The Texas Judicial Council (the Council) adopts the repeal of current Chapter 175 of Title 1 of the Texas Administrative Code (1 TAC §§175.1-175.7) and adopts a new Chapter 175 (1 TAC §§175.1-175.6) concerning the Collection Improvement Program (the Program). The Chapter is adopted with changes to the proposed text published in the July 1, 2016, issue of the Texas Register (41 TexReg 4745). The changes in the adopted chapter respond to public comments and will be republished.

The purpose of the Council's actions is to: 1) revise the current Program components and requirements that the Office of Court Administration is required to develop pursuant to Art. 103.0033 of the Code of Criminal Procedure to ensure that compliance with the Program does not result in an undue hardship on defendants and defendant's dependents, and 2) clarify that the Program is not intended to apply to defendants whose court costs, fees, and fines have been waived by the court. The effective date of the new Chapter 175 is January 1, 2017.

Summary of Comments

The Council received a total of 143 written comments from district and statutory county court judges, justices of the peace, municipal court judges, local collections program staff, and community supervision and corrections departments. The Council also received comments from the Probation Advisory Committee, Texas Municipal Courts Association, Texas Appleseed, Texas Legal Services Center, Texas Fair Defense Project, and American Civil Liberties Union of Texas. No oral comments were received. All of the comments are available on the Council's website at http://www.txcourts.gov/media/1435718/cip-comments.pdf.

Six commenters, including Texas Appleseed, Texas Legal Services Center, Texas Fair Defense Project, and American Civil Liberties Union of Texas, expressed approval of the proposed rules. Several commenters objected to any change to the current rules arguing that change was unnecessary. These commenters did not provide any recommendations or suggested changes to the proposed rules. Most of the comments from those who opposed the proposed rules that listed specific concerns primarily focused on the six key issues discussed below.

1. Workload Increase and Associated Costs

Comments: Many commenters expressed concern that the proposed rules will result in a workload increase for the courts and for local programs that will ultimately require adding staff.

Response: These concerns appear to be based on a misunderstanding of the proposed Sec. 175.3(a)(6)(A) requirement that local program staff refer a case back to the court if the payment ability information they collect demonstrates that a defendant is unable to pay any portion of the court costs, fees, and fines without undue hardship to the defendant or the defendant's dependents. This section was intended to codify the local program staff's ability to flag cases when it is evident from the payment ability information a defendant has submitted that the defendant cannot pay any part of the court costs, fees, and fines, or that the defendant can pay some but perhaps not all of them within a reasonable time. This would allow the court the opportunity to consider whether alternative enforcement options are available or whether the amounts should be reduced. In most cases, it would only require the court's review of a proposed payment plan or approval of suggested alternative enforcement options.

The Council has amended Sec.175.3(a)(6)(a) to clarify that when local program staff have received information that a defendant is unable to pay court costs, fees, and fines without undue hardship to the defendant or the defendant's dependents, local program staff are required to inform the court but the defendant is not required to appear before the court.

Comments: Several commenters objected to the new requirement in Sec. 175.3(a)(3)(A) that staff obtain statements from defendants who have judge set payment plans stating that the defendant has the ability to pay the court costs, fees, and fines under the payment plan terms ordered by the judge without undue hardship to the defendant or the defendant's dependents. If the defendant is unable to make the statement, the new rules would require local program staff to obtain payment ability information and determine whether the defendant's information needs to be reviewed by the judge.

Response: Under the current rules, local program staff are only required to obtain contact information from defendants who have payment plans set by the judge. Based on the assumption that a court will have considered a defendant's payment ability information prior to referring the defendant to the local program, the Council has eliminated the proposed provision in the adopted rule and the provisions currently in place for judge-set payment plans will remain in place.

2. Presumption of Inability to Pay/Waiver of Court Costs, Fines and Fees

Comments: Many commenters objected to Sec. 175.3(a)(6)(B) which lists instances in which a defendant is presumed to be unable to pay court costs, fees, and fines without undue hardship to the defendant or the defendant's dependents. Examples of those instances are if a defendant is required to attend school under the Education Code, if the defendant's household income does not exceed 125% of the federal poverty guidelines, or if the defendant receives assistance under certain federal programs.

Response: Based on the comments, it appears that the commenters believe that the list of instances in which a defendant is presumed to be unable to pay court costs, fees, and fines is an irrebuttable presumption when in fact it is only intended to be a trigger for the purpose of determining whether local program staff need to inform the judge of the defendant's payment ability information. It was not intended to be an irrebuttable presumption nor was it intended to mandate that a court find that the defendant is unable to pay solely because the defendant meets the criteria. Whether a defendant is in fact unable to pay court costs, fees, and fines is a decision to be made by a judge.

To avoid confusion, the Council has changed this provision in the adopted rules to clarify that the criteria are intended to assist local program staff in identifying which cases require additional judicial review and that they do not establish an irrebuttable presumption regarding a defendant's ability to pay.

Comments: Many commenters also objected to Sec. 175.3(a)(6)(B) based on a misunderstanding that when a defendant falls under one of the categories that raises the presumption that the defendant is unable to pay court costs, fees, and fines without undue hardship to the defendant or defendant's dependents that this would result in the waiver of all court costs.

Response: The commenters misunderstand the proposed rule. The rule only requires that a defendant's case be brought to the attention of the judge so that the judge can determine if a waiver or reduction of financial obligations or conversion of the financial obligations to a non-monetary option is appropriate.

To avoid confusion, the Council has revised this provision in the proposed rule to clarify that the fact that a person meets the criteria requiring the local program staff to provide the judge information regarding the defendant's ability to pay does not mean that the defendant's court costs, fees, and fines are automatically waived or that they must be waived.

3. Cap on Monthly Payment Amounts, Time Limitations

Comments: Many commenters objected to the language in Sec. 175.3(a)(7)(C)(ii) which stated that monthly payments generally should not exceed 20% of a defendant's discretionary income.

Response: The statement that payments generally should not exceed 20% of a defendant's discretionary income was intended as a guideline and best practice; it was not a requirement. The Council has removed this provision from the proposed rules since it is not mandatory. However, the Council is of the opinion that monthly payments at or below 20% of a defendant's discretionary income result in more compliance than payments that exceed this amount because defendants are more likely to comply when the payment terms are reasonable. Payments that exceed 20% of a defendant’s discretionary income may result in an increase in non-compliance if they place an undue hardship on defendants and their dependents.

Comments: Several commenters suggested that the rules set time limits so that court involvement does not last indefinitely.

Response: If information is provided to the judge by local program staff regarding the defendant’s ability to pay that would indicate the amount needs to be reduced in order to keep the payment plan term within a reasonable time, the judge may make this change. Any attempt to impose this requirement in the rules would interfere with a judge’s discretion. For this reason, the Council declines to prescribe time limitations on payment plans in the adopted rules.

4. Definition of Discretionary Income and Household Income

Comments: Many commenters also objected to the definition of discretionary income and household income (Sec. 175.2(d) and (e)). Household income is defined as the defendant’s income and the defendant’s spouse’s income. The commenters want the rules to also include as part of household income the income from any other person living in a household.

Response: The term “discretionary income” is only used in the recommended limitation of payment amounts to 20% of a defendant’s household income. With the deletion of the 20% of discretionary income limit on payments, the definition of discretionary income is no longer necessary and has been deleted from the adopted rules.

The Council disagrees with commenters’ suggestions regarding the definition of household income. Persons other than a spouse who reside in a household are not legally obligated to pay a defendant’s courts costs, fines and fees. Even if one were to assume another member of the defendant’s household is liable for the defendant’s court costs, fines, and fees, local program staff would then be required to collect from all of those individuals’ payment ability information including their debt, monthly expenses, etc. For this reason, the Council did not make any changes to the definition of household income in the proposed rules.

5. Applicability of Rule

Comments: Some commenters expressed concern that their jurisdictions are too small to be covered by the rules. Others stated that the rules should apply to every jurisdiction, not only the ones required to participate under Art. 103.0033 of the Code of Criminal Procedure.

Response: In an effort to streamline the rules, the Council removed the language in the current rules that duplicated the statutory language regarding the applicability of the statute and rules. This was a cleanup provision. It was not intended to expand the coverage of the rules to jurisdictions that are not already covered by Art. 103.0033. In order to avoid confusion, the Council has added language to the rule to clarify that the revisions to the rule do not expand the program to jurisdictions not already covered under the rules and Art. 103.0033. The Council cannot expand the coverage of the rules to all jurisdictions as suggested by some of the commenters. This would require a change to Art. 103.0033 of the Code of Criminal Procedure. Such a change is solely within the authority of the Texas Legislature.

Comments: Several commenters expressed concern that the proposed rules would apply to the collection of community supervision (probation) fees assessed when a defendant is placed on community supervision.

Response: Neither the current rules nor the proposed rules apply to probation fees. The Council has added language to the adopted rules that clarifies this.

6. Reduction in Revenue Collected

Comments: Some commenters expressed concern that the new rules would result in the reduction of revenue to the jurisdictions that are subject to the rules.

Response: Most of the concerns raised by the commenters are based on a misunderstanding that the proposed rules automatically require the waiver of costs, fines and fees when a defendant is found to be unable to pay without undue hardship to the defendant and the defendant's dependents. The subsection that provided that monthly payments generally should not exceed 20% of a defendant's monthly discretionary income also contributed to this perception. The removal of the language with the suggested cap on monthly payments of 20% of a defendant's discretionary income and the clarification of the presumption of inability to pay provisions in the proposed rule address these concerns.

The Council disagrees with commenters' assertions that the proposed rules will result in a significant decrease in revenue. The courts' role is to ensure that orders entered by the court are appropriately enforced, including those assessing court costs, fees, and fines. While enforcement of orders assessing court costs, fees and fines will result in increased revenue to state and local governments, the Council is mindful that the courts' role in assessing court costs, fees, and fines, is not to ensure revenue streams for state or local government. As noted by the National Center for State Courts in its clarification regarding CourTools Measure 7:

> The responsibility of the courts in general, and individual judges in particular, is to ensure that any fees and fines arising out of a criminal case are reasonable and take into account a defendant's ability to pay. Compliance with legal and financial obligations has two dimensions. First, it requires a court, including its judicial officers and staff, to follow applicable constitutional provisions, statutes, case law and appellate court policies and procedures that apply to collecting monetary penalties, as well as consciously employing recognized best practices in doing so. These best practices include making a determination of an offender's ability to pay, supported by findings of fact. (http://www.courtools.org/~/media/Microsites/Files/CourTools/M7%20Clarification%20v4.ashx)

The proposed rules were drafted to ensure the enforcement of a defendant's compliance with the payment of court costs, fees, and fines while simultaneously ensuring that local programs engage the judiciary in situations in which a defendant may not have the ability to pay the assessed court costs, fees, and fines without undue hardship. They were also drafted to ensure that the procedures used to manage these cases, from the imposition of legal financial obligations, to notice practices, through ultimate disposition, are consistent among all local programs and that the practices of local programs do not inadvertently result in the removal of the courts' role in the determination of a defendant's ability to pay when involvement by the court is necessary.

Other Comments

The Council also received comments regarding the following:

Workgroup Composition

Comments: A few commenters objected to the fact the workgroup that was convened by the Office of Court Administration to discuss revisions to the current rules did not include district and statutory county court judges. The commenters believe that the workgroup focused on concerns related to justice and municipal courts at the expense of the needs and concerns of district and statutory county courts.

Response: Though the workgroup did not include district and statutory county court judges it did include district clerks who are responsible for collecting court costs, fees, and fines for these courts and a district/statutory county court administrator. Additionally, most of the objections raised by these commenters focus on the mistaken belief that the rules will require that the defendant be brought back to court in order to determine inability to pay. As discussed in number 1 above, the adopted rules have been amended to clarify that this will not be necessary.

Lack of Defendants' Accountability for Their Crimes, No Consequences for Poor Defendants' Actions, Separate System for Defendants' Who Are Unable to Pay

Comments: Many commenters expressed concern about the rules establishing a system in which defendants who are unable to pay court costs, fees, and fines would be able to commit crimes without fear of repercussion because there would be no consequences for their actions and that this would lead to an increase in crime. They also expressed concern that the rules would result in a dual system in which defendants are treated differently based on their income.

Response: The changes to the rules do not provide an automatic waiver of court costs, fees, and fines; further they make explicit that courts should make available alternative options in all cases, as appropriate. As stated above, the proposed changes to the rules are designed to ensure that local programs engage the judiciary in situations in which a defendant may not have the ability to pay the assessed court costs, fees, and fines without undue hardship. They were also amended to help ensure that the procedures used to manage cases, from the imposition of legal financial obligations, to notice practices, through ultimate disposition, are consistent among all local programs and that the practices of local programs do not inadvertently result in the removal of the courts' role in the determination of a defendant's ability to pay when involvement by the court is necessary. In some instances, courts may waive a defendant's obligations or impose alternative compliance options; but this would be because it was necessary under the law and within a court's discretion, not because of the requirements in the proposed rules.

Referral to Court After Court Has Already Reviewed Case

Comments: Several commenters were concerned that if local program staff referred a defendant's case to the court for review and the court did not make any changes to the assessment they would have to return the case to the judge again after they reviewed their payment ability information for the second time.

Response: The adopted rules have been changed to clarify that if a judge has reviewed the case once, the local program staff do not have to refer the defendant's payment ability information to the court for another review unless the defendant provides additional information that has not already been provided to the judge.

Employer Contact Information

Comments: Several commenters objected to the removal of employer contact information from the list of payment ability information that must be collected.

Response: The employer contact information served no purpose other than for local program staff to call and confirm that the defendant was employed. This information is not necessary to set a payment plan and calls could be construed as intimidation. The Council declines to change this provision in the adopted rules.

Payment Ability Information

Comment: One commenter expressed confusion regarding the last sentence in the definition of payment ability information (Sec. 175.2(j)). The sentence read as follows: "The payment ability information provided by the defendant to local program staff is presumed to be current unless the defendant notifies the court or local program staff that resources or circumstances have changed and a review is requested."

Response: The Council agrees with commenter and does not see the need for this sentence. A defendant is always able to provide additional information and the information provided originally will be considered to be correct unless other information is provided by defendant. The sentence has been deleted from the adopted rules.

Audit Standards Name Change

Comment: One commenter objected to the proposed change to the title of Sec. 175.5, Audit Standards, to Compliance Review Standards.

Response: The proposed change is not substantive, but it does more accurately reflect the audit process described in Art. 103.0033. Therefore, the Council declines to change this provision in the adopted rules.

Judicial Discretion Language

Comment: One commenter provided suggested language that more accurately expresses the judicial discretion exercised by the judge in proposed Sec. 175.3(a)(6)(E).

Response: The Council agreed with the suggestion and the adopted rule incorporates this recommendation.

Comment: Several commenters suggested that the language in Sec. 175.1(c) of the proposed rule regarding a judge's discretion to waive or to reduce court costs, fees, and fines after the assessment date implied that judges did not have this authority at the time of sentencing.

Response: This was not the intent of the proposed language. The Council agrees with the recommendation and the adopted rule does not include the language "after the assessment date" in Sec. 175.1(d).

Definition of Undue Hardship

Comments: Several commenters expressed concern with the fact that "undue hardship" is not defined.

Response: The Council is aware that this is a subjective term and that its definition may depend on the jurisdiction's cost of living and other local factors. For this reason, the Council did not define undue hardship but instead provided guidelines that alert programs to defendants who will likely have an inability to pay without undue hardship to themselves and their defendants so that the judge can review and determine if any changes are necessary.

Availability of Non-Monetary Options

Comments: Several commenters expressed concern about the lack of non-monetary options, such as community service, available in their jurisdictions.

Response: The adopted rules include language that non-monetary option information only has to be collected if any are available.

Additional Reporting to OCA

Comments: Several commenters suggested adding additional reports that local program staff must provide to OCA in addition to those already required and the proposed additional report. One commenter also suggested the reports be submitted quarterly instead of monthly.

Response: The Council does not believe additional reports are necessary at this time and declines to change the reporting due dates or to add additional reports.

No Change Necessary to Current Rule

Comment: A few commenters indicated that they did not believe the rule should be changed.

Response: The Council determined that the Collections Improvement Program rules needed to be amended in order to promote local program practices that fully align with existing statutes and constitutional provisions relating to a defendant's compliance with legal financial obligations.

Clarification of Cases Subject to the Rules

Comment: Four commenters noted that the language in Sec. 175.1(f) listing the types of cases the rules do not apply to is inconsistent with the list of "eligible case" that are subject to review in a compliance review under Sec. 175.5. Specifically, cases in which a defendant is incarcerated are not excluded from the CIP rules under Sec. 175.1(f) but are not eligible cases for compliance review under Sec. 175.5(b).

Response: The Council agrees with commenters and has incorporated the suggestion into the adopted rule.

Additional Information Provided to Defendants Regarding Compliance Options and Review of All Defendants' Payment Ability Information

Comment: Four commenters also suggested that the rules provide that the payment ability information of all defendants be reviewed. They also suggested that local program staff use understandable language on forms so that defendants could understand that they are being asked if they have the ability to pay. They also expressed concern that sometimes defendants' circumstances change and they may be unable to pay at some point after they have agreed to a payment plan. The commenters recommend requiring local program staff to inform defendants how they can seek relief if their circumstances change and to also provide this information in past due notices.

Response: The Council does not believe that payment ability information for all defendants needs to be reviewed by local program staff and it is imperative that judges have the discretion to set the plans that they have determined are appropriate. Based on the assumption that a court will have considered a defendant's payment ability information prior to referring the defendant to the local program, the Council declines to make this change in the adopted rules. Regarding the use of understandable forms, the Council has instructed the Office of Court Administration to provide model forms that can be used by local programs that will be easy to understand. The best practices will also provide that local program staff inform defendants that they should always contact local program staff to discuss changes in circumstances that may require the revision of their payment plans and the rules contemplate that revised payment plans may often result after a defendant has been contacted for failure to pay. The rules provide that the phone contact, written notice, and final notices sent to a defendant after a missed payment provide instructions about what to do if the defendant is unable to make payments.

Additional Item for List of Criteria That Trigger Referral of Defendant's Payment Ability Information to Judge

Comments: Four commenters suggested adding Telephone Lifeline program assistance to the list of criteria that would trigger the requirement that a defendant's payment ability information be referred to the court for review.

Response: The Council believes that the list in the adopted rules covers many who are likely already served by this program. Further, local program staff may still refer others for review even if they do not meet the criteria listed in the rule. The Council has instructed Office of Court Administration staff to provide materials to local program staff informing them of additional types of programs, such as the Telephone Lifeline program, that local programs should be aware may be indicate a need for court review of the defendant's payment ability information.

Comments in Support of Proposed Rules

A few commenters agreed with the elimination of mandatory time payment requirements. One commenter indicated she approved of the proposed changes to the rules.

Texas Appleseed, Texas Legal Services Center, Texas Fair Defense Project, and American Civil Liberties Union of Texas expressed support for the proposed rules and provided additional recommendations that are addressed in the comments discussion.

The Municipal Court Judges Association initially objected to the rules, but after reviewing the suggested changes to the proposed rules that were presented to the Council for final approval, the Association indicated they supported the revised rules.

The Justices of the Peace and Constables Association indicated they also are in favor of the proposed rules.

Other Changes in Adopted Rules

The following changes have been included in the adopted rules based on recommendations and concerns raised by Office of Court Administration staff.

Defendants Whose Costs, Fees, and Fines Have Been Waived

Though the program's provisions have never applied to indigent defendants, this was not specifically mentioned in the rule. The language in the proposed rule stating that the rules do not apply to defendants who are unable to pay any portion of the costs, fees, and fines without undue hardship to the defendant and the defendant's dependents created confusion because many individuals believed this meant that if a person could only pay a portion of the assessed costs, their case was no longer in the program. The adopted rule clarifies that the rules do not apply to defendants whose court costs, fees and fines have been waived.

Standard Payment Plan

In an effort to allow local program staff to focus on defendants who need assistance with payment plans and information regarding possible non-monetary compliance options while also reducing the amount of time and effort needed to complete paperwork in order to obtain a payment plan, the adopted rule adds a new Sec. 175.3(a)(7)(A) that allows judges to set standard payment plans that local programs can offer to defendants who have the ability to pay but need additional time to do so. If a defendant chooses one of these options, the defendant does not need to provide payment ability information. These defendants will only need to provide contact information like defendants who have judge-set plans. Before accepting a standard payment plan, the defendant must acknowledge that the defendant: 1) understands the payment plan terms, 2) has the ability to successfully meet the payment plan terms, and 3) declines the opportunity for local program staff to review defendant's payment ability information to consider lower monthly amounts or a longer payment plan term. The Council has instructed the Office of Court Administration to provide a model acknowledgement form that can be used by local programs that will be easy for defendants to understand.

Written Notice

The adopted rule clarifies that written notice is not required if the defendant is successfully contacted by telephone after a missed payment and the defendant has either made a payment or made other payment arrangements.

Postcard Regarding Application and Contact Information

The adopted rule includes a provision for local program staff to send notices to defendants who are ordered to report to the local program, but fail to do so, instructing them to call and make arrangement to submit payment and contact info. The rules currently require that an entire application and contact information sheet be sent. The use of a notice should result in printing and postage savings.

Correct name for reporting web based system

The adopted rule also corrects the name of the reporting system currently in use by OCA.

Statutory Authority

The new Chapter 175 is adopted under §71.019 of the Texas Government Code, which authorizes the Council to adopt rules expedient for the administration of its functions. The statutory provision for the proposed rules is Article 103.0033 of the Code of Criminal Procedure. No other statutes, articles, or codes are affected by the proposed amendment.

The Council hereby certifies legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.