A recent lawsuit in Ohio involved a climate-controlled unit. The tenant claimed that the on-site personnel represented to him that climate controlled meant that the contents would always be kept dry. Even though the tenant had signed a responsibility waiver in favor of the facility owner (the lease in question contained waiver/non-liability language like the TSSA lease), the court held that the tenant could proceed with a cause of action to determine whether the facility committed fraud in allegedly representing that the goods would always be kept dry. (One cannot generally waive away liability for fraud – this is why the tenant’s lawyer was trying to prove fraud.) This is not to say that the tenant will win the suit, just that the court didn’t throw the suit out. In this Ohio example, the facility owner would have been much better off if in the lease documents there had been a definition of the phrase “climate controlled.” Of course, on-site personnel can always make other oral representations that could cause problems.

Consider this example: A manager, reassuring a customer storing valuable antiques, says, “Yes sir, we have a brand new HVAC unit, and the temperature should never be above 75 degrees.” Unfortunately, another customer props the outside door open for five hours on a particularly hot day during an extended move-in, and no one notices until the first customer comes in to complain about soaring temperatures in his unit at the end of the day. Even without such a statement from the manager, the tenant can always assert that these representations were made. If, however, you have something in writing defining “climate controlled,” it makes it much more difficult for the tenant to claim fraud or deceptive trade practices on your part. The new version of the TSSA lease (printed this past summer), includes the language in the box at right. This is very generic, “one-size fits all” language, and your facility may be able to, and may want to from a marketing perspective, expand on this language and offer more guarantees on your climate control system (like humidity control to a certain level, etc.). TSSA recommends that you check with your own legal counsel and insurance provider before making any representations of this nature, to make sure you are not inadvertently imposing increased liability on your facility.

If your unit is climate controlled, the term “climate controlled” for the purposes of this lease means that the facility will use reasonable efforts to avoid temperature extremes in a unit by keeping the unit warmer than the outside temperature in cold weather, and cooler than the outside temperature in hot weather, through an HVAC or other system. As with any mechanical system, it is subject to failure or malfunction. The facility makes no representations regarding humidity control or safety of contents stored in the unit.
**Self-Storage Solutions**

**Q:** If a tenant has moved out and has requested all original and any copies of all documents that we have on him in his file, are we legally obligated to give them to him?

**A:** No, your records are yours; you are not legally obligated to give the tenant originals or copies of any of your records. In a lawsuit a tenant would be entitled to obtain copies of anything in your records related to him (unless the record was attorney-client privileged), but you may use your discretion to comply with or refuse his request. You could say that you would be happy to make copies, if he reimburses you for the cost, or simply tell him, “No.” If you suspect that the tenant is trying to set you up for a lawsuit, you may consider contacting your attorney first and review all materials before voluntarily giving any copies to the tenant.

**Q:** We have noticed lately that we often have some really nice things in an auction, but the bids are really low, lower than we believe they should be. We suspect bid rigging—that bidders are getting together after we leave, trading amongst themselves and reselling some of the goods. Is this legal? What would you suggest?

**A:** It is against the law for bidders to collude to fix prices. I would suggest reminding bidders of this before each sale. Hiring a licensed auctioneer for one or more future auctions might be helpful, as auctioneers have much more experience and can sometimes detect when collusion is occurring, when others can’t.

Often in bid rigging scenarios, each member of the “bid rigging group” decides to buy certain items (units in this case) and to be the sole bidder. Then after the auction, the group meets with a list of what they have bought, then holds other auctions among themselves.

Several red flags that bid rigging may be occurring are: low turnout of auction attendees, winking, hand signals or other similar signs among bidders after bidding is opened, uniformity in the bidding (for example, bidder 1 bids on a particular unit and buys it with little or no activity, bidder 2 buys another unit with little or no activity), difficulty in getting things going (difficulty in getting the bidding started), a lot of handshaking and other signs of recognition among bidders before or after the auction, an air of silence throughout the auction or, conversely, conversation between bidders, or lack of competition among bidders who normally bid strongly against each other.

Knowing your bidders and their bidding styles is an important step in preventing bid rigging from happening. A sudden change in style could be a signal that things aren’t right. Bid rigging participants often look for small auctions with little competition from private individuals, so you could consider advertising over and above your standard statutorily-required newspaper ads (although any further advertising is not legally required).

Bid rigging is a federal crime, and the United States Department of Justice investigates complaints. Some ideas to stop bid rigging: selling items with a minimum bid (your auction rules could retain the right for you to impose a minimum bid on any lot/unit auctioned). As a last resort the auction may be stopped, but this is difficult, as you would have to start over with new notices and a new sale. If you require a minimum bid the facility itself should either be willing to bid the minimum bid, or be willing to start the procedure over with new notifications and newspaper ads if the minimum bid is not achieved. There is nothing wrong with the facility paying the minimum bid, and some facilities may choose to bid up to the amount that the tenant owes. If you bid the amount the tenant owes, you can simply zero out the tenant’s account balance, and you have bought all of the goods. At that point you can resell the goods in a future auction, sell them at a garage sale, or whatever else you choose to do with them.

Individuals participating in bid rigging are subject under the Sherman Anti-Trust Act to a maximum fine of $250,000 and/or three years of imprisonment under federal law. Corporations are subject to a maximum fine of $10 million. An announcement by the auctioneer or by the person performing the auction, along with a few signs around the property noting bid rigging penalties, lets potential criminals know that they are being watched and may also be an effective deterrent to bid-rigging.

**Q:** A customer moved to Mexico last year and paid a year’s rent in advance. He left us an e-mail address for contact. His unit is now delinquent (more than a year has passed.) I e-mailed him and he has e-mailed back saying he gives us authorization to cut the lock, dispose of all the contents and re-rent his unit. Does his e-mail response cover us legally?

**A:** If the e-mail address from which he is mailing matches the e-mail address that he gave you (hopefully he gave it to you in his own handwriting), you are probably safe in relying on it. However, it would be preferable to insist on something signed (in handwriting) by the tenant. I would recommend that you have him fax you a signed “Authorization and/or Release by Tenant” with paragraph 5 checked. This Authorization and/or Release is a TSSA Official Form. If you check paragraph 5, the tenant acknowledges that he is abandoning the contents of his unit. Then get your tenant to sign this form (with paragraph 5 checked) and fax it back to you.

*Continued on next page*
The risk in relying on his e-mail is that he could always claim that he didn’t send the e-mail. A jury would probably find that you were entitled to rely on it since it was the same e-mail address that he had given you, but it would seem best to avoid this risk if possible. It would be safer to insist on a signed fax from him, on the TSSA official form. Then you would want to compare the signatures, and if the signatures match you could have a good comfort level in considering his unit abandoned.

Q: Where do you draw the line between cutting a deal with a tenant (and not spending undue money on the foreclosure/eviction process), and foreclosing or evicting an overdue client?

A: This is going to be a business decision for each owner to make, and it will likely depend to a large extent on the number of vacancies that you have at your facility. If you have little or no vacancy at your facility, it is costing you a significant amount of money in opportunity cost to let a tenant continue to be overdue. If you have significant vacancy, it is probably not costing you any money to let the overdue tenant stay there, but obviously you are not making money on this tenant.

It would likely be beneficial for each facility to adopt a policy for its managers to follow as to how many months a tenant will be allowed to be overdue before you start the overlock and foreclosure process (or the eviction process if you do not have a signed lease with the proper language in it allowing for foreclosure).

Q: We have a number of buildings that were constructed over a period of years beginning in 1995. None of them would meet ADA requirements except for our temperature-controlled units. Can these temperature-controlled units serve as our handicap accessible ones? Also, we have a tiny public office on site that we use only to sign contracts, and it is not accessible. Can I accommodate a handicapped person by going to their car and signing the contract from the car?

A: The ADA (Americans with Disabilities Act) became effective in 1992. Any facility built after 1992 should have been built in compliance with ADA as a matter of law. The Architectural Barriers Division of the Texas Department of Licensing and Regulation generally enforces ADA requirements (or their Texas equivalent), and requires that for facilities built after 1992, at least 5% of the total number of units must be accessible, and at least one unit of each type or size must be accessible, at the time of initial construction.

So, in order to comply with this policy, your accessible temperature-controlled units alone would not be sufficient. At least one unit of each type (for example, non-climate controlled) and size must be accessible. Similarly, if your office was built after 1992, and it is open to the public, it is a commercial establishment and a public accommodation under ADA and must comply with ADA. It must be accessible by wheelchair, the door handle must be a lever type, and other such requirements. From a strict legal perspective, if a commercial structure was built after 1992 it must comply, without exception. For more information, please see the Goldbook® titled “ADA Accessibility for Self-Storage Facilities.”

Q: I have several facilities in one city, all in the same county. To save costs, can I combine all of my newspaper ads into one ad? The sales would be held at different times on the same day at the respective facilities.

A: There is no prohibition on combining more than one sale in one ad, as long as you comply with all statutory requirements. The statute (Chapter 59 of the Texas Property Code) requires that a notice advertising a sale must contain (1) a general description of the property, (2) a statement that the property is being sold to satisfy a landlord’s lien; and (3) the date and terms of sale.

Q: We purchase disk locks and boxes from our wholesalers to resell to our customers. We collect sales tax when we resell these items to our customers, and do not pay sales tax when we purchase these items from our wholesaler due to the “purchase for resale” sales tax exemption. Occasionally we will give away a disk lock or some boxes as part of a promotion. Is sales tax owed in this instance, when items are given away rather than sold?

A: Yes, sales tax is due. You must pay sales tax at one “end” of the transaction, regardless of whether or not you give the items away. In this instance you would pay sales tax on the items given away based on their purchase price from the wholesaler. The “give away” items should be categorized as a “taxable purchase” on your sales tax return, reportable on line three of your sales tax return.
The 2007 Legislative Session came to an end at the end of May this year, after more than 6,300 bills were filed, with more than 1,400 bills passed into law. Approximately 200 bills that had the potential to affect, directly or indirectly, the self-storage industry, were closely monitored by TSSA. Probably the most important topics in this legislative session were revisions to the margins tax which passed two years ago (the tax on business gross earnings), real property appraisal reform (nothing passed of significance regarding appraisal reform), and mandatory sales price disclosure (nothing past of significance regarding mandatory sales price disclosure, but it is a safe bet that this topic will come up again next session).

I am pleased to report as TSSA’s legal counsel and lobbyist, that no adverse legislation passed directly affecting the self-storage industry. No legislation was proposed or passed amending Chapter 59 (the self-storage lien statute) or Chapter 70 of the Property Code (the statute which supplements Chapter 59 with regard to vehicle foreclosures). There are several bills that passed which will affect the self-storage industry and self-storage facility operations. These are generally outlined below.

Margins Tax Revisions
(HB 1207 – Keffler, Dallas) Probably the biggest change is to the margins tax. Two years ago, a margins tax passed, which is a tax on a business’ gross revenues. This new tax was passed (purportedly) in exchange for reduction in property taxes. However, many if not most real property owners are unlikely to see any property tax reductions due to appraised value increases, aka “appraisal creep.” As initially passed, the margins tax was generally a one percent tax on all business gross revenues over $300,000. As tweaked and amended this session, the margins tax still is payable only by businesses with gross revenues of $300,000 or more. However, under the revised law, businesses that gross $300,000 – $900,000 per year are partially exempt from the tax, on a “stair-step” approach. The tax exemption decreases as revenues increase. For example, at the $800,000 gross revenue level, there is a 20% exemption from the margins tax. The margins tax now applies a .575% tax on all gross revenues over $900,000.

An amendment to the margins tax—making for double taxation. This means that if your business has historically had less than $300,000 gross income per year and is normally exempt from paying the margins tax, there is significant potential that if you sell your property, you will be subject to the margins tax as well as the capital gains tax, because the capital gains revenue (including depreciation recapture) will most likely put you over the $300,000 exemption threshold. I expect that the capital gains issue will be revisited in the future, as TSSA and other trade associations are very interested in seeing this “double taxation on depreciation recapture” remedied.

JP and Small Claims Jurisdiction
(SB 618, Wentworth, San Antonio) For the first time in years, the dollar amount for the jurisdictional limit has been raised for JP and small claims courts, from $5,000 to $10,000. Under previous law, JP and small claims courts could not hear any cases where the amount in controversy, including attorney’s fees, was more than $5,000. The amount in controversy has been changed to a maximum of $10,000 for both JP and small claims courts, meaning that you can now take more sizable cases to the less expensive JP and small claims courts.

Legislation also passed which provides that there is no legal appeal (no ability to appeal) from a JP or small claims court ruling if the judgment is less than or equal to $250.

Liens on Bibles
(HB 167, Raymond, Laredo)
A bill was introduced that had the potential to be very problematic for TSSA members. House Bill 167 provided that it was illegal to seize bibles. Obviously our membership is not out to place liens on and foreclose on a tenant’s bible, however there is a real possibility that you may seize a bible and sell it at a foreclosure sale and never know that you did it, as you may seize volumes of boxes and never know that a bible was in one of the boxes. This would be a serious potential liability risk.

Fortunately, representative Richard Raymond (D-Laredo), the author of the bill, was very receptive to TSSA’s concerns about inadvertently violating the proposed bill’s prohibitions in its lien sales. TSSA drafted amendment language for the bill and took it to Rep. Raymond. He accepted our language, and the bill ultimately passed in an acceptable form – namely, there is an exception to the “no lien on bibles” provision for lessors of real property exercising contractual or statutory lien rights. This new law will thus have no effect on TSSA members’ Chapter 59 sales. TSSA wants to extend special thanks to Representative Raymond for working with TSSA to resolve this potential problem.

Restroom Access
(HB 416, Strama, Austin) A law also passed that provides that customers of a retail establishment may use an “employees only” bathroom if the customer requesting the use of the non-public toilet facility provides you with evidence of an “eligible medical” condition, including a statement signed by a physician stating that the customer has Crohn’s disease, ulcerative colitis, irritable bowel syndrome, or any other permanent or temporary medical condition that requires immediate access to a toilet facility. The new law specifically provides that owners of retail establishments like self-storage facilities have no obligation to make changes, such as Americans with Disabilities Act renovations, to these non-public toilets. The new law simply provides that persons with a qualified medical condition may have access to them in an “as-is” state. Refusing to allow an eligible customer access to an employee toilet facility can lead to fines of up to $100.

Automotive Wrecking and Salvage Yards
(HB 2163, Harless, Spring) This bill, House Bill 2163, is now law and expands the definition of automobile wrecking and salvage yards to mean any outdoor place where a

Continued on next page
person keeps three or more vehicles for the purpose of dismantling or wrecking the vehicles to remove parts for sale, or for use in an automotive repair or rebuilding. So, if any self-storage facility allowed three or more vehicles to be stored “for the purpose of dismantling or wrecking the vehicles to remove parts for sale, or for use in an automotive repair or rebuilding” this facility would need to have a salvage permit.

Notice of Hot Check
(SB 548, Carona, Dallas)
This bill amended the notice requirement under the penal code for establishing a hot check (theft by check). This notice is one and the same as the TSSA Goldbook appendix form (one of the business [BUS] forms) “Notice to Issuer of Returned Check,” which contains a 10-day notice, which is a prerequisite to filing suit to collect the hot check. Under the previous law, this notice had to be sent registered or certified mail with return receipt requested, or it could be sent first class mail if certain (extremely complicated, and as a practical matter not feasible) conditions were met. Under the new law, the notice can be sent certified mail with return receipt requested, registered mail, or first class mail “evidenced by an affidavit of service.” In other words, you could send the notice first class mail, and have the sender sign a sworn affidavit stating that the person sent the letter, and this would be sufficient notice to the issuer of the hot check. The new law also states that the writer of the hot check is liable for all fees associated with sending them a registered or certified mail notice (if you still choose to send the 10-day notice registered or certified mail rather than first class mail with an affidavit of service.) This new law is effective September 1, 2007.

Summary
All in all it was a very successful session for TSSA and its members. If you would like more information about any of these bills, you may view the full text of any bills passed in the 2007 session by going to www.capitol.state.tx.us, and clicking on “bill search” or “bill lookup”.

In lease Paragraph 1, the word “Initial(s)” has been replaced by “Middle Initial” in the blank where the tenant’s name is written. With the old language, sometimes tenants got confused and put their full set of initials in this blank rather than their middle initial.

In lease Paragraph 2, we’ve added language requiring any change of address given by a tenant to the facility to be dated (in addition to being signed). We’ve also added language asking what branch of the military a tenant is in (if the tenant indicates that he or she is in the military), as this is often necessary or helpful in locating a soldier and confirming his or her military status at a later time.

Instead of lease Paragraph 4(g) saying “Charge for locking of space when lock missing,” the language has changed to “Charge for locking of space when space unlocked or improperly locked.” Sometimes a unit is “locked open,” so to speak – there is a lock on it, but the lock serves no purpose because the unit is locked in the open position. This lease change was to clarify that the charge in paragraph 4(g) is owed by the tenant any time a unit is not locked.

The signature lines of the lease have been reconfigured to give more room for email address entry. Also, lease Paragraph 9 was amended with regard to a tenant’s right to terminate the lease upon 10 days notice. The lease formerly said “subject to the minimum lease term in Paragraph 3” tenant may move out on 10 days notice. A cross-reference to Paragraph 38 regarding mandatory move-out instructions was added to make it clear that the tenant must also, in order to move out on 10 days notice, comply with the move-out provisions in Paragraph 38 of the TSSA lease.

Language defining “climate control” (see page one of this Legal Update) has been added to Paragraph 13. Disputes and court cases have arisen as to what is meant by “climate control.” For example, tenants often argue that it was represented to them, or they assumed, that it was a guaranty of humidity control, etc. This new language in the lease makes it clear that if a unit is “climate controlled,” it is not a representation of humidity control, safety, or of anything but that the temperature will be kept warmer than the outside air in cool weather, and cooler than the outside air in warm weather. If facilities wish to make more specific warranties than this, they may do so in special provisions, or in their rules.

Paragraph 24(3) has changed
Previously the lease said that a facility may overlock and deny access to a tenant for violating Paragraphs 36 or 37 of the lease. This language has been changed to allow overlocking and access denial for a violation of any provision whatsoever in the lease.

Paragraph 35(a) has changed
Previously the TSSA lease said that a tenant must at all times keep his unit locked, and if he does not, he is subject to the locking charge in Paragraph 4(g) of the lease. A reference to Paragraph 4(h) has also been added, to make it clear that if a tenant fails to keep his unit locked, he is also subject to the charge in Paragraph 4(h), which is the daily charge if the tenant does not lock his unit after 7 days notice.

In Paragraph 37(c), reference to Transportation Code
Section for towing has been replaced by reference to the Occupations Code section for towing. In the 2007 legislature, the towing statutes were moved from the Transportation Code to the Occupations Code.

Paragraph 38, regarding Abandonment of Storage
Space and Contents, has been deleted for space-saving reasons as it was simply a repetition of language already stated elsewhere in the lease.

All of these changes to the “regular” lease have also been made to the TSSA Vehicle, Trailer, and Boat lease.

TSSA continues to make changes to the lease to keep up with current laws and make the lease the most effective and user-friendly document possible. It is important for your protection that you utilize the most current version of the lease in your operations. Don’t forget that all members using the TSSA lease have the ability under the lease to update tenants to the most current lease version by virtue of the terms of TSSA lease Paragraph 30 – all it takes is a 30-day notice to the tenant.

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Summary of Recent Wage and Hour Legislation

The Federal Fair Labor Standards Act was recently amended to change the minimum wage, to require certain postings on a job site, as well as other amendments that may be relevant to self-storage facility owners and operators. This article will provide a brief summary of the amendments to the Act, and should not be used as a substitute for talking with your own employment attorney about how the recent amendments affect your operations specifically.

The Fair Labor Standards Act (FLSA) is a federal law that sets minimum wage and overtime pay requirements for workers. It sets a minimum wage and sets requirements for overtime wages to be paid. Issues like vacation, holiday, or sick pay are not governed by the FLSA.

When Does the FLSA Apply?
The FLSA applies to all “employers” for the benefit of “employees.” The definition of employers is extremely broad. An employer is any person acting directly in the interest of an employer in relation to an employee.

So anyone who has financial control or authority to act on behalf of the employer with regard to employee relationships may be considered an “employer.” This may include a manager having hiring and firing power. The act covers employees who are engaged in commerce or employed in an enterprise engaging in commerce. The definition of “commerce” is extremely broad, so as a practical matter the act will apply to virtually all employers.

Minimum Wage and Overtime
Effective July 24, 2007 the federal minimum wage increased from $5.15 per hour to $5.85 per hour. It will increase again to $6.55 per hour effective July 24, 2008, and increase again to $7.25 per hour on July 24, 2009. Regarding overtime, if your employee works more than 40 hours in a week, the FLSA requires you to pay your employee the federally-required overtime wage for each hour worked in excess of 40 hours per week. This is currently calculated as the employee’s regular hourly wage plus 50%. An employee who earns $10 per hour would earn $15 per hour for work in excess of 40 hours per week. The Act does not require overtime pay for work on Saturdays, Sundays, holidays or any other day. It simply requires overtime pay for employees working more than 40 hours in any given week. If an employee is salaried (not to be confused with “exempt”) or paid in a method other than hourly, his or her overtime pay must be computed on the basis of the average hourly rate derived from his or her earnings. This is calculated by dividing the total pay for employment in any work week by the total number of hours actually worked.

Who may enforce the FLSA?
The FLSA may be enforced either by the employee or by the United States Department of Labor. An employee can file suit under the FLSA to recover unpaid wages and overtime compensation, plus liquidated damages in an amount equal to the unpaid minimum wages and overtime compensation due. The Department of Labor may impose fines and penalties against employers of up to $10,000 per violation.

Executive Exemption to FLSA
There is an “executive exemption” to the FLSA. To qualify for the executive employee exemption, all of the following tests must be met: The employee must be compensated on a salary basis of not less than $455 per week; the employee’s primary duty must be managing the operation or a department or subdivision of the operation; the employee must customarily and regularly direct the work of two other full-time employees or their equivalent; and the employee must have the authority to hire or fire other employees, or the employee’s suggestions as to hiring and firing must be given particular weight.

Employees vs. Independent Contractor
Independent contractors, as opposed to employees, are not governed by the FLSA. However, this is not as straightforward as it seems, because...

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the FLSA itself broadly defines “employee” as “any individual employed by an employer.” Courts have developed the “economic reality” test to determine who is an employee and who is an independent contractor. An independent contractor may under some circumstances be considered an employee who is subject to the FLSA requirements of minimum wage and overtime requirements.

Courts will determine under the economic reality test whether the alleged employee is economically dependent on the supposed employer. If the answer “yes,” then there is an employer-employee relationship. Factors the courts will consider include the degree of control exercised by the alleged employer over the alleged employee, the degree to which the alleged employer determines the pay of the alleged employee, and the permanency of the relationship.

Employee vs. independent contractor status is important, because if a contractor is deemed to be an employee under the FLSA, he or she cannot be paid less than the current minimum wage, and overtime must be paid.

Summary

Employers should make sure they post the required FLSA poster, and comply with overtime regulations and the new minimum wage. For more information regarding the FLSA, you may visit the US Department of Labor’s Wage and Hour Division website at www.wagehour.dol.gov or call the toll-free helpline at 1-866-487-9243.

Mandatory Federal Minimum Wage Poster

Every employer subject to the FLSA must post, and keep posted, a notice explaining the FLSA in a conspicuous place in all of their establishments, so as to permit employees to readily read it. Several versions of acceptable posters may be obtained from the United States Department of Labor’s official website at www.dol.gov/esa/regs/compliance/posters/flsa.htm. Posters may be printed directly from the website and used.

Purpose of the Form:

The purpose of this form is to give you a form to enable you to comply with your statutory duties to notify owners and lienholders of record before you sell a vehicle, boat, trailer, or outboard motor at a foreclosure sale. Chapter 70 of the Texas Property Code requires that you wait at least 30 days after mailing your Notice of Claim form, then you must mail a Notice of Intent to Sell to owners and lienholders of record via certified mail, return receipt requested.

When to Use:

In the case of any “special foreclosure” —namely foreclosure on a vehicle, boat, trailer or outboard motor, this form needs to be used after you’ve mailed your Notice of Claim and at least 30 days have passed. This “Notice of Intent to Sell” form will provide a statutorily-required notice to the owners and lienholders of record. Before sending this form, you will need to obtain information regarding the owners and lienholders of record from either TxDOT (in the case of vehicles and trailers) or TPWD (in the case of boats and motors).

Tips for Use:

The Notice of Intent to Sell must be sent via certified mail, return receipt requested, to the owners and lienholders per TxDOT or TPWD records, at the address of the owners and lienholders per TxDOT or TPWD records. Per state law (Property Code, Chapter 70) owners and lienholders of record have a 31-day period after this notice is mailed to redeem the property.

This “Notice of Intent to Sell” is the second of two notices that must be sent. The first notice that must be sent is the “Notice of Claim” (sent certified mail). At least 30 days after sending the Notice of Claim, this Notice of Intent to Sell must be sent. Don’t forget that when foreclosing on vehicles or trailers, TxDOT policies require you to send the Notice of Claim not only to the tenant, but also to the owners and lienholders of record, and also require that you send the Notice of Claim within five days of seizing the vehicle or trailer. In the case of boats and outboard motors, the Notice of Claim need only be mailed to the tenant, and can be mailed any time after seizure.
Rumors occasionally circulate through the self-storage industry that storage facilities need an EPA storm water drainage permit (known as the Texas Commission on Environmental Quality as an “Industrial Storm Water Multi-Sector General Permit”). TSSA legal counsel has investigated this issue by reviewing the EPA and TCEQ storm water drainage laws and talking with officials from the Environmental Protection Agency, the Texas Commission on Environmental Quality (TCEQ), and the regional Occupational Safety and Health Administration (OSHA) offices. The general conclusion and good news is that for the vast majority of storage facilities a storm water drainage permit is most likely not necessary. However, such facilities that allow certain uses (such as car repair onsite, painting onsite, etc.) probably fall under the EPA regulations (now enforced by the TCEQ) and are required to have a storm water drainage permit.

In short, the EPA and TCEQ require a storm water permit for certain “industrial facilities” that have certain kinds of pollution potential. If your facility is classified under Standard Industrial Code (SIC) 4226, you do not need a permit. If your facility is classified under SIC 4225, you generally must obtain a permit by submitting an “NOI” (Notice of Intent — this is a written submission to the TCEQ requesting coverage under the Industrial Storm Water Multi-Sector General Permit) and receiving approval, or in the alternative you may apply for a “no exposure” exclusion (an “NEC” — no exposure certification). However, exceptions to this general rule also exist.

If you are classified as 4225 and you have any areas in your facility in which you allow vehicle and equipment maintenance; mechanical repairs; painting; fueling and lubrication; and cleaning, you must submit an NOI or obtain an NEC.

But if your facility is classified 4225 and does not allow vehicle and equipment maintenance, mechanical repairs, and the other items listed and underlined above, you are not required to submit an NOI or obtain an NEC, but you must (1) maintain a condition which ensures that there is no exposure of industrial activities to storm water (for example, there cannot be significant leaks coming from stored cars) and (2) comply with part III(E) of the Industrial Storm Water Multi-Sector General Permit, with the exception that the NOI submittal requirements of part III(E) do not apply. The permit itself can be referenced for more detail, but in general, part III(E) of the permit imposes duties to take reasonable steps to minimize discharge that has a reasonable likelihood of adversely affecting human health or the environment (such as preventing leaks from cars), and contains notification requirements that require you to notify TCEQ of any situation/event/discharge that may endanger human health or safety, or the environment.

**QUESTION:** What is my appropriate Standard Industrial Code, and if it’s listed wrong with the Comptroller’s records, how do I get it changed?

**A facility owner must designate the facility’s SIC Code (also called a NAICS code) on the Comptroller’s application for a sales and use tax permit, and this form/designation is filed with the Comptroller’s office. There is a lot of confusion in the self-storage industry about which SIC number is correct for any given facility. In short, under federal law, industrial classification number 4225 covers “warehousing and self storage” and requires a storm water permit in many instances (see “Summary” above). However, most TSSA members fall under a different industrial classification, 4226.

Industrial classification 4226 covers “establishments primarily engaged in the warehousing storage of special products…such as household goods…” SIC classification 4226 specifically encompases automobile dead storage, furniture storage (without local trucking), and household goods warehousing and storage (without local trucking). If you believe you have inadvertently listed the wrong SIC code (aka NAICS code) with the Comptroller, you can change your designation by calling the Comptroller’s office at 1-800-252-5555. Category 4226 is not a category under federal law that requires storm water drainage permitting.

**No Exposure Certificate**

If you find yourself in a situation where you are subject to category 4225, you can either (1) seek to change it to 4226 with the Comptroller’s office, if you fall into that category; or (2) avoid the mandatory certification requirement of a 4225 designation by prohibiting on-site auto repairs, painting, and other similar activities as outlined above, and ensuring that the stored vehicles and boats do not leak so that pollutants would be discharged. It would seem preferable, if you do not allow auto repairs, painting, etc., to seek a 4226 designation.

In a nutshell, for a “no exposure” certification, you must certify that there are no industrial materials, raw materials, by-products, waste products, etc., that are exposed to precipitation on your site. Automobiles, RVs, boats, etc., that do not leak and are not worked on (no repairs performed on-premises) do not present a threat and do not necessitate a storm water drainage permit. No engineers, surveyors, attorneys, environmental consultants, studies, surveys, or maps are involved in preparing or filing a “no exposure certificate” should that be appropriate for you. You can do it all yourself.

If your facility is limited to indoor storage, or indoor storage and outdoor storage of automobiles, trucks, trailers, RVs and boats (and none of these vehicles or boats have significant leaks), you should fall under category 4226 and shouldn’t need a “no exposure” certification (NEC) because you simply do not fall under an industrial category that requires a storm water drainage permit. Even if you are classified 4225, if you do not allow auto repairs, painting, etc., you should not need an NEC. However, if your local officials insist otherwise, rather than trying to educate them or fight them, the easiest solution may be to simply file a “no exposure” certificate. If you receive conflicting opinions from local officials or others, you should probably contact your own attorney and provide him or her with a copy of this article.

**Local Laws**

Different municipalities throughout the state may have their own storm water permitting requirements in addition to the federal requirements. You may want to consult your own attorney or engineer to make sure there are no local requirements you should be aware of.