

The Texas Forensic Science Commission (“Commission”) proposes amendments to 37 Tex. Admin. Code, §§651.1 - 651.11 and §§651.101 - 105 to correct references to the Texas Department of Public Safety (“DPS”) and internal rule citations. The Commission also proposes the repeal of §651.12. The amendments and the repeal are necessary to update rule language to reflect the transfer of the rules from Title 37, Part 1, Chapter 28 to new Part 15, Chapter 651. The transfer was made in accordance with Senate Bill 1287, which was passed in the 84th Legislative Session.

Fiscal Note. The Commission has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposal.

Public Benefit/Cost Note. The Commission has also determined that for each year of the first five years the proposed amendments and repeal are in effect, the anticipated public benefit will be accurate and updated rules.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code § 2006.002(c) and (f), the Commission has determined that the proposed amendments and repeal will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any person who is required to comply with the rules as proposed.

Takings Impact Assessment. The Commission has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code § 2007.043.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh Tomlin, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by November 29, 2015 to be considered by the commission.

Statutory Authority. The amendments are proposed under Tex. Code Crim. Proc. art 38.01 § 4-d.

Cross reference to statute. The proposal affects 37 Tex. Admin. Code §§ 651.1 – 651.11 and §§ 651.101 – 651.105.

Title 37. PUBLIC SAFETY AND CORRECTIONS

Part 15. TEXAS FORENSIC SCIENCE COMMISSION

Chapter 651. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES

SUBCHAPTER A. ACCREDITATION

651.1. Purpose.

(a) Generally. This subchapter contains the Texas Forensic Science Commission (Commission) [director's] rules adopted under Government Code, §411.0205, that govern:

(1) the recognition of an accrediting body by the Commission [director]; and

(2) the accreditation of an individual laboratory or other entity by the Commission [director].

(b) Accreditation sequence. To be accredited by the Commission [director] under this subchapter, a laboratory must first be accredited by a recognized accrediting body.

(c) Source of evidence predicate. The Code of Criminal Procedure, Article 38.35, requires Commission [DPS] accreditation of an individual laboratory or other entity for admission of evidence or testimony if the laboratory or entity conducts a forensic analysis of physical evidence for use in a criminal proceeding.

(d) Statutory Commission [DPS] accreditation. A laboratory may apply to the Commission [director] for [statutory DPS] accreditation if accreditation is required for evidence admissibility under Code of Criminal Procedure, Article 38.35.

651.2. Definitions.

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

(1) Environmental testing--An analysis by a laboratory conducted for the purpose of determining the chemical, molecular, carcinogenic, radioactive, or pathogenic components of air, water, soil, or other environmental media for use in an administrative, civil, or criminal matter.

(2) Forensic analysis--has the meaning assigned by Code of Criminal Procedure, Article 38.35. The term does not include:

(A) an expert examination or test excluded under Code of Criminal Procedure, Article 38.35, subsection (a)(1);

(B) an expert examination or test conducted principally for the purpose of scientific research, medical practice, civil or administrative litigation, or other purpose unrelated to determining the connection of physical evidence to a criminal action;

(C) the location, identification, collection, or preservation of physical evidence by laboratory or investigative personnel unless the activity is integral to an expert examination or test; or

(D) field, spot, screening, or other presumptive testing unless the activity is integral to an expert examination or test for which an expert opinion is rendered.

(3) Forensic pathology--Includes that portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician. The term does not include a toxicology or other laboratory associated with the office of a medical examiner.

(4) Laboratory--An entity that conducts a forensic analysis of physical evidence for use in a criminal proceeding. The term includes a forensic DNA laboratory and a CODIS user laboratory.

(5) Physical evidence--has the meaning assigned by Code of Criminal Procedure, Article 38.35.

651.3. Recognition Process.

The Commission [director] shall recognize an accrediting body under this section if the Commission [director] determines that the accrediting body:

(1) issues an accreditation that is accepted throughout the relevant scientific community and appropriate or available to a laboratory;

(2) has established adequate accreditation criteria reasonably likely to ensure trustworthy forensic analysis;

(3) requires a periodic competency audit or review of the personnel, facilities, and procedures employed by a laboratory to conduct a forensic analysis; and

(4) withholds, grants, or withdraws its accreditation of a laboratory based on its own determination of a reasonable likelihood of meaningful corrective action for each deficiency noted during the periodic audit or review.

651.4. List of Recognized Accrediting Bodies.

(a) The Commission [director] recognizes the accrediting bodies in this subsection, subject to the stated discipline or subdiscipline limitations:

(1) American Board of Forensic Toxicology (ABFT)--recognized for accreditation of toxicology discipline only.

(2) American Society of Crime Laboratory Directors, Laboratory Accreditation Board (ASCLD/LAB)--recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter.

(3) ANSI-ASQ National Accreditation Board (ANAB) formerly known as Forensic Quality Services (FQS and FQS-I) or National Forensic Science Technology Center (NFSTC)--recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter.

(4) Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services (HHS/SAMSHA), formerly known as the National Institute on Drug Abuse of the Department of Health and Human Services (HHS/NIDA)--recognized for accreditation of toxicology discipline in the subdiscipline of Urine Drug Testing for all classes of drugs approved by the accrediting body.

(5) College of American Pathologists (CAP)--recognized for accreditation of toxicology discipline.

(6) American Association for Laboratory Accreditation (A2LA)--recognized for accreditation of all disciplines which are eligible for accreditation under this chapter.

(b) If an accrediting body is recognized under subsection (a) of this section and the recognized body approves

a new discipline, subdiscipline, or procedure, the Commission [director] may temporarily recognize the new discipline, subdiscipline, or procedure. A temporary approval shall be effective for 120 days.

651.5. Disciplines and Subdisciplines Subject to Commission [DPS] Accreditation.

(a) 'Forensic analysis'/recognized accreditation. This section describes a discipline or subdiscipline that involves forensic analysis for use in a criminal proceeding and for which accreditation is available from a recognized accrediting body.

(b) By entire discipline. A laboratory may apply [to the director] for Commission [DPS] accreditation for one or more of the following disciplines:

(1) controlled substances;

(2) toxicology;

(3) biology;

(4) firearms/toolmark;

(5) questioned documents;

(6) trace evidence; or

(7) other discipline if approved by a recognized accrediting body and the Commission [director].

(c) Limited to subdiscipline. A laboratory may apply [to the director] for Commission [DPS] accreditation limited to one or more of the following subdisciplines:

(1) under the controlled substances discipline, subdiscipline may include controlled substances marihuana, precursor analysis, and clandestine laboratory analysis;

(2) under the toxicology discipline, subdiscipline may include forensic toxicology, urine drug testing, and blood alcohol analysis;

(3) under the biology discipline, subdiscipline may include biology, serology, and DNA;

(4) under the firearms/toolmark discipline, subdiscipline may include: firearms, ballistics, and toolmarks;

(5) under the questioned documents discipline, subdiscipline may include questioned documents, handwriting, and ink analysis (including forensic handwriting comparison);

(6) under the trace evidence discipline, subdiscipline may include: fire debris, explosives, fibers, gun shot residue, glass, hairs, paint, filaments, and unknown substances; and

(7) other discipline and its related subdiscipline if accredited by a recognized accrediting body and the Commission [director].

(d) A laboratory may choose to assign a particular subdiscipline to a different administrative section or unit in the laboratory. For example, the subdiscipline of impression evidence, including footwear, tiretrack, and similar impression evidence, may be administratively assigned by the laboratory to its trace evidence section, firearms section, or questioned document section. The Commission [director] deems

impression evidence to be a subdiscipline of several disciplines under this subchapter, including trace evidence, firearms/toolmark, or questioned documents.

(e) If an accreditation for a subdiscipline is accompanied by the term 'only' or a similar notation, the Commission [director] will deem the accreditation to exclude other subdisciplines in that discipline.

(f) Accreditation of a confirmation test procedure does not carry automatic accreditation of an associated field, spot, screening, or other presumptive test.

651.6. Disciplines, Subdisciplines, and Procedures to Which Statutory Commission [DPS] Accreditation Does Not Apply.

This section describes disciplines, subdisciplines, or procedures excluded from the definition of forensic analysis or otherwise exempted by the Code of Criminal Procedure, Article 38.35, or by this subchapter based on their nature.

(1) This paragraph describes a discipline, subdiscipline, or procedure that is excluded from the definition of forensic analysis or otherwise exempted by the Code of Criminal Procedure, Article 38.35, and for which no recognized accreditation is appropriate or available. A laboratory may not apply for Commission [to the director for DPS] accreditation for:

(A) breath specimen testing under Transportation Code, Chapter 724;

(B) latent print examination;

(C) digital evidence (including computer forensics, audio, or imaging); or

(D) an examination or test excluded by rule under Government Code, §411.0205(c).

(E) the portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician.

(2) This paragraph describes a discipline, subdiscipline, or procedure that does not normally involve forensic analysis of physical evidence for use in a criminal proceeding and for which recognized accreditation is inappropriate or unavailable. A laboratory may not apply for Commission [to the director for DPS] accreditation for:

(A) forensic photography;

(B) non-criminal paternity testing;

(C) non-criminal testing of human or nonhuman blood, urine, or tissue;

(D) a crime scene search team (whether or not associated with an accredited laboratory) if the team does not engage in forensic analysis because it only engages in the location, identification, collection, or preservation of physical evidence and the activity is not integral to an expert examination or test;

(E) other evidence processing or handling that is excluded under §28.142(2) of this title (relating to Definitions); or

(F) other discipline or subdiscipline so determined by the Commission [director].

651.7. Disciplines, Subdisciplines, and Procedures Exempt from Statutory Commission [DPS] Accreditation.

(a) This section describes a discipline, subdiscipline, or procedure that is 'forensic analysis' but is not subject to accreditation by one or more recognized accrediting bodies.

(b) Even though a discipline or subdiscipline is forensic analysis, the Commission [director] has determined that no accreditation is appropriate or available from a recognized accrediting body for the following disciplines, subdisciplines, or procedures and a laboratory may not apply for Commission [to the director for DPS] accreditation for:

(1) sexual assault examination of the person;

(2) forensic anthropology, entomology, or botany;

(3) environmental testing;

(4) facial or traffic accident reconstruction;

(5) serial number restoration;

(6) polygraph examination;

(7) voice stress, voiceprint, or similar voice analysis;

(8) forensic hypnosis;

(9) statement analysis;

(10) profiling; or

(11) other discipline or subdiscipline so determined by the Commission [director], including those identified and listed at the Commission's [department's] website.

(c) A request for exemption shall be submitted in writing to the Commission [director].

651.8. Full Commission [DPS Accreditation].

(a) Issuance and renewal. The Commission [director] may issue or renew accreditation under this section.

(b) Application. An applicant for full Commission [DPS] accreditation shall complete and submit to the Commission [director] a current Laboratory Accreditation Form [form LAB-5] and attach copies of the following:

(1) an accreditation certificate and letter of notification of accreditation from a recognized accrediting body; and

(2) each document provided by the recognized accrediting body that identifies the discipline or subdiscipline for which the laboratory has received accreditation and any limitation or restriction regarding that accreditation.

(c) Additional information. The Commission [director] may require additional information to properly evaluate the application either as part of the original application or as supplemental information.

(d) Reports to the Commission [director].

(1) If accredited by ASCLD/LAB, a laboratory shall provide the Commission [director] with a copy of each Annual Accreditation Review Report. If accredited by another recognized accrediting body, a laboratory shall provide the Commission [director] with a copy of each equivalent annual accreditation assessment document. The copy shall be submitted to the Commission [director] at the same time that it is due to the recognized accrediting body.

(2) A laboratory shall provide the Commission [director] with a copy of correspondence and each report or communication between the laboratory and the recognized accrediting body. The laboratory shall submit the copy to the Commission [director] no later than 30 days after the date the laboratory receives or transmits the correspondence, report, or communication.

(3) A laboratory that discontinues a specific forensic discipline or subdiscipline:

(A) if known beforehand, should submit written notification to the Commission [director] at least 30 days before the effective date of the discontinuation; or

(B) if unknown beforehand, shall submit written notification to the Commission [director] at least 5 business days after the effective date of the discontinuation.

(e) Federal forensic laboratories. A federal forensic laboratory is deemed to be accredited by the Commission [director] without application provided that the laboratory is accredited by a recognized accrediting body as provided under §651.4 [§28.144] of this title (relating to List of Recognized Accrediting Bodies). A laboratory deemed accredited is not subject to the reporting requirements of this subchapter or the processes provided under Subchapter B [J] of this chapter (relating to Complaints, Special Review, and Administrative Action).

651.9. Provisional Commission [DPS] Accreditation.

(a) Issuance and renewal. The Commission [director] may issue provisional accreditation under this section that is non-renewable for that discipline, subdiscipline, or procedure.

(b) Application. An applicant for provisional Commission [DPS] accreditation shall complete and submit to the Commission [director] a current Laboratory Accreditation Form [form LAB-5] as referenced in §651.8(b) [§28.148(b)] of this title (relating to Full Commission [DPS] Accreditation) and attach copies of the following:

(1) the application for accreditation by a recognized accrediting body;

(2) the initial audit, inspection, or review report from an independent auditor based on the standards of the recognized accrediting body;

(3) a full response in writing to the initial audit, inspection, or review report described in paragraph (2) of this subsection; and

(4) each document provided by the recognized accrediting body that identifies the discipline or subdiscipline for which the laboratory seeks accreditation.

(c) Provisional-Interim. If a laboratory is in good standing with its accrediting body and has made application to renew or replace its accreditation, the laboratory may apply for Provisional Commission [DPS] Accreditation if necessary to cover a period between times that it qualifies for full Commission [DPS] accreditation. For this Provisional Commission [DPS] Accreditation, the laboratory may complete and submit

to the Commission [director] a current Laboratory Accreditation Form [form LAB-5] as referenced in §651.8(b) [28.148(b)] of this title and attach copies of the following:

- (1) the application for accreditation by a recognized accrediting body; and
 - (2) each document provided by the recognized accrediting body that identifies the discipline or sub-discipline for which the laboratory seeks accreditation.
- (d) Additional information. The Commission [director] may require additional information to properly evaluate the application either as part of the original application or as supplemental information.
- (e) Reports to the Commission [director].

(1) The laboratory shall request that the recognized accrediting body provide the Commission [director] with a copy of each audit, inspection, or review report conducted before full Commission [DPS] accreditation.

(2) A laboratory shall provide the Commission [director] with a copy of correspondence and each report or communication between the laboratory and the recognized accrediting body. The laboratory shall submit the copy to the Commission [director] no later than 30 days after the date the laboratory receives or transmits the correspondence, report, or communication.

(3) A laboratory that discontinues a specific forensic discipline, subdiscipline, or procedure shall submit written notification to the Commission [director] at least 30 days before the effective date of the discontinuation.

(f) Second sample required. A laboratory with provisional Commission [DPS] accreditation under this section must:

(1) preserve one or more separate samples of the physical evidence for use by the defense attorney or use under order of the convicting court; and

(2) agree to preserve, and preserve those samples until all appeals in the criminal case are final.

651.10. Accreditation Term.

(a) Normal term. The normal term for Commission [DPS] accreditation:

(1) begins on the date of issuance of the initial Commission [DPS] accreditation letter; and

(2) extends until withdrawn by the recognized accrediting body or by the Commission [director] under §651.11 [§28.164] of this title (relating to Withdrawal of Commission [DPS] Accreditation).

(b) Provisional term.

(1) A laboratory or its discipline or subdiscipline that applies for accreditation from a recognized accrediting body may apply to the Commission [director] for [a] provisional [DPS] accreditation in accordance with §651.9 [§28.139] of this title (relating to Provisional Commission [DPS] Accreditation) for a term not to exceed one year from the date the Commission [director] issues the accreditation unless formally extended for good cause by the Commission [director].

(2) If a currently accredited laboratory is in the process of renewing or replacing its accreditation from a recognized accrediting body, prior to the end of its term, and applies for provisional Commission [DPS] accreditation, the term of that provisional accreditation may not exceed six (6) months.

(c) Limited term. A laboratory, including an out of state, federal, or private laboratory, may request Commission [DPS] accreditation for a term less than the term normally available under this subchapter.

651.11. Automatic Withdrawal of Commission [DPS] Accreditation.

The Commission [director] shall automatically withdraw:

(1) the full Commission [DPS] accreditation for a laboratory, discipline, or subdiscipline at the date and time that the recognized accrediting body withdraws its relevant laboratory, discipline, or subdiscipline accreditation; or

(2) the provisional Commission [DPS] accreditation for a laboratory, discipline, or subdiscipline at the date and time that the recognized accrediting body notifies the Commission [director] that the laboratory has withdrawn its application for the relevant laboratory, discipline, or subdiscipline accreditation.

[651.12. Consent to Cooperate with the Texas Forensic Science Commission.

The director requires that a laboratory or other entity that is accredited by the department must agree to consent to any request for cooperation by the Texas Forensic Science Commission that is made as part of the commission's duties under Code of Criminal Procedure, Article 38.01.]

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

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SUBCHAPTER B. COMPLAINTS, SPECIAL REVIEW, AND ADMINISTRATIVE ACTION

§651.101. Complaint Process.

(a) Question or complaint. If the Commission [director] learns of a fact, circumstance, or complaint that raises a question about the integrity or trustworthiness of a laboratory, or a procedure, examination, or test conducted by the laboratory since the date of application for Commission [DPS] accreditation, the Commission [director] may take any of the following actions:

- (1) communicate further with the source of the complaint to assess the appropriateness of further action;
- (2) refer the matter to the laboratory's director for evaluation, audit, correction, or other appropriate action;
- (3) initiate an audit under §651.102 [§28.162] of this title (relating to Unscheduled Audit);
- (4) issue a letter to the laboratory:
 - (A) demanding an immediate response and explanation of the matter;
 - (B) demanding that the laboratory permit or arrange for an immediate inspection or audit of the matter; or
 - (C) explaining the action to be taken by the Commission [director] in the matter;
- (5) notify or refer the matter to a law enforcement agency or prosecutor and recommend appropriate criminal action;
- (6) refer the matter to a district judge and recommend appropriate action to convene a court of inquiry under Code of Criminal Procedure, Chapter 52;
- [(7) refer the matter to the Texas Forensic Science Commission;] and
- ~~(7)~~ [(8)] any other actions deemed appropriate by the Commission [director].

(b) Source and scope. A question or complaint may be raised by any source, including an individual, entity, or audit. The scope of any action taken or proposed by the Commission [director] under this section shall be determined by the Commission [director], based on the nature of the question or complaint.

(c) Records. The Commission [director] may maintain a public record of a laboratory's accreditation or approval status.

(1) The Commission [director] may maintain on the public record a notation of an action taken under this subchapter, including a question, complaint, or audit.

(2) A question, complaint, or audit is public information when in the possession of the Commission

[director].

§651.102. Unscheduled Audit.

(a) If the Commission [director] determines that there is reasonable cause to believe that a laboratory has failed to maintain quality assurance standards as provided under the laboratory's specific policy required by its recognized accrediting body or the FBI DNA Quality Assurance Audit Document, or has violated any rule in this chapter, the Commission [director] may take appropriate action, including one or more of the following:

(1) direct the laboratory to conduct an internal audit and implement appropriate corrective action;

(2) order the laboratory to obtain, at its own expense, a special external audit by an auditor approved by the laboratory's recognized accrediting body and provide that report to the Commission [director] within a reasonable time frame determined by the Commission [director] not to exceed 60 days from the date of the order;

(3) notify the laboratory that further testing is not approved by the Commission [DPS];

(4) initiate an evaluation of continued accreditation under Subchapter A [I] of this chapter (relating to Accreditation); or

[(5) provide appropriate compliance information to the Texas Forensic Science Commission and/or any entity that may be responsible for oversight of the laboratory;] or

(5) [(6)] any other actions deemed appropriate by the Commission [director].

(b) An audit under this subsection shall comply with minimum standards for audits or inspections as established by the Commission [director] of the department's Crime Laboratory Service].

(c) The Commission [director] of the department] may enter an accredited laboratory at any reasonable time to conduct an inspection or audit under this chapter.

§651.103. Corrective Action Plan.

(a) If a laboratory is subject to an unscheduled audit that has resulted in a finding of non-compliance, the laboratory shall propose a corrective action plan and submit the plan to the Commission [director] within 30 days from the date that the laboratory receives the audit results. If the laboratory has been notified that further testing is not approved, the plan should identify the date that the laboratory intends to reinstate approved testing.

(b) A proposed corrective action plan under this section must fully address each non-compliance finding and identify corrective action that meets or exceeds the standards:

(1) required by the laboratory's recognized accrediting body; and

(2) approved by the Commission [director].

(c) The Commission [director] shall promptly review a proposed corrective action plan and take the following action:

(1) approve the corrective plan if it meets the requirements of this section; or

(2) decline to approve the corrective plan and identify necessary revisions to the plan.

(d) The Commission [director] shall notify the laboratory of approval or disapproval of the audit response. If disapproved, the Commission [director] shall notify the laboratory of required corrective action, and the laboratory shall implement the corrective action in a timely manner specified in the notification, except as provided by subsection (e) of this section.

(e) A laboratory shall implement and complete an approved corrective action plan described in subsection (d) of this section, unless the laboratory demonstrates good cause for extension to the Commission [director] before the due date for completion.

§651.104. Withdrawal of Commission [DPS] Accreditation.

The Commission [director] may withdraw [DPS] accreditation for a laboratory, discipline, or subdiscipline if the laboratory:

(1) violates this chapter;

(2) fails to respond meaningfully within five business days to a letter issued by the Commission [director] under this subchapter;

(3) fails to timely submit an audit required under this subchapter; or

(4) fails to allow or substantially interferes with an inspection or audit conducted under this subchapter.

§651.105. Review by the Commission [Director].

(a) Reconsideration. A laboratory that has been ordered to take action under this subchapter may request reconsideration by the Commission [director] in writing within 15 days of the order.

(b) Reinstatement. An accredited laboratory that has had Commission [DPS] accreditation withdrawn automatically under §651.11 [§28.151] of this title (relating to Automatic Withdrawal of Commission [DPS] Accreditation) may have its accreditation reinstated by the Commission [director] if the laboratory shows that it presently meets or exceeds the quality assurance standards required by the laboratory's recognized accrediting body.