

**MINUTES
PUBLIC SAFETY COMMISSION
April 15, 2005
Austin, Texas**

The Public Safety Commission met in Austin, Texas on April 15, 2005. Attending the meeting were Chairman Colleen McHugh and Commissioners Carlos Cascos and Ernest Angelo, Jr.

DPS Staff members present:

Tommy Davis, Director
David McEathron, Assistant Director
Laura Font, Accounting & Budget Control
Randy Elliston & Lamar Beckworth, Highway Patrol Division
Kent Mawyer & Gary Stone, Criminal Law Enforcement
Burt Christian, Administration
Judy Brown, Angie Parker, Greg Gloria, Linda Boline & Claire McGuinness, Driver License
Ray Coffman, Texas Rangers
Farrell Walker, Office of Audit & Inspection
Mary Ann Courter, General Counsel
Ed Kelly, Information Management Service
Rick Kautz, Information Resource Section
David Outon, Internal Affairs
Michael Kelley, Legislative Liaison
Dorothy Wright, Secretary

No guests were present.

The meeting was called to order by Chairman McHugh. Proper notice had been posted.

- I. **Minutes.** Upon motion by Commissioner Cascos and seconded by Commissioner Angelo, the minutes of the February 28, 2005 meeting were approved.
- II. **Public comment.** There was no public comment.
- III. **Personnel matters, pending and contemplated litigation, ongoing criminal investigations, status of purchase of real property.** The Commission went into Executive Session pursuant to Tex. Gov. Code Secs. 551.071, 551.074, 551.072 & 411.0041 to discuss personnel matters; Special Ranger and Special Texas Ranger commissions; pending and contemplated litigation; status of purchase of real property; and ongoing criminal investigations. Upon reconvening Regular Session, Commissioner McHugh announced that the Commission had discussed personnel matters, pending & contemplated litigation and ongoing criminal investigations. Special Ranger commissions had been considered for DPS retirees Randy Alsup, Milton R. Hall, Donald R. Morris, Francisco Perez, Jr. and Scott Woolery. Upon motion by Commissioner Angelo and seconded by Commissioner Cascos, Special Ranger commissions were approved for the above named individuals.

- IV. **Budget matters.** Laura Font gave the budget report. There was some discussion on the House & Senate recommendations on exceptional items in the Appropriations Bill and proposed riders.
 - A. **Acceptance of donation of easements in Wallisville, Texas for DPS area office.** Burt Christian briefed the Commission on the proposed donation of easements in Wallisville, Texas for the DPS area office. Upon motion by Commissioner Cascos and seconded by Commissioner Angelo, the donation was accepted.
 - B. **Acceptance of donation of DNA analysis equipment from the Fort Worth Police Department.** Kent Mawyer briefed the Commission on the proposed donation of DNA analysis equipment from the Fort Worth Police Department. Upon motion by Commissioner Cascos and seconded by Commissioner Angelo, the donation was accepted for use by the Crime Lab.
- V. **Audit & Inspection report.** Farrell Walker gave the audit & inspection report. There was some discussion on audit recommendations not being implemented in a timely manner.
- VI. **Division reports.** Burt Christian gave the Administration Division report. There was some discussion on the private security licensing and investigation process backlog and building projects. The Texas Highway Patrol Division report was given by Randy Elliston. There was some discussion on traffic stops and STEP activities. Judy Brown gave the Driver License Division report, including an update on DL reengineering, the Garland office compliance program, and court ticket entry automation. The Criminal Law Enforcement Division report was given by Kent Mawyer. There was some discussion on ongoing activities of the various services including immigration law trends, drug seizures and DNA use in crime solving. There was also some discussion on proposed legislation for controlling the methamphetamine problem in Texas. Ray Coffman gave the Ranger Division report. The Information Management Service report was given by Ed Kelly.
- VII. **For adoption.**
 - A. **Proposed amendment to Rule 3.28, 37 TAC Sec. 3.28, relating to the Citation Disposition Receipt Program and the specific circumstances under which a Trooper may utilize the program, as published in 30 TexReg 512, Feb. 4, 2005.** Mary Ann Courter briefed the Commission on the proposed amendment. Upon motion by Commissioner Angelo and seconded by Commissioner Cascos, the attached amendment was unanimously approved for final adoption.
 - B. **Proposed Rules 15.161 & 15.162, 37 TAC Secs. 15.161 & 15.162, relating to implementation of the Driver Responsibility Program, as published in 29 TexReg 10467, Nov. 12, 2004.** Angie Paker briefed the Commission on the proposed rules. Upon motion by Commissioner Cascos and seconded by Commissioner Angelo, the attached rules were unanimously approved for final adoption.

VIII. Proposed legislation. Colonel Davis briefed the Commission on Senate Bill 881 pertaining to Special Rangers.

A motion was made by Commissioner Cascos and seconded by Commissioner Angelo adjourning the meeting.

Read and approved this 19 day of May, 2005.

Commissioner Eric Hight
Chairman

Carl H. Cascos
Member

Ernest Angelo Jr.
Member

TEXAS DEPARTMENT OF PUBLIC SAFETY
ORDER ADOPTING A RULE

On April 15, 2005, the Public Safety Commission (Commission) by majority vote approved rules concerning:

Texas Highway Patrol
Title 37 T.A.C. Part I, Chapter 3
Subchapter B
Section Number 3.28

The Texas Department of Public Safety adopts amendments to Section 3.28, concerning Citation Disposition Receipt Program, without changes to the proposed text as published in the February 4, 2005, issue of the Texas Register (30 TexReg 512).

Amendments to the section are necessary in order to clarify the specific circumstances under which a Trooper may utilize the Citation Disposition Receipt Program.

No comments were received regarding adoption of the amendments.

The amendments are proposed pursuant to Texas Government Code, Section 411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the department's work.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

The effective date of the rules is 20 days after the rules are filed with the Texas Register Division, Office of the Secretary of State.

This order constitutes the order of the Commission required by the Administrative Procedures Act, Government Code, Section 2001.033.


Colleen McHugh, Chairman
Public Safety Commission



TEXAS DEPARTMENT OF PUBLIC SAFETY
ORDER ADOPTING A RULE

On April 15, 2005, the Public Safety Commission (Commission) by majority vote approved rules concerning:

Driver License Rules
Title 37 T.A.C. Part I, Chapter 15
Supchapter F
Section Numbers 15.161 and 15.162

The Texas Department of Public Safety adopts new Sections 15.161 and 15.162 concerning the Driver Responsibility Program, with changes to the proposed text as published in the November 12, 2004, issue of the Texas Register (29 TexReg 10467). These rules will be republished.

Chapter 708 of the Texas Transportation Code grants the department the authority to adopt rules to implement the Driver Responsibility Program. This program was created during the 78th Legislative Session and requires the department to assess fees based on an individual's driver history. The program has two major components, a point system and a conviction surcharge system. Individuals are required to pay the assessed fee, which ranges from \$100 to \$2000, every year for three years.

The statute specifically requires the department to establish rules regarding the acceptance of installment payments. The department has contracted with a vendor to process the surcharge payments. As such, the vendor, acting on behalf of the department, will accept installment agreements to the extent outlined in this rule. This rule will provide necessary information to the general public regarding the use of a vendor and the acceptance of installment agreements under the Driver Responsibility Program.

The department accepted written comments on the proposed rules through March 10, 2005. Written comments were submitted by Marc Fellman, a student attorney with the University of Texas School of Law Criminal Defense Clinic. The department also received correspondence from Rick Habecker of Cedar Park, supporting the Driver Responsibility Program and encouraging the department to offer installments agreements. During the comment period, the department also received input from the State Auditor's Office pertaining to the text of the proposed rules.

At the request of the Texas Criminal Defense Lawyers Association, a public hearing was conducted on March 10, 2005. Comments were received from Richard Segura, an Austin area attorney, and Marc Fellman.

The substantive comments, as well as the department's responses thereto, are summarized below:

Comment: The Notice published on November 12, 2004 states that the points surcharge is based on Class C traffic offenses. However, the moving violations adopted by the department include Class C offenses plus other more serious offenses. This is not explained.

Response: The preamble to the proposed rule contains a brief and generalized synopsis of the Driver Responsibility Program. The department is confident that the information contained in the original publication provided sufficient notice to the public regarding the nature and content of the proposed rules.

Comment: The Notice indicates no fiscal implications to the State as a result of these rules. It is difficult to understand how this can be so since the Fiscal Note explaining HB 3588 explains considerable revenue is expected to be generated as a result of the surcharge fees for the State.

Response: The purpose of the proposed rules is to provide general information to the public regarding the use of a vendor and the acceptance of installment agreements. No fiscal impact with regard to the revenue generated by the Driver Responsibility Program is anticipated as a result of the adoption of the proposed rules.

Comment: The Notice indicates no fiscal implications to local economies and local government as a result of these rules. This statement does not take into account the direct costs of enforcement that will be passed onto local economies as a result of enforcing the rules, in particular the acceleration for a missed payment and licensure suspension. The predictable result of suspending licenses will be an increase in arrests for Driving While License Suspended which will in turn increase costs to local jails and County and Municipal Courts.

Response: The department disagrees with this comment. Proposed 15.162 provides general information regarding installment agreements and advises the public what steps must be taken to enter into an installment agreement, when payments are due and what constitutes a minimum payment. Whether or not an individual enters into an installment agreement has no direct fiscal impact on local economies or local governments. The overall effect of enforcing the provisions of the Driver Responsibility Program, including the potential increase in the number of arrests for Driving While License Invalid, was considered by the Texas Legislature prior to the enactment of HB 3588.

Comment: The failure to properly notify the public as to impact of these rules affects the quality of the comments received and the public's ability to participate. The department should analyze the true costs and republish the rules with the same publicity it advertised the program in its Press Releases.

Response: The department disagrees with this comment. The agency has complied with all statutory requirements related to this rulemaking process and is confident that the information contained in the original publication provided sufficient notice to the public regarding the nature and content of the proposed rules.

Comment: The fiscal impact to individuals is not specified. The Notice should state the precise percentage or range of percentage that the vendor may charge individuals for installments. In other words, the additional cost to individuals for entering into an installment payment as opposed to paying in full should be specified in the rules.

Response: The department disagrees with this comment. The purpose of proposed 15.162 is to provide general information to the public regarding installment agreements. The Surcharge Notice mailed to every individual subject to a surcharge requirement provides specific information pertaining to the actual amount of the surcharge and the additional fees associated with an installment agreement.

Comment: 15.161(a) indicates that a vendor will be sending notices to individuals. Texas Transportation Code, Section 708.151 requires that the department and not the vendor send the notice. This is an important distinction because the department is a government body that does not have any pecuniary conflict of interest and will not directly profit from the enforcement or non-enforcement of any particular provision.

Response: The department disagrees with this comment. Texas Transportation Code, Section 708.155 provides that the department may contract with a private vendor *for the provision of services* for the collection of surcharges receivable and related costs. The department has construed this provision to permit the agency to contract with a vendor to perform all necessary tasks to ensure the efficient implementation of the Driver Responsibility Program, including sending notices, collecting fees and other related administrative functions. The department's objective is to enforce the law and the vendor, as an agent of the department, is held to the same standard.

Comment: 15.161(b) requires the public to make payments through the vendor. This does not serve a public purpose but only ensures the vendor collects its fee. It is in the public interest for individuals to the extent possible to directly pay DPS. The rules should make an allowance for individuals to pay DPS.

Response: The department disagrees with this comment. As previously indicated, the efficient administration of the Driver Responsibility Program requires that the vendor handle general administrative aspects of the program, including the collection process. As such, the suggested amendment is not required.

Comment: 15.161(c) does not define "additional cost" and the term is not defined in the statute. Is this the same as "related cost" in Chapter 708.155 of the Transportation Code? The ambiguity inherent in failing to define this term would permit the vendor and/or DPS to later change or add to the amounts or nature of the charges defined as "additional costs" without notifying the public. The statutory authority to do this is not present in the statute unless the term is strictly related to costs of either: (1) a credit card transaction in which the vendor or DPS incurs a fee; or (2) attorneys fees to collect on a surcharge.

Response: The department used the term "additional costs" to mean "related costs." However, based on this comment, the proposed rule has been amended to reference the term "related costs" as utilized in Texas Transportation Code, Section 708.155. For purposes of clarification, "related costs" are optional service fees charged in addition to the vendor's fee, including credit card transaction fees, electronic check service fees and partial payment fees associated with installment agreements. General information regarding these costs is contained in the Surcharge Notice mailed to every individual subject to a surcharge requirement.

Comment: 15.161(c) does not define "fails to pay the... any additional cost." This does not specify what procedure is due to an individual if the failure to pay occurs because of an error of the Department of Public Safety or an error of the vendor. This does not specify whether any conditions justify, mitigate, or excuse the payment of the installment fee, such as the preemptive effect of federal law or a judicial order.

Response: The department is committed to maintaining accurate and complete driver records. The agency's standard business practice is to fully investigate any claim regarding a potential error, regardless of whether or not it pertains to a surcharge or cost associated with the Driver Responsibility Program. It is not necessary to create an administrative rule to further define the agency's error resolution process. In addition, the governing statute does not provide for any conditions that justify, mitigate or excuse the payment of any fee associated with the Driver Responsibility Program.

Comment: 15.161 states that an individual that fails to pay any installment fee or related cost will be subject to a revocation action. However, Chapter 708 does not authorize revocation actions, only suspensions. The term "revocation action" should be defined if used and the time period should be specified.

Response: The department agrees with this comment and has amended the proposed rules to change all references from “revocation” to “suspension.”

Comment: 15.162 is entitled “Installment Agreements” yet the installment agreements are never defined or explained. The term “installment agreement” clearly contemplates a written agreement and the failure to provide one will allow for the abuse of Texas citizens by the vendor or its agents. The vendor or its agents could state anything over the telephone to a citizen in order to facilitate a payment. Without a written agreement, Texas citizens do not know what limits have been placed on the vendor and do not know when their rights have been violated.

Response: The department disagrees with this comment. Texas Transportation Code, Section 708.153 does not require the agreement to be formally documented and grants the department the authority to adopt rules governing the payment of surcharges in installments. Proposed 15.162 clearly states what steps must be taken to enter into an installment agreement, when payments are due and what constitutes a minimum payment. The Surcharge Notice mailed to every individual subject to a surcharge requirement provides further information regarding installment agreements.

Comment: 15.162(b) “additional processing fee” would require additional statutory authority that has not been provided for in the statute. This is not a fee that the department can impose to the surcharge by legislative rule. The clear language of the statute defines surcharge amounts and the rules should do in accordance with the text of statute.

Response: The department disagrees with this comment. Texas Transportation Code, Section 708.155 provides that the total amount of compensation received by the vendor may not exceed 30% of the amount of the surcharge and related costs collected. The current contract provides that the vendor will be compensated in an amount equal to 4% of the surcharge assessed. If a person subject to a surcharge requirement elects to pay the surcharge in installments, the contract permits the vendor to charge an additional \$2.50 installment payment fee per payment. The vendor contract specifically states that the total compensation cannot exceed the 30% authorized by the governing statute. As such, the department is within its statutory authority to adopt this rule.

Comment: 15.162(c) allows for an installment agreement to be formed by an individual paying the “minimum amount due.” However, the department does not define the minimum amount due precisely. The department does not specify the “minimum amount due” and reference it to the various surcharged offenses.

Response: The department disagrees with this comment. The minimum amount due is determined by the total surcharge owed. Proposed 15.162(k) advises the public how to determine the minimum payment given a general range of surcharge requirements. Furthermore, the Surcharge Notice mailed to every individual subject to a surcharge requirement provides examples [in dollars] of the minimum amount due.

Comment: 15.162(c) does not specify whether an individual can enter into an installment agreement without being told by the vendor or the department. This is a problem because installment agreements that are created without the knowledge of the individual are void because it is unfair to bind someone to a contract without their knowledge.

Response: The department disagrees with this comment. The decision to enter into an installment agreement rests entirely with the person against whom the surcharge was assessed. As previously stated, proposed 15.162 clearly states what steps must be taken to enter into an installment agreement, when payments are due and what constitutes a minimum payment.

Comment: 15.162(c) states "The individual is not required to provide written declaration of the installment agreement." However, it does not clarify whether the individual has a right to receive an installment agreement from the department or the vendor. A copy of the installment agreement should be sent with the notice letter.

Response: The department disagrees with this comment. Proposed 15.162(c) is intended to simplify the process in that it does not require an official declaration of the intent to enter into an installment agreement. Payment of the minimum amount due automatically establishes an installment agreement. The department does not intend to create a document formalizing the agreement.

Comment: 15.162(c) allows the vendor's acceptance of a payment to determine whether an individual is aware of the consequences of entering into an installment agreement. This is counterintuitive and violates fundamental principles of fairness and contract law. Whether an individual is aware of the consequences of any action cannot be defined by whether the vendor accepts a payment from that person.

Response: The department agrees that the language contained in proposed 15.162(c) may be confusing to the public. Based on this comment, the department has amended proposed 15.162(c) by deleting the phrase "and denotes that the individual is aware of the agreement as well as the consequences for failing to uphold the agreement."

Comment: 15.162(d) requires payment in 30 days or implies revocation will occur. There is no statutory authority for revocation. This should be excised from the rules as an ultra vires action of the agency and also as an action that does not benefit the public interest.

Response: As previously stated, the department has amended the proposed rules to change all references from "revocation" to "suspension."

Comment: The department should not suspend any licenses if the person cannot pay because the person is indigent. Texas law has long recognized that if a person lacks financial resources and can make a showing to that effect, the Excessive Fines Clause of the Texas Constitution requires that the individual be accommodated. The department should develop rules allowing for an individual to show proof of indigent status.

Response: The department disagrees with this comment. The Texas Legislature, in enacting HB 3588, could have provided a mechanism by which the department was required to consider a person's ability to pay a surcharge assessed under the Driver Responsibility Program. However, absent statutory language to that effect in Texas Transportation Code, Chapter 708, the department does not have the authority to adopt a rule that waives a surcharge for certain individuals based on indigent status.

Comment: 15.162(e) allows for a revocation to be lifted if an individual has made no payments but does not provide for the lifting of a revocation if payments have in fact been made after an installment agreement is

made but have been late. This situation is counterintuitive and in fact provides a reverse incentive for individuals NOT to make any payments for as long as possible. The department should provide rules and mechanism for all revocations/suspensions to be lifted.

Response: The department disagrees with this comment. A person who has not yet entered into an installment agreement may do so at any time. Proposed 15.162(e) is designed to encourage individuals who have been suspended to comply with the law. However, individuals who have demonstrated that they will not comply with the terms of an installment agreement will not be permitted to enter into another agreement for the same surcharge requirement. The plain language of Texas Transportation Code, Section 708.153(b)(2) clearly contemplates this situation and authorizes the department to adopt a rule that ensures the orderly collection of surcharge payments.

Comment: 15.162(f) is arbitrary and capricious. It does not define "attempt to enter into an installment agreement." It is unclear what behavior or conduct the department is attempting to penalize with a revocation action by virtue of creating this rule. The definition of entering into an installment agreement is to make the minimum payment. How then can one attempt to enter into an installment agreement without in fact making that minimum payment? The rule fails to provide sufficient notice as to what conduct is prohibited. The department should specify what specifically it considers an "attempt to enter into" and also not include a good faith mistake or inability to pay as grounds for revocation.

Response: The department disagrees that proposed 15.162(f) is arbitrary and capricious. However, based on this comment, the proposed rule has been amended to clarify that submission of less than the minimum payment needed to establish an installment agreement in a timely manner will result in suspension action. As previously stated, indigent status does not excuse the obligation to pay the surcharge. Furthermore, the department cannot excuse the failure to pay a surcharge due to a good faith mistake absent specific statutory authority.

Comment: In 15.162(f), the term "specific surcharge requirement" is not defined. If the department means the assessment for the entire year, then it should state that in the rule. However, because the statute does not require such a severe penalty, the department should allow an individual to cure any default or inability to enter an agreement if good cause is shown. The department should adopt rules defining good cause.

Response: The department disagrees with this comment. "Specific surcharge requirement" refers to the total surcharge for which the individual, for whatever reason, failed to submit the minimum payment. This reference does not require further definition. As previously stated, individuals who have demonstrated that they will not comply with the terms of an installment agreement will not be permitted to enter into another agreement for the same surcharge requirement.

Comment: In 15.162(f) the term "associated fees" is not defined. The department's authority to require payment of any "associated fees" is not provided for in the statute. Prior to making rules that require or impose additional financial burdens on individuals, the department must have additional statutory authority that has not been provided for in the statute. This is not a fee that the department can impose to the surcharge by legislative rule. The clear language of the statute defines surcharge amounts and the rules should do in accordance with the text of the statute.

Response: The department used the term “associated fees” to mean “related costs.” However, based on this comment, the proposed rule has been amended to reference “related costs” as utilized in Texas Transportation Code, Section 708.155. As previously indicated, “related costs” are optional service fees charged in addition to the vendor’s fee, including credit card transaction fees, electronic check service fees and partial payment fees associated with installment agreements. General information regarding these costs is contained in the Surcharge Notice mailed to every individual subject to a surcharge requirement.

Comment: 15.162(g) states the surcharge is due on the same date each month. However, this requirement does not take into account the fact that the dates for some individuals each month will fall on Saturdays and Sundays as well as official holidays. The rules should specify that an official holiday or weekend provides a grace period until the next working day.

Response: The department disagrees that the rule should be amended to specifically provide for a grace period. The vendor processes payments on Saturdays. However, current business practice provides that payments due on a Sunday or holiday are considered timely if received by the next business day. To further clarify payment due dates, the department has amended the text of proposed 15.162(g) by removing the word “received” to clarify that the payment due date is based on the date of the Surcharge Notice, not the date that the Surcharge Notice was received. Also, proposed 15.162(g)(1) has been amended to reflect the current business practice of extending the payment due date to the next business day if the payment is due on the 29th, 30th or 31st in months that do not have those dates.

Comment: 15.162(h) uses the term “fails to provide a timely payment” without defining that term. Is timely payment within the discretion of the vendor to determine? If so, the vendor has a conflict of interest. May the vendor bargain with the individual to require more frequent payments and thus increase its overall interest rate in the form of “partial payment fees?” This sort of conflict of interest will lead to unequal application of the law based on factors that the Legislature neither contemplated nor desired. The rule should specifically define “timely payment” and provide for a grace period for good cause so as to prevent the vendor from applying its own standards that may be unequal and self-interested.

Response: The department disagrees with this comment. Proposed 15.162(g) specifically provides that subsequent installment payments are due each month on the same date as the date of the Surcharge Notice. The Surcharge Notice advises the person that the initial payment must be received within thirty days from the date of the letter. The vendor does not select the initial payment date, nor can the vendor change the date for future payments. Therefore, no further clarification is required.

Comment: Insofar as 15.162(h) imposes a revocation for the failure to make a timely payment, it exceeds the statutory authority of the department. Chapter 708 specifically states what conduct authorizes the department to suspend a license, and a late payment is not specified as a grounds upon which the department may suspend a license. Therefore, the department should not include a penalty at all.

Response: The department disagrees with this comment. Texas Transportation Code, Section 708.152(a) provides that if the person fails to pay the amount of a surcharge or fails to enter into an installment agreement before the 30th day after the date the department sends notice, the license is suspended. Furthermore, Texas Transportation Code, Section 708.153(b)(2) authorizes the department to adopt a rule which declares the amount of the unpaid surcharge immediately due and payable if the person fails to make a required

installment payment. As such, the department has the authority to take suspension action if an individual fails to make a timely installment payment and is considered in default of the agreement.

Comment: 15.162(h) insofar as it improperly delegates the administrative responsibilities of the department to the department's vendor is not in the public interest. Chapter 708 provides for the department to perform functions that are essential governmental and/or police exercises such as taxing or revoking a license. Because this rule delegates authority to a private vendor without clear safeguards and such delegation offends the structure and provisions of Article II and Article III of the Texas Constitution, the rule should not be adopted.

Response: The department disagrees with this comment. Texas Transportation Code, Section 708.155 provides that the department may contract with a private vendor *for the provision of services* for the collection of surcharges receivable and related costs. The department has construed this provision to permit the agency to contract with a vendor to perform all necessary tasks to ensure the efficient implementation of the Driver Responsibility Program, including sending notices, collecting fees and other related administrative functions. Furthermore, proposed 15.162(h) does not improperly delegate any administrative responsibilities of the department to the vendor. Employees of the department, not the vendor, actually enter the suspension information on the person's driver record.

Comment: 15.162(h) includes the term, "Defaults on the installment agreement" however, that term is not defined. Is the decision to declare someone in default the department's or the vendor's? If so, the vendor has a conflict of interest. May the vendor bargain with the individual to require more frequent payments and thus increase its overall interest rate in the form of "partial payment fees?" This sort of conflict of interest will lead to unequal application of the law based on factors that the Legislature neither contemplated nor desired. The rule should specifically define "Defaults on the installment agreement" and provide for a grace period for good cause so as to prevent the vendor from applying its own standards that may be unequal and self-interested.

Response: The department disagrees with this comment. Failure to provide a timely payment constitutes default on the installment agreement as described in proposed 15.162(h). The Surcharge Notice advises the person that payment must be received within thirty days from the date of the letter and further states the consequences for failure to provide a timely payment. As previously stated, the vendor does not have the authority to change the date for future payments. No further clarification is required.

Comment: 15.162(h) "individual will not be eligible to enter into another installment agreement." There is no statutory authority to prevent or limit the number of installment agreements that a person may enter into with the vendor. The Legislature intends individuals to be able to pay out the surcharge over time and it contravenes the intent of Chapter 708 to accelerate the entire balance of the surcharge for a single late payment. The Legislature clearly could have but did not authorize such action in the statute.

Response: The department disagrees with this comment. Texas Transportation Code, Section 708.153(b)(2) specifically authorizes the department to adopt a rule which declares the entire amount of the unpaid surcharge immediately due and payable if the person fails to make a required installment payment.

Comment: 15.162(h), statement that "The revocation will remain in effect until the surcharge and associated fees are paid in full" is beyond the statutory authority of the department because the statute does not authorize

a revocation. Additionally, the revocation or suspension cannot be applied to the “associated fee(s)” because this is essentially a collection action to benefit a private vendor. The state is not benefiting through the collection of the “associated fees.”

Response: As previously stated, all references to the term “revocation” have been changed to “suspension” and all references to “associated fees” have been changed to “related costs.” Texas Transportation Code, Section 708.152(b) provides that a license remains suspended until the person pays the amount of the surcharge and any related costs. As such, the department is within its statutory authority to adopt such a rule.

Comment: 15.162(i) insofar as it allows the vendor to continue to receive payments despite keeping a license revoked is not in the public interest. The rule does not explain or define when the driver’s license must be restored. The rule appears to allow the department and its vendor to receive and enforce a contract without providing consideration to the individual making the payments. Because this rule is unfair to members of the public and only appears to benefit the vendor, it should be modified so as to provide as long as payments are made, the individual’s license should not be suspended.

Response: The department disagrees with this comment. Proposed 15.162(i) *permits* the person to continue to make payments, but does not require such action on the part of the individual. Following a default, there is no longer an installment agreement between the parties and the person is not obligated to pay the partial payment fee. Further, the proposed rule specifically states that the license will remain revoked [suspended] until the specific surcharge has been paid in full.

Comment: 15.162(i) insofar as it contemplates revocation of all driving privileges is ultra vires. The department lacks statutory authority for this action. Chapter 708 only authorizes an automatic suspension. Because this clearly exceeds the statutory authority of the department, it should not be adopted.

Response: As previously stated, all references to the term “revocation” have been changed to “suspension.”

Comment: 15.162(k) “partial payment fee” is not defined. The statute does not authorize the imposition of a partial payment fee. Therefore, the rules exceed the statutory authority of the agency and should be modified to exclude any partial payment fees.

Response: The department disagrees with this comment. As previously described, partial payment fees are optional service fees associated with an installment agreement. Texas Transportation Code, Section 708.155 provides that the total amount of compensation received by the vendor may not exceed 30% of the amount of the surcharge and related costs collected. The current contract provides that the vendor will be compensated in an amount equal to 4% of the surcharge assessed. If a person subject to a surcharge requirement elects to pay the surcharge in installments, the contract permits the vendor to charge an additional \$2.50 installment payment fee per payment. As such, the department is within its statutory authority to adopt such a rule.

Comment: 15.162(j) is flawed because it does not clarify whether individuals who received a single reference number for more than one surcharge may direct their surcharge payments to be divided up between the assessed surcharges.

Response: The department disagrees with this comment. According to current business practices, each surcharge requirement is identified by a unique reference number. This number is contained in the Surcharge

Notice mailed to each individual subject to surcharge a requirement. Individuals who owe more than one surcharge requirement may establish an installment agreement for each surcharge owed. Proposed 15.162(j) merely establishes guidelines for how multiple surcharge requirements will be processed by the vendor.

Comment: 15.162(k) is vague and confusing because it is not clear whether the "total amount due" refers to the total amount due for an annual assessment or the total amount due for a projected three year period. It does not make sense to allow multiple small payments more often than once a month as this will result in individuals paying more in charges to the vendor than in payments directed towards principal amounts. Such a rule is not in the public interest.

Response: The department disagrees with this comment. The "total amount due" only refers to the assessment for the current year since the surcharge is not yet due for future years. Installment payments are only due once per month as provided in proposed 15.162(g). Further, proposed 15.162(l) provides that the balance may be paid in fewer payments, which allows the person to avoid additional partial payment fees.

Comment: The rules provide no mechanism for an individual to dispute a surcharge, cost or fee that has been assessed in error. Such a provision should be developed and proposed prior to the adoption of any rules regarding installment contracts.

Response: The department disagrees with this comment. As previously stated, the agency's standard business practice is to fully investigate any claim regarding a potential error, regardless of whether or not it pertains to a surcharge or fee associated with the Driver Responsibility Program. It is not necessary to create an administrative rule to further define the agency's error resolution process.

Comment: The rules provide no mechanism for an individual to dispute whether the department or its vendor properly sent notice. Such a provision should be developed and proposed prior to the adoption of any rules regarding installment contracts.

Response: The department disagrees with this comment. As previously stated, the agency's standard business practice is to fully investigate any claim regarding a potential error, regardless of whether or not it pertains to a surcharge or fee associated with the Driver Responsibility Program. It is not necessary to create an administrative rule to further define the agency's error resolution process.

Comment: The rules do not make clear how individual's protected and confidential criminal history information has been protected from disclosure to the vendor and/or the general public. For example, what restrictions exist on the ability of the vendor to use information gained from individuals for pecuniary gain. May the vendor develop a database of information that it can resell to other information brokers based upon information provided in the course of entering installment agreement and making payment collections.

Response: The department disagrees with this comment. The purpose of the proposed rules is to provide general information to the public regarding the use of a vendor and the acceptance of installment agreements. This comment pertains to matters addressed in the contract between the department and the vendor and is outside the scope of the proposed rules.

Comment: The rules do not explain whether the vendor may disclose information about an individual's surcharge to another person to allow the other person to make a payment on behalf of an individual. May

another person make a payment on behalf of someone who has received a surcharge and if so, to what information about the underlying reason for the surcharge is the person entitled. Considering that the significant privacy interests may be implicated for large numbers of the population, the rules should address this issue.

Response: The department disagrees that the proposed rules should address this situation. A person may make a payment on behalf of another person. However, the person making the payment must provide the vendor with the appropriate information in order for the vendor to credit the payment to the correct surcharge. The vendor does not provide any information to third parties to facilitate the payment.

Comment: The rules do not explain the nature of the Driver Responsibility Program surcharge. Are the surcharges considered criminal fines, civil fines, taxes, or criminal penalties or punishment. The department's interpretation may determine the extent to which a variance exists between the enforcement of the statute for particular individuals, especially debtors, and an inconsistency with federal law, such as order of a United States Federal Bankruptcy Court.

Response: The department disagrees that the proposed rules should address this issue. The purpose of the proposed rules is to provide general information to the public regarding the use of a vendor and the acceptance of installment agreements. This comment addresses issues which are outside the scope of the proposed rules.

Comment: The department's statutory authority to use a vendor is limited to the collection of "surcharges receivable." The rules as proposed contemplate the use of a vendor to provide notice, assess the surcharge, monitor compliance payments, initiate installment agreements, and declare defaults. The department lacks the statutory authority to use a vendor as contemplated in the proposed rules. The rules should be rewritten to limit the ability of the vendor to collect delinquent surcharges.

Response: The department disagrees with this comment. Texas Transportation Code, Section 708.155 provides that the department may contract with a private vendor *for the provision of services* for the collection of surcharges receivable and related costs. The department has construed this provision to permit the agency to contract with a vendor to perform all necessary tasks to ensure the efficient implementation of the Driver Responsibility Program, including sending notices, collecting fees and other related functions. As such, the department is within its statutory authority to adopt the rule as written.

Comment: It does not appear that the proposed rules provide for proper and effective notice which is a prerequisite to collecting payment. For example, commingling credit card fees, processing fees, related fees, contract fees, partial payment fees, and other "fees" into a single amount asserted to be the surcharge amount implies to the individuals receiving the notice that the entire amount is owed to the State of Texas as an assessed surcharge. The rules should provide for a clear and unambiguous notice of the assessment of the surcharge amount which consists of only the statutorily authorized figure as set on in the offense categories contained in Chapter 708.

Response: The department disagrees with this comment. The proposed rules are designed to provide basic information to the public pertaining to the Driver Responsibility Program and installment agreements. The Surcharge Notice mailed to every individual subject to a surcharge requirement provides specific information regarding the total amount due, which includes the statutory surcharge assessment and the vendor's fee. In

addition, the correspondence provides general information regarding optional service fees such as credit card fees, check by phone services and partial payment fees. A person is not obligated to pay the respective optional service fee unless an optional service is utilized.

Comment: The rules fail to provide for the vendor to utilize creditor cards for payments. If the department intends to allow individuals to make payments with credit cards or to establish an installment agreement through the use of a credit card, the department's current rules are not effective.

Response: The department disagrees with this comment. The proposed rules were not intended to address the various methods of payment. The Surcharge Notice mailed to every individual subject to a surcharge requirement provides specific information on how to contact the vendor to facilitate payment by credit card.

Comment: The rules are fundamentally flawed in that they fail to protect members of the public from the fundamental conflict of interest created by having a for-profit vendor notify and collect the surcharges instead of the Department of Public Safety which is a governmental agency and is not a profit-making entity. The rules should clearly inform individuals of their rights and limit the discretion of the vendor or should provide an alternative to the individuals having to utilize a for profit vendor.

Response: The department disagrees with this comment. Texas Transportation Code, Section 708.155 provides that the department may contract with a private vendor *for the provision of services* for the collection of surcharges receivable and related costs. As such, the proposed rules are within the department's statutory authority to adopt. The department does not intend to establish an alternate mechanism for notification and collection processes related to the Driver Responsibility Program.

Comment: In order to understand fully the nature of the installment rules as proposed, the department should make available by publication in the *Texas Register* or on the department's website, the contract between it and its vendor along with any amendments or modifications that have been made to the contract and other binding agreements between it and the vendor. Because the vendor's conduct towards member of the public will be governed in such an agreement, it is impossible to fully analyze the extent to which these rules may or may not conflict with the written agreement between the Department of Public Safety and its vendor and/or any other vendors or subcontractors utilized.

Response: The department disagrees with this comment. The department has complied with all statutory requirements with regard to this rulemaking process. A person interested in reviewing specific documentation related to the implementation of the Driver Responsibility Program may make an official request for information in accordance with state law and agency policy.

Comment: Proposed 15.162(k)(3) and (4) authorize installment agreements which extend beyond the time period authorized by the governing statute.

Response: Based on this comment, the department has corrected this oversight by amending proposed 15.162(k)(3) and (4) to reflect the specific amounts and time periods referenced in Texas Transportation Code, Section 708.153(b).

Comment: The proposed rules do not address how the department will determine an alcohol concentration of 0.16 or greater in order to assess a higher surcharge or how the department will assess the surcharge on an individual who receives a second/subsequent DWI before the first offense is adjudicated.

Response: The department disagrees that the proposed rules should address this issue as they do not concern the mechanism by which the department actually assesses the surcharge. The rules are limited in scope and are designed to advise the public regarding the use of a vendor and installment agreements. As previously indicated, the department has a business process by which a person subject to a surcharge requirement may verify the accuracy of the information contained on the driver history. It is not necessary to create an administrative rule to further define the agency's error resolution process.

Comment: The proposed rules do not clarify when the assessment is made or if the assessment is made by the vendor or the department. Further, the rules do not specify how the department intends to differentiate between those individuals who received surcharges during the backlog period.

Response: The department disagrees that the proposed rules should address this issue as they do not concern the mechanism by which the department actually assesses the surcharge. The Surcharge Notification mailed to every individual subject to a surcharge requirement provides information regarding when the department will assess a surcharge and describes the point system and intoxication offense surcharges. The proposed rules apply to all individuals, regardless of whether or not the surcharges were assessed during the backlog period.

Comment: The proposed rule is unclear as to whether the installment agreement is between the department and the person or the vendor and the person.

Response: The department disagrees with this comment. The vendor serves as an agent of the department. Proposed 15.162(a) provides that the department, through the vendor, will accept installment payments.

Comment: The rule does not address what safeguards are in place with respect to fair debt collections and how an individual may report a complaint against the vendor.

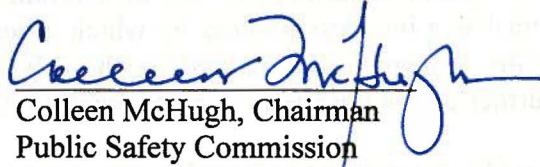
Response: The department disagrees that the proposed rules should address this issue. As previously stated, the agency's standard business practice is to fully investigate any claim regarding a potential error, regardless of whether or not it pertains to a surcharge or fee associated with the Driver Responsibility Program. Likewise, the department would fully investigate any complaint against the vendor. It is not necessary to create an administrative rule to further define this process.

The new sections are adopted pursuant to Texas Government Code, Section 411.004(3), which authorizes the Public Safety Commission to adopt rules considered necessary for carrying out the Department's work; and Texas Transportation Code, Section 708.002 and Section 708.153.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

The effective date of the rules is 20 days after the rules are filed with the Texas Register Division, Office of the Secretary of State.

This order constitutes the order of the Commission required by the Administrative Procedures Act, Government Code, Section 2001.033.


Colleen McHugh, Chairman
Public Safety Commission

