestor when
13 using similar sources of revenue to be pledged, if applicable;

14 (7) a preliminary design study which includes:

15 (A) an initial route and potential alignments;

16 (B) the project's logical termini and independent
17 utility, if applicable; and

18 (C) potential revisions or changes to state highway
19 system facilities necessitated by the project;

20 (8) a description of the extent to which the requestor's
21 toll collection system or plan for a toll collection system
22 provides interoperability;

23 (9) unless the request is to fund development costs only,

1 official written approval of the project by the governing body
2 of each entity that may become liable for repayment of any
3 financial assistance;

4 (10) a binding commitment that the environmental
5 consequences of the proposed project will be fully considered in
6 accordance with, and that the proposed project will comply with,
7 all applicable local, state, and federal environmental laws,
8 regulations, and requirements;

9 (11) a binding commitment to implement all EPIC; and

10 (12) documentary evidence, to the extent then available,
11 of community involvement in development of the proposed project
12 and public opinion about it.

13 (c) Supplemental information and data. Except as provided
14 in subsection (d) of this section, the requestor shall submit
15 the following supplemental information and data.

16 (1) Financial feasibility study. Unless the request is
17 to fund development costs only, the requestor shall submit a
18 financial feasibility study that includes:

19 (A) a project construction or asset acquisition
20 schedule identifying the timing, amount, and source of all funds
21 required;

22 (B) an analysis of the expected financing period of the
23 project;

1 (C) a pro forma annual cash flow analysis for the
2 expected financing period of the project showing:

3 (i) if applicable, anticipated revenues to be used in
4 repayment by source;

5 (ii) anticipated disbursements for preliminary
6 studies and engineering, construction, EPIC, right of way
7 acquisition, utility adjustments, operations, and maintenance;

8 (iii) anticipated debt service coverage ratios for
9 each debt obligation; and

10 (iv) funds expected to be used to meet the
11 requirements of any sinking funds, reserve funds, and loan
12 amortization payments;

13 (D) a description of the methods used in preparing the
14 financial feasibility study, the assumptions contained in the
15 study, and persons and entities responsible for the preparation
16 of the study;

17 (E) if loan financing is requested under this
18 subchapter, the length of time the financial assistance will be
19 outstanding or obligated;

20 (F) the anticipated interest rates for any and all debt
21 outstanding during the term of the financial assistance;

22 (G) the anticipated benefits to the state and to the
23 requestor resulting from the assistance; and

1 (H) based upon then available information and analyses,
2 a description of how the requested assistance will, to the
3 extent applicable, accomplish the following (it being understood
4 that failure to accomplish all of these items will not
5 necessarily cause a request to be ineligible for financial
6 assistance):

7 (i) expand the availability of funding for
8 transportation projects;

9 (ii) reduce direct state costs;

10 (iii) maximize private and local participation in
11 financing projects; and

12 (iv) improve the efficiency of the state's
13 transportation systems.

14 (2) Project impacts. The requestor shall provide the
15 following information concerning the impact of the project:

16 (A) how the project will be consistent with the
17 Statewide Transportation Plan and, if appropriate, with the
18 metropolitan transportation plan developed by an MPO;

19 (B) if the project is in a nonattainment area, how the
20 project will be consistent with the Statewide Transportation
21 Improvement Program, with the conforming plan and Transportation
22 Improvement Program for the MPO in which the project is located
23 (if necessary), and with the State Implementation Plan; and

1 (C) a preliminary description of any known
2 environmental, social, economic, or cultural resource issues,
3 such as hazardous material sites, impacts on wetlands and other
4 water resources, endangered species, parks, neighborhoods,
5 businesses, historic buildings or bridges, and archeological
6 sites.

7 (d) Waiver of required information or data. The executive
8 director may waive submission of individual items of information
9 or data required by subsection (c) of this section if:

10 (1) the information or data required by this section is
11 not relevant to the project or the financial assistance
12 requested;

13 (2) the department already possesses information or data
14 in a format that may be substituted for the required information
15 or data; or

16 (3) the past performance of the requestor on previous
17 projects developed in collaboration with the department
18 indicates that the requestor will adequately and prudently
19 address the issues and impacts described in the requested
20 information or data.